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ON

INTERNATIONAL PUBLIC LAW

BY

HANNIS TAYLOR, LL. D.

LATE MINISTER PLENIPOTENTIARY OF THE UNITED STATES TO SPAIN;  
AUTHOR OF "THE ORIGIN AND GROWTH OF THE ENGLISH CONSTITUTION;" A MEMBER OF THE GENERAL ADVISORY COMMITTEE OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE.



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TO

**Edward Lafayette Russell,**

A LAWYER WHO HAS ADVANCED HIMSELF TO THE FRONT RANK OF HIS PROFESSION BY HIS INDUSTRY, LEARNING AND ELOQUENCE;

A MAN OF AFFAIRS WHO HAS MADE HIMSELF A POWER IN THE STATE BY HIS INDOMITABLE WILL AND FORCEFUL PERSONALITY;

A GOOD COMRADE WHO HAS LED CAPTIVE MANY HEARTS BY HIS SYMPATHY AND UNSELFISH LOYALTY,—THIS BOOK IS INSCRIBED BY HIS OLD FRIEND,

THE AUTHOR.





## PREFACE.

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During the last fifty years international law, as a living and growing organism, has passed through a more marked and rapid development than in any other single epoch in its entire history. Within that time the awakened conscience of the world has drawn the states composing the family of nations into a closer concert, which has been active in its efforts to improve the existing system of international relations through a re-examination and re-statement of the rules by which they are regulated. On its scientific side, this movement has been promoted by a new school of publicists, representing nearly every nationality, whose tireless investigations into every branch of the subject have assumed the systematic form of corporate thought under the guiding hand of the Institute of International Law. On its practical side, this movement has been applying the fruits of that kind of research and reflection to the solution of the vital questions presented in rapid succession to the series of international congresses and conferences which began at Paris in 1856 and ended at The Hague in 1899. When the records of the proceedings of those notable assemblies are read as a connected whole, it is impossible not to hear the outcry for a higher and more stable international life to be based upon some kind of a code more precise and definite than that embodied in existing rules, and for some kind of an international tribunal with a jurisdiction more comprehensive than that usually vested in voluntary courts of arbitration. Whether or no such an ideal is attainable, is purely a tentative question to be solved only by patient and persistent efforts made in the light of actual experience. The hope of even partial success rests not upon the Utopian dream that the passions and self-interest of mankind will grow less acute, but upon the fact that as nations become more perfectly organized they perceive that stability, comfort and economy may be promoted by a transition from the reign of arms to the reign of law.

The re-examination to which the entire system of international law has been thus subjected has been conducted, to a large extent, according to that method of investigating the origin and growth of all law, public and private, which,

beginning with its germs in primitive society, attempts to explain its nature and meaning through the record of its development. Only through the application of that method to the entire data to be examined is it possible fully to grasp the nature of the existing aggregation of states viewed as "the result of their historical antecedents,"—antecedents represented by the three great state-systems whose prior histories extend over the immense interval that divides the beginning of authentic tradition from the beginning of modern times. In order clearly to comprehend all the elements that have entered into the existing state-system, through the interpenetration of principles and ideas thus brought about, it is necessary to make a cursory examination at least of its three predecessors—Greek, Roman and Medieval—whose individual histories constitute only distinct stages in one unbroken and progressive development.<sup>1</sup>

Comparatively recent researches into the history of ancient international law have revealed the fact that very perfect methods of diplomatic intercourse existed between the independent Greek city-states, acting either under their own constitutions, or through the federal bodies to which the right to such intercourse was surrendered. While it is not possible to prove that there was such a thing as a Greek common law of nations, as that term is now understood, there certainly was an international positive law, composed partly of treaties and partly of conventional usages sanctioned by general acceptance. The dominant idea was that positive international right must rest upon express compact, and under the influence of that idea treaty-making was carried to such perfection that there were eight or ten technical terms in Greek diplomacy to express the different kinds of treaties into which states might enter. To prevent the greater city-states from acquiring abnormal importance by reducing others to a condition of dependence, the weaker and less organized communities began at a very early day to gather in confederations. In the effort thus made to preserve the internal equilibrium of Greece a well matured

<sup>1</sup> Die Wahrheit, dass das gegenwärtige Recht ein gewordenes und daher wesentlich aus der Vergangenheit zu erklären ist, bedarf der Ergänzung durch die andere Wahrheit, dass das gegenwärtige Recht zugleich ein werdendes und berufen ist, das fortschreitende Leben der Menschheit zu begleiten.—From the letter of Dr. Bluntschli to Dr. Francis Lieber, written at Heidelberg, September, 1867, and published as a preface to *Das Moderne Völkerrecht der Civilisirten Staaten*.

treaty system for the maintenance of the balance of power came into full operation. While the aristocratic and agricultural states like Sparta were averse to the admission of strangers on any terms, the commercial ones like Athens permitted domiciled aliens to enjoy their laws through a patron, subject to a stranger's tax, and to military service by land and sea. In some of the Greek states individual aliens, or even whole communities, were voted such important civic rights as exempted them from taxation, and enabled them to hold real estate and to intermarry. The most notable feature, however, of this liberal policy was that part embodied in international conventions providing for the mutual administration of justice to resident foreigners, for the establishment of mixed tribunals, or even for the grant of isopolity. While the conception of neutrality as between state and state was very imperfectly developed the *πρόξενος*, a kind of vice consul whose person and property were sacredly protected in time of war, represented the idea of a neutralized individual as perfectly as any of the medical or clerical staff now guarded during hostilities by the Red Cross conventions.

So long as Rome continued to be simply a state among states there was a normal development of that branch of law pertaining exclusively to the relations of the government of Rome with those of other states. That branch known as the *jus fetiale*, the law of heralds as agents of negotiation and diplomacy, was the only branch of Roman law that corresponds to the modern conception of a law of nations. The most important function of the *collegium fetialium*, which regulated the practice and procedure connected with all international questions, related to the forms incident to a declaration of war,—until a formal demand for reparation and a declaration were first made, Cicero tells us that no just war could begin. With that formal and unfruitful branch of Roman jurisprudence the international law of to-day has no definite connection, the most important ceremony embodied in it having become obsolete. In the process through which Rome was transformed from a state among states into a world-power, disdainful relations on terms of equality with other powers, her system of diplomacy first shriveled and then disappeared. Rome's priceless legacy to modern international law is represented by the *jus gentium* which, as employed by her, was not international law at all. Accord-

ing to ancient legal ideas the law of one city had no application to the citizens of another; the *jus civile* was the embodiment of the immemorial rules and usages which were the special property of Roman citizens as such. It was a special law administered by the *praetor urbanus* between Roman and Roman,—it had no application between a Roman and a foreigner. As a large colony of resident foreigners finally gathered at Rome, it became necessary to remedy that condition of things through the creation of a *praetor peregrinus*, the praetor of foreigners, whose duty it was to administer justice between Roman citizens and foreigners, between foreigner and foreigner, and between citizens of different cities within the Empire. As such praetor could not rely upon the law of any one city for the criteria of his judgments, he naturally turned his eyes to the codes of all the cities from which came the swarm of litigants before him. In the generalizations necessarily made upon such broad data we have the beginnings of comparative jurisprudence, whose first fruit at Rome was the ascertainment of the fact that there are certain universal and uniform conceptions of justice common to all civilized peoples. Before this new growth, watered by the learning of the juriconsults, reached its maturity the intellectual life of Rome passed under the dominion of her subjects in Attica and Peloponnesus, just after they had yielded to the ascendancy of the Stoic philosophers who were ever striving to discover in the operations of nature, physical, moral and intellectual, some uniform and universal force pervading all things which could be designated as the law of nature—the embodiment of universal reason—identical with Zeus, the supreme administrator of the universe. Through the mind of the Roman lawyer that splendid conception entered into the *jus gentium* as an expanding and enriching force which finally lifted it into a higher sphere. Thus a broad principle of Greek philosophy became so blended with a particular branch of Roman commercial law that the Antonine juriconsults finally assumed the position that the *jus gentium* and the *jus naturae* were identical. Such, in short, was the origin and nature of that branch of Roman private law, whose distinctive feature was its limitation to the legal relations of individual foreigners resident at Rome,—it had nothing whatever to do with the relations of states with states. Only with this fact clearly in view is it possible to estimate the immense importance of the transition

which took place when Ayala, Gentilis and Grotius seized upon the *jus gentium* as the source from which could be drawn rules adequate to determine the jural and moral relations of a group of sovereign, coequal and independent states. Thus it was that a particular branch of Roman commercial law became the philosophic basis of the modern international system.

The state-system of modern Europe is the outcome of "the process of feudalization" through which the Teutonic nations passed, after their settlements within the limits of the Roman Empire. Out of that process arose the modern conception of the state as a nation with fixed geographical boundaries, the state as known to modern international law. The conception of sovereignty which the Teutons brought with them from the forest and the steppe was distinctly tribal or national and not territorial. The idea of sovereignty was not associated in the Teutonic mind with dominion over any particular portion or subdivision of the earth's surface. Alaric was king of the Goths wherever the Goths happened to be, whether upon the banks of the Tiber, the Tagus, or the Danube. The dominant idea that seems to have prevailed among the conquering nations that settled down on the wreck of Rome was that they were simply encamped upon the land they had won. In the course of time they became tied to the land through a process which, for the want of a better term, has been called "the process of feudalization." In that way the elective chief of the once migratory nation was transformed into the hereditary lord of a given area of land. The new conception of territorial sovereignty which thus arose did not become established, however, until after the breaking up of the Empire of Charles the Great. The completion of the transition is marked by the accession of the Capetian dynasty in France. Hugh Capet and his descendants were kings in the new territorial sense; they were kings who stood in the same relation to the land over which they ruled as the baron to his estate, the tenant to his freehold. The form thus assumed by the monarchy in France was reproduced in each subsequent dominion established or consolidated, and thus has arisen the state-system of modern Europe in which the idea of territorial sovereignty is the basis of all international relations.

The separate nationalities, each with its own character, language and institutions, which arose out of the ruins of the Empire of Charles the Great, passed through a long childhood under the protecting wings of an institution that illus-

trated for centuries the enduring power of a political theory. "The two great ideas which expiring antiquity bequeathed to the ages that followed were those of a World-Monarchy and a World-Religion."<sup>1</sup> By those two ideas the Teutonic conquerors of Rome were so overmastered that they came to believe that as the dominion of Rome was universal so must it be eternal. Out of such belief gradually arose the strange creation known as the Holy Roman or Medieval Empire which rested upon the magnificent notion of a vast Christian Monarchy whose sway was absolutely universal. The chiefs of that comprehensive society were the Roman emperor and the Roman pontiff,—the one standing at its head in its temporal character as an empire, and the other standing at its head in its spiritual character as a church. The theory was that each chief in his own sphere ruled by divine right as the vice-regent of God, and that each possessed the hearty sympathy and support of the other. The Holy Roman Empire and the Roman Catholic Church were, according to medieval theory, two aspects of a single Christian Monarchy whose mission it was to shelter within its fold all the nations of the earth. Unfortunately after Christianity had substituted for the pagan precept, "Thou shalt hate thy enemy," the novel admonition, "Love your enemies," the new European nationalities continued as of yore to be torn internally by insurrections and bloody civil wars, or to be impelled by race-hatred or the jealousies and ambitions of their sovereigns to perpetual strife with each other. Out of such conditions arose then as now the longing for some acknowledged system of international law, and for some supreme tribunal that could so administer it as to settle all contentions without bloodshed. The highest aspiration of the pope in his struggle with the emperor was so to establish his supremacy over all princes, including the emperor himself, as to enable him to offer to Europe the arbitrating power it demanded. As the supreme international judge of Christendom the pope administered the august scheme of authority embodied in the canon law, designed by its authors to reproduce and rival the Imperial jurisprudence; and, in order to give emphasis to that idea, Gregory IX, who was the first to condense the canon law into a code, was entitled the church's Justinian. Thus it was that the Roman pontiff assumed the office of supreme judge of appeals in all causes arising in the ecclesiastical courts of

<sup>1</sup> Bryce, Holy Roman Empire, p. 87.

Christendom, especially in matrimonial causes involving the validity of a royal marriage, where the result might affect the legitimacy of the issue, and indirectly the peace of the nation. In that way the pope was called upon to adjudicate in the famous case of the divorce between Catherine and Henry VIII. On the other hand, those who like Dante maintained the independence of the Empire, and who wished to substitute for the canonical system secular Roman jurisprudence, attempted, when it was too late, to find in its temporal head an international judge and mediator who, by reason of his severance from local associations and interests, might, as "Imperator Pacificus," prevent wars between the states of Europe by hearing complaints and redressing injuries inflicted by sovereigns or peoples on each other. As the direct heir of those who from Julius to Justinian had moulded the jurisprudence of Europe, he was to be not only peacemaker but the very embodiment of legality and as such the expounder of justice and the source of positive law. The very extravagance of such pretensions rendered their realization impossible. The wars which such a dominion was designed to check rather increased than diminished in intensity,—the theory of the Empire's political and legal supremacy never ripened into reality. And yet, no matter to what extent the Medieval Empire may have failed as an international power, whether arbitrating on its spiritual side through the pope and the canon law, or on its temporal side through the emperor and the Imperial law, the fact remains that for centuries it was the one bond of cohesion, holding Europe together under the spell of a theory that assumed to provide a complete system of international justice and a supreme tribunal adequate for the settlement of all controversies which could possibly arise between Christian nations. No matter whether the Medieval Empire was a theory or an institution, not until the splendid conception of a united Christendom it embodied was wrecked by the Reformation was the field cleared for the growth of international law as now understood.

The great earthquake which began in Germany struck at the very root of the theory by which the Empire had been created and upheld,—the theory that all Christendom consisted of a single body of the faithful held together under the dominion of the Eternal City, ruling through her spiritual head, the bishop of Rome, and through her temporal head the emperor. From the time of the establishment of the

world dominion of the Roman Empire the doctrine of the subordination of states to a common superior became so firmly settled in the minds of men that it seemed a part of the natural order that subject nations and their rulers should look for the settlement of all grave disputes, personal and national, to Caesar, as the supreme source of law and political authority. So completely did that idea overshadow the barbarian hordes which finally wrecked the Empire of the West that they refused to believe in the reality of their own achievement. In the firm belief that the overlordship of Rome was destined to be eternal they assisted in the creation of the new fabric known as the Holy Roman Empire which, during the interval that divides the coronation of Charles the Great from the Reformation, grew into an international power so potent that its spiritual head in the person of Gregory VII claimed, in the second excommunication passed upon Henry IV, the right "to give and to take away empires, kingdoms, prince-doms, marquisates, duchies, countships, and the possessions of all men." Not until the collapse of that ancient and imposing theory of a common and irresistible superior did the emancipated nationalities, which had crouched so long at its feet, begin to realize, first, that each state is sovereign and independent, and as such coequal with all the rest; second, that territory and jurisdiction are coextensive. Grotius, clearly comprehending these simple truths, emphasized the fact of the independence of the sovereign states about him by formally repudiating the obsolete doctrine of a temporal and spiritual head of Christendom armed with the right to exact universal obedience. His primary contention was that each state is absolutely independent of all external human authority. Having thus established a common basis of equality, the difficulty that remained was how to subject sovereign states, through their own volition, to the yoke of legality. No more novel or difficult problem was ever presented for solution than that which confronted the publicists of the sixteenth and seventeenth centuries when they were called upon to furnish rules adequate, by virtue of their intrinsic weight and dignity, to compel the obedience of the freshly emancipated European nationalities, without the coercive force of any recognized central authority. As imitation is always easier than invention it is not strange that every mind which attempted to solve the problem should have turned instinctively to Roman jurisprudence as the only



source from which the vacuum could be filled. The most enduring outcome of Roman civilization, surviving the wreck of two empires, was Roman law, whose revived study in the twelfth century in the schools of Italy, Spain, France, and England, caused it to be regarded, in the modern as in the ancient world, as the perfection of human wisdom, the only true and eternal law. A brief account has already been given of the origin and growth of that branch of Roman commercial law known as the *jus gentium*, and of its blending with the Stoic conception of law in the higher sense, as "right reason, pervading all things," and proceeding "from Zeus and the common Nature." Even in Cicero's time the fusion of the *jus gentium* and the *jus naturae* was so complete as to induce him to declare them identical. Nothing could be more clear or vivid than Grotius's definition of natural law as the Antonine jurists had understood it. Following in the footsteps of Suarez and Gentilis he accepted the dominant idea of his age that nature was a law-giver,—as such he placed her upon the vacant Imperial throne, and then undertook to interpret her mandates to nations who would admit no other superior.

The ancient struggle of the German princes for territorial independence, which was greatly advanced by the beginning of the Reformation in A. D. 1521, did not ripen into full triumph until the making of the Peace of Westphalia in 1648, whereby the conflict that had convulsed Germany for more than a century was definitely closed, at the end of the Thirty Years' War, through the two treaties then signed at Münster and Osnabrück. By declaring both Lutherans and Calvinists free from the jurisdiction of the pope or any catholic prelate, and by rendering the states of the Empire practically independent of the emperor as its federal head, the Peace of Westphalia became a formal abrogation of the sovereignty of Rome, and of the theory of Church and State with which the name of Rome had been for so long a time associated. As an eminent English publicist has recently expressed it: "That peace set the final seal on the disintegration of the World-Empire at once of pope and emperor, and made possible the complete realization of the doctrine of Grotius, the doctrine of the sovereignty of states. The Peace of Westphalia did not create international law, but it made a true science of international law realizable."<sup>1</sup> Such, in brief, was the general character of the treaty-settlement made during

<sup>1</sup> Walker, *The Science of Int. Law*, p. 57.

the year 1648 in the first body that can be called a diplomatic congress in the modern sense of that term,—a settlement that survived without a break as the public law of Europe down to the French Revolution. The Grotian system,—depending upon a full and unqualified recognition of the doctrine of territorial sovereignty, from which flow the corollaries that all states are formally equal, and that territory and jurisdiction are coextensive,—was made the basis of the settlement embodied in the Peace of Westphalia, so far as the written treaty law was concerned; and upon that basis it has been claimed from that day to this that, before the law of nations, the legal rights of the greatest and smallest states are identical. While such has ever been the legal theory the practice has been far otherwise. Such rights and such equality have always been enjoyed *sub modo*,—that is, subject to the irresistible power vested by what is called the conventional or higher law in a committee composed of the representatives of a few of the greater states acting in behalf of the whole. That primacy or overlordship, gradually developed outside of the written treaty law since the Peace of Westphalia, represents the common superior who actually succeeded to the place made vacant by the collapse of the Holy Roman Empire as an international director. How to limit and restrain that primacy or overlordship, whether vested in one or more of the greater states, has ever been, as it is to-day, the problem involved in the maintenance of the balance of power. To depress the house of Hapsburg, and to keep Germany disunited were among the leading purposes of the Peace of Westphalia in which the foundations of the system of balance were laid,—a system that proved strong enough to save from annihilation or annexation all of the smaller states down to the partition of Poland begun in 1772. After only one notable interruption the system of balance thus established, with all its defects, still survives. While it may be true that the tendency manifested at times by Great Britain, during the last century, to assume a position of isolation, and the recent military preponderance of Germany may have seriously modified the idea of a system of balance as understood in Europe sixty years ago, such system cannot be said to be obsolete. Nothing is better understood in European diplomacy to-day than the fact that a primacy or overlordship is still vested in the Concert composed of Great Britain, Russia, France and Austria, a combination into which

Italy was admitted in 1867. No student of international law can fully comprehend the nature of that Concert without having in mind an outline, at least, of the history of the more important European treaties made during the long interval which divides the Congress of Westphalia from the Congress of Berlin.

The foundations of the public law of Europe as laid in the treaties made in 1648 at Münster and Osnabrück were not disturbed until the French Revolution, an event which induced the great powers to interfere in the internal affairs of France when certain revolutionary principles threatened to extend themselves to all other countries. Never before had the principle of the balance of power, in the sense of mutual defense, been asserted on so grand a scale, and in the end the intervention was successful. Napoleon, whose schemes contemplated the overthrow of the European Concert, was crushed, and the throne of France restored to the house of Bourbon. But, before the end came, the ancient diplomatic fabric of Europe was shattered,—old landmarks were swept away, many of the smaller states annihilated, and new ones created. After settling in general terms the basis upon which the European system was to be reestablished, the first peace of Paris provided that “within two months all the powers which had been engaged in the war on either side should send plenipotentiaries to Vienna to settle, at a general congress, the arrangements required to complete the provisions of the Treaty of Peace.” On November 1, 1814, the Congress opened; after long delays and serious disagreements the great treaties of Vienna were signed on June 7, 1815; on the 9th, the Final Act; and on the 11th closed the most important diplomatic body that had met since the Peace of Westphalia, a body which relaid the foundations of public law and restored to Europe a peace not seriously disturbed for forty years.

With the advent of the eighteenth century the European Concert,—made up in the main prior to that time of France, Austria, Spain, Sweden and Holland, with the occasional intervention of Great Britain when her interests were specially involved,—was widened by the addition of new elements that entirely changed the politics of the world. Such elements were represented by the new empire of Russia built up in the north by the genius of Peter the Great and Catherine; by the powerful and independent kingdom of Prussia, lifted from a secondary place in the German empire by the military

ambition of Frederick II; by the colonial possessions of Great Britain, France, Spain, Portugal and Holland in the continents of Asia and America and in the eastern and western isles; and by the federal republic of the United States whose birth in the west was proclaimed in the Declaration of Independence. Before the close of the American Revolution the Congress of the United States,—which, under the Articles of Confederation, possessed jurisdiction over all questions arising under the law of nations,—in its Ordinance of December 4th, 1781, concerning marine captures, professed obedience to that law “according to the general usages of Europe.” The new member who thus entered into the family of nations was soon called upon to complete a chapter which has become an integral part of modern international law. While publicists like Galiani, Lampredi and Azuni were giving scientific form to the growing conceptions of the rights and duties of neutrals considered as a definite part of the international code, and while the Baltic powers were insisting upon the practical enforcement of such rights and duties at the cannon’s mouth, the young republic beyond the sea was suddenly compelled to restate with precision and force the very imperfect rules by which the law of nations then attempted to protect the sanctity of neutral territory. The loose practice of the seventeenth century, under which acts of war were so often committed with impunity within neutral lands and waters, after being somewhat improved during the latter part of the eighteenth, relapsed during the wars of the French Revolution into a condition worse than the first. In the presence of flagrant breaches of neutral right and duty in the Old World Washington, as the embodiment of the spirit of legality in the New, said to Congress in his fourth annual address of 1792: “I particularly recommend to your consideration the means of preventing those aggressions by our citizens on the territory of other nations, and other infractions of the law of nations, which, furnishing just subject of complaint, might endanger our peace with them.” A year later, as the conflict deepened between the nations engaged in the first general European war growing out of the French Revolution, Washington issued his famous neutrality proclamation of April 22, 1793, in which he declared “that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations by committing, aiding or abetting hostilities against any of said

powers, or by carrying to them those articles which are deemed contraband by the modern usages of war, will not receive the protection of the United States." When complaint was made a short time thereafter by the British minister of the fitting out at Charleston under French commissions of two privateers to cruise against British commerce, and of the condemnation of British prizes by a prize-court set up by the French consul at that port, Jefferson, as Secretary of State, replied on June 5th "that the granting of military commissions within the United States by any other authority than their own is an infringement on their sovereignty, and particularly so when granted to their own citizens to lead them to acts contrary to the duties they owe their own country; that the departure of vessels thus illegally equipped from the ports of the United States will be but an acknowledgment of respect analogous to the breach of it, while it is necessary, on their part, as an evidence of their faithful neutrality." Later on the American cabinet resolved that the dispatch of June 5th should be followed by a circular directed on August 4th to the collectors of customs throughout the United States for the guidance of the revenue officers in their efforts to prevent the arming and equipping of vessels by belligerents in our ports; and, on August 7th, Jefferson wrote M. Genet that the President considered this government bound to restore all prizes which had been captured by privateers fitted out in the United States, and brought into port after June 5th, or make compensation therefor. After the sowing of that crop of principles—the harvest from which the United States reaped in the treaty of Washington of 1795, and the arbitration at Geneva—it is no wonder that the world should be willing to admit, as Hall has lately expressed it, that "the policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality \* \* it represented by far the most advanced existing opinions as to what those obligations were." On the substructure thus laid was built up the scheme of legislation for the enforcement of neutral duties provided for in the first American Foreign Enlistment Act of June 5th, 1794, enacted in the first instance for only two years, and made perpetual by the act of April 24, 1800. After the passage of an additional and temporary act on March 3, 1817, all prior legislation on the subject was superseded by the act of April 20, 1818, which, after repealing all other acts, consolidated their contents in a definite code, so designed as to prevent or punish every

infraction of neutral duty which could be committed by the issuance of a foreign commission or by the enlistment of land or sea forces within the territorial limits of the United States. As a recognition of the perfection of that neutrality code, there was enacted the British Foreign Enlistment Act of 1819 which, as all the world knows, was simply a reproduction of the American acts of 1794 and 1818, viewed in the light of their diplomatic and judicial histories. Canning, who was an advocate of the British act, carried through parliament in the face of strong opposition in 1819, declared, in a notable speech made in the same place in 1832: "If I wished for a guide in a system of neutrality, I should take that laid down by America in the days of the presidency of Washington and the secretaryship of Jefferson." And here the fact should be noted that while the government of the infant republic was thus leading the way to a higher conception of neutral duty, it took the initiative in the establishment of another important principle which has since become a generally accepted rule of international conduct. The European theory that a government's title to recognition is not so much the fact of its existence as the theoretical legitimacy of its origin received its death-blow when Jefferson, as Secretary of State, declared, in reference to the recognition of the republic proclaimed in France by the National Convention, that "we surely cannot deny to any nation that right whereon our own government is founded, that every one may govern itself according to whatever form it pleases, and change these forms at its own will; and it may transact its business with foreign nations through whatever organ it thinks proper, whether king, convention, assembly, committee, president, or anything else it may choose. The will of the nation is the only thing essential to be regarded." Thus our federal republic emphasized the doctrine, which all states are forced to admit in their dealings with each other, that all must finally recognize the government *de facto*.

The unusually intimate relations between a few of the greater powers, resulting from their joint intervention in the affairs of France, seem to have suggested to the czar the idea of uniting Russia, Austria and Prussia in the mystic bonds of a Holy Alliance, whose primary purpose was to protect the principle of legitimacy against the rising tide of popular freedom by which it was threatened. As a part of that design Austria, at the command of the alliance, crushed the Neapoli-

tan revolution of 1820; and France, by the same authority, invaded Spain in 1823 for the purpose of overthrowing the constitution of the cortes and of restoring absolutism in the person of Ferdinand VII. In the summer of that year it was that the Alliance notified Great Britain that, so soon as France should complete the overthrow of the revolutionary government of Spain, an international congress would be called for the purpose of terminating the revolutionary governments of South America which had been recognized by the United States but not by Great Britain. In order to defeat that design, full of menace to the English merchants who had built up a large trade with South American countries, Canning, in the summer of 1823, began to correspond with Mr. Rush, the American minister at London, as to the advantage of a joint declaration by Great Britain and the United States against the proposed intervention of European powers in the affairs of this hemisphere. The outcome of that correspondence was the definition of the relations of the federal republic of the United States to the nations of the Old World, coupled with a very clear intimation of what its own position was to be in the New. The essence of that epoch-making manifesto, prepared by Jefferson at the request of Monroe, was (1) that the Concert of Europe must never be permitted to interfere in the political affairs of America, North or South; (2) that America must have a political system of her own entirely distinct from that of Europe. "Our first and fundamental maxim should be never to entangle ourselves in the broils of Europe; our second, never to suffer Europe to intermeddle with cis-Atlantic affairs. America, North and South, has a set of interests distinct from those of Europe, and peculiarly her own. She should, therefore, have a system of her own, separate and apart from that of Europe." The Monroe Doctrine, whose seeds were thus planted by one of the greatest of historic men, like every other institution which has been the result of growth, did not attain its full stature in a night; it did not spring into life fully armed. Its present dimensions are the result of seventy-five years of persistent development worked out by the pens of successive presidents and secretaries of state. It is distinctly a creation of the executive power. By President Polk's protest against future European colonization in this hemisphere, made in the face of possible European intervention on account of the annexation of Texas, President Monroe's original statement was greatly widened;

and when, in 1865, it became necessary for President Johnson to notify the emperor of the French that this country would no longer tolerate armed intervention in the affairs of the sister republic of Mexico, it was given a deeper meaning and a stronger significance. Not, however, until a resolute and far-sighted statesman, who clearly understood that our marvellous national development entitled us to rank as a world power, was given the opportunity by the boundary controversy between Great Britain and the republic of Venezuela, was the inevitable declaration finally made that the same reasons which impel the Concert of Europe to guard the balance of power in the Old World prompt the government of the United States to maintain alone its primacy in the New. "If the balance of power is justly a cause for jealous anxiety among the governments of the Old World and a subject for our absolute non-interference, none the less is an observance of the Monroe Doctrine of vital concern to our people and their government."

Thus from the hand of President Cleveland the Monroe Doctrine first received complete and scientific definition; and when the government of Great Britain justly and wisely conceded the right of arbitration then asserted by the United States, solely by virtue of its primacy or overlordship in the New World, a final settlement was made of the place of this republic in the family of nations, and the foundations laid for that close and priceless moral alliance since developed between the two broad divisions of English-speaking peoples. If the Monroe Doctrine as thus expounded is not already a part of the international law of the world, it is rapidly tending in that direction. As an eminent English publicist has recently expressed it: "The great powers of Europe, as they are called, have gradually obtained such a predominant position as to render untenable the proposition that there is no distinction between them and other sovereign states; and the position they hold in Europe is held by the United States on the American continent. \* \* The great Republic of the New World stands out like a giant among pigmies. There is no other state in the same hemisphere which can be compared to her in strength and influence.

\* \* The supremacy of a Committee of States and the supremacy of a single state can not be exercised in the same manner. What in Europe is done after long and tedious negotiations, and much discussion between representatives of no less than six countries, can be done in America by the



decision of one Cabinet discussing in secret at Washington."<sup>1</sup>

The balance of power system, as re-established by the Congress of Vienna, in 1815, was not seriously disturbed until the outbreak of the Crimean War in 1854, a war undertaken by Great Britain and France primarily to preserve the balance of power in eastern Europe, and incidentally to vest in the European Concert the protection of the Christian peoples subject to Turkey assumed prior to that time by Russia alone. Although not actual belligerents Austria and Prussia were admitted to the Congress which met at Paris in 1856 to terminate the war, a body in which appeared for the first time in European history ambassadors from the Ottoman Porte. The most important and enduring work of that Congress, in which all the great powers were thus represented, was transacted after the negotiations for peace were terminated. The time had now come when the increasing outcry for the introduction of greater humanity into the rules and practices of war could be disregarded no longer.

In obedience to that demand the question of the maritime rights of belligerents and neutrals was formally presented to the Congress, and the result was the Declaration of Paris, a protocol signed April 16 by all the parties represented, and subsequently accepted as a part of the public law of the world by all powers except the United States, Spain and Mexico.

The first great step thus taken was soon followed by the notable act of President Lincoln who, in 1863, requested Prof. Francis Lieber of Columbia University in the city of New York to undertake the no less novel than humane task of codifying the laws of war. In the very next year, really in response to the appeal made by two citizens of Geneva,—Dunant, a physician, who published a startling story of what he had seen in the hospitals on the battlefield of Solferino, and his friend Moynier, who conceived the idea of "neutralizing the sick wagons,"—met the famous body composed of the representatives of the fourteen states who signed, on August 22, 1864, the Convention of Geneva, regulating the treatment of the sick and wounded, and neutralizing all persons and things employed in their service, such as surgeons, chaplains, nurses, hospitals and ambulances, provided such persons and things are distinguished by a badge or a red cross on a white ground displayed on an arm or on a flag, as the case may be. In order to revise and extend the original provisions another Convention was

<sup>1</sup> Lawrence, Principles of Int. Law, pp. 65, 247. Second ed., revised.

signed at Geneva in 1868, but never ratified, whose Additional Articles, including the neutralization of hospital ships, relate chiefly though not exclusively to warfare at sea. Less than two months thereafter a Military Commission at St. Petersburg, composed of delegates from seventeen states, including representatives from Persia and Turkey, agreed as between themselves "to renounce the employment of any projectile, on land or the sea, of a weight below four hundred grammes (fourteen ounces), which should be explosible or loaded with fulminating or inflammable materials." In the Declaration then made it was said that the object of the use of weapons in war is "to disable the greatest possible number of men, that this object would be exceeded by the employment of arms which needlessly aggravate the sufferings of disabled men, or render their death inevitable, and that the employment of such arms would therefore be contrary to the laws of humanity." In 1871 met the conference of London which so modified the Treaty of Paris of 1856 as to release Russia from the burdens then assumed as to the Black Sea. In 1874 met the Conference of Brussels, in which appeared the representatives of all the European powers of any importance, in the hope of bringing about the adoption by all civilized states of a common code for the regulation of warfare on land. As the delegates were not plenipotentiaries, the Conference was purely consultative; and the outcome was a series of articles embodied in a Declaration which remained as the basis for future negotiations between the governments concerned. In 1877 met the Conference of Constantinople which vainly endeavored to obtain from the Porte guarantees for the better government of its Christian subjects; in 1884-85, the West African Conference of Berlin, whose purpose was to regulate the affairs of that region, including the boundaries and independence of the Congo Free State; in 1889 the Marine Conference of Washington, said to have been the first world Conference ever held for purposes of *quasi* legislation; and, in 1890, the Conference of Brussels, which resulted in the Final Act for the suppression of the African slave trade.

Such were the worthy preludes to the meeting of the International Conference of Peace, to the results of whose deliberations, begun in the city of The Hague on the 18th of May, 1899, special consideration has been given in the body of this work. Proposed and summoned by the czar of Russia, the Conference was attended by an hundred delegates from

twenty-six powers,—twenty European, four Asiatic, and two American. It was certainly a hopeful sign for the peace of the world when, at a very early stage in the proceedings of an assembly called by the chief of the great empire of the east of Europe, the first plenipotentiary of the great empire of the West, Sir Julian Pauncefote, formally proposed, in a remarkable *mémoire*, the question of the creation of a permanent tribunal of arbitration. The delegation of the United States submitted at the same time a similar proposition, expressing the desire that arbitration might become a normal method of adjusting international disputes. While the delegates of the German Empire objected, and no doubt wisely, to obligatory arbitration, as a step too far in advance of existing conditions, they subsequently expressed the cordial adherence of Germany to an international court of arbitration, Prof. Zorn declaring that his government “fully recognized the importance and the grandeur of the new institution.” It is safe to say that all was done that could have been wisely attempted in a meeting necessarily preliminary and tentative. The strength of the Conference was in its patience and moderation. M. Martens, one of the Russian delegates, tells us, “it is a happy token to note, the longer the labors of the Conference at The Hague lasted, the more fully views were exchanged among the representatives of the different powers, the more pronounced grew the mutual respect, the more friendly grew the personal relations, the more palpable became the desire to do something for the future.” That steadfast hope for the future certainly found high-thoughted and eloquent expression when the Hon. Andrew D. White, one of the delegates of the United States, said,—in the notable oration pronounced by him in the midst of the proceedings of the Conference and at the tomb of Grotius,—“from this tomb I seem to hear a voice which says to us as the delegates of the nations: ‘Go on with your mighty work: avoid, as you would avoid the germs of pestilence, those exhalations of international hatred which take shape in monstrous fallacies and morbid fictions regarding alleged antagonistic interests. Guard well the treasures of civilization with which each of you is intrusted; but bear in mind you hold a mandate from humanity. Go on with your work. Pseudo-philosophers will prophesy malignantly against you: pessimists will laugh you to scorn: cynics will sneer at you: zealots will abuse you for what you have not done: sublimely unpractical thinkers will revile you for what you have done: ephemeral critics will

ridicule you as dupes: enthusiasts, blind to the difficulties in your path and to everything outside their little circumscribed fields, will denounce you as traitors to humanity. Heed them not: go on with your work. Heed not the clamor of zealots, or cynics, or pessimists, or pseudo-philosophers, or enthusiasts, or fault-finders. Go on with the work of strengthening peace and humanizing war: give greater scope and strength to provisions which will make war less cruel: perfect those laws which diminish the unmerited sufferings of populations: and, above all, give to the world at least a beginning of an effective, practical scheme of arbitration.' "

In the preparation of Part IV, relating to the laws of war, the author was fortunate in having the active and able assistance of his friend and fellow-citizen, Peter J. Hamilton, Esq., a rising lawyer and scholar of whom any state might be proud. The son of one of the ablest and most cultured of Southern jurists, Mr. Hamilton was trained under his father's eye, and graduated at Princeton University in 1879. As a recognition of his distinguished career in that institution he was awarded the highest grade ever given there in political science, and also a fellowship which enabled him to continue his training at the University of Leipzig, where he studied philosophy under Wundt and Roman law under Windscheid. The ripe fruit of Mr. Hamilton's researches into French and Spanish history and organization in America was embodied in his notable book published in 1897,<sup>1</sup> which is not so much a local chronicle as a real contribution to the history of the valleys of the Alabama and Mississippi. Grateful acknowledgments must also be made to the Hon. William Wirt Howe of New Orleans, late President of the American Bar Association, for advice frequently given in the domain of Roman law, of which he is a recognized master; and to Rev. W. J. Tyrrell, President of Spring Hill College, Mobile, for valuable assistance in reference to several vexed questions concerning Greek international law. Last but not least the author desires to express his thanks for a set of valuable public documents received from the Department of State through the personal kindness of its able and experienced chief, the Hon. John Hay, whose impartial courtesies to his fellow citizens of all sections and all parties compel them to recognize in him an American who belongs to the country as a whole.

MOBILE, ALA., AUGUST 11TH, 1901.

<sup>1</sup> "Colonial Mobile."

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## INTRODUCTION.

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§ 1. Analytical and historical methods contrasted.—The exponents of jurisprudence are now divided into two distinct schools whose methods of investigation and demonstration are radically different from each other. To a student of the older or analytical school a constitution, a code of laws or customs present themselves as things that have existed from the very beginning in their present form. His primary duty therefore involves only such an analysis of their various provisions as will reveal the existing rules under which rights and duties are defined and remedies administered. With the history of the processes through which such constitutions or codes came into existence he has nothing directly to do,—in his view the history of law is really no part of jurisprudence, it is simply a side-light which may or may not be used as an aid to interpretation. From the utterly false assumption upon which this method proceeds have necessarily resulted many serious misconceptions as to the origin of government, and as to the nature and development of law, both public and private. Chief among these may be mentioned the fanciful theory, long upheld by the names of Hooker, Hobbes, Locke and Rousseau, that man, in order to escape from the ills incident to the imperfect operations of the law of nature in a “state of nature,” consciously and deliberately entered into a “social contract.”<sup>1</sup> Hooker tells us that “this was the cause of men uniting themselves first in political societies;” and to that Locke adds that in order to escape from a condition that was practically a state of war men agreed “together mutually to enter into one community and make one body politic.” Investigations of the historical school into the early history of institutions have long ago revealed the fact that not only does such assumption lack any historical foundation whatever, but that the very contrary was the truth. Through recent research the fact has been established that individualism was unknown to ancient politics; that status and not contract was the basis of primitive society. At the outset the individual counted for nothing,

<sup>1</sup> Ecclesiastical Polity; the Learning; the *Contrat Social*.  
viathan; the Essays on Civil Gov-

the state, society for everything. As Aristotle has stated it, "man is born to be a citizen."<sup>2</sup> By the accident of birth he was assigned his grade in primitive society from which he was not expected to depart.

§ 2. Roman theory of a determinable law of nature.—The theory thus exploded by means of the historical method began with the assumption that over and above the laws of men there is a law of nature, an abstract standard of human conduct to which all earthly laws should conform, and to which all mankind should be made to assent through the dictates of universal reason. When the time came for Ayala, Gentilis and Grotius to lay the foundations for the set of understandings now generally known as international law, the main difficulty was to settle upon a source from which rules could be drawn adequate to determine the jural and moral relations of a group of sovereign, coequal and independent states. In the effort to supply the vacuum Grotius and his successors revived the Roman theory that there is really such a thing as a determinable law of nature; and so the conclusion was reached that the natural law is binding on states *inter se*; and that that law and the *jus gentium* are identical. Thus it became the fashion to attribute the origin of international law to some transcendental source, such as nature, reason, and the Divine Will,—a source that was supposed to impart to it an intrinsic and substantive authority over all the nations of the earth. To give color to such fictions it was held that the usage of nations was not the origin of the law, but only the evidence of it; as Sir Robert Phillimore has expressed it such usage expresses "the consent of nations to things which are *naturally*, that is, by the law of God, binding upon them."<sup>3</sup>

What international law really is.—In order to disentangle the subject from such fanciful and unscientific theories the historical school made another of its prosy inquiries into the actual historical facts, and the outcome is the statement that what is now called international law is simply a body of rules accepted by civilized nations as binding and obligatory in

<sup>2</sup> "A really *city-less* man \* \* \* this ἀπολις, the clanless and masterless man whom Aristotle regards as a kind of Monster, is identical with the natural man of Hobbes and Rousseau. He is the unit out of whom, if there be only

enough of them, theorists of the Social Contract school undertake to build up the State." Sir.F. Pollock, Hist. Science of Politics, p. 20.

<sup>3</sup> Preface to Com. on Int. Law, vol. i, p. 5.

their mutual dealings with each other. In the words of Dr. Bulmerincq such law "is the totality of legal rules and institutions which have developed themselves touching the relations of states to one another."<sup>4</sup> Thus the historical school, ever opposed to all *à priori* assumptions, has clearly demonstrated, that the primitive organization of individual states never was, and never could have been, based upon conscious and deliberate contract among its members; that as between sovereign and coequal states, refusing to admit any common superior, no set of understandings, expressed or implied, could possibly rest upon any other basis.

§ 3. Growth of law explained through the record of its development.—The historical method of investigating the origin and growth of law, public and private, beginning with its germs in primitive society, attempts to explain its nature and meaning through the record of its development. The main difficulty in the way of complete demonstration is the fragmentary character of the evidence as to the initial forms of law in the early periods. Only by a comparison of such fragments as have been preserved in the survivals of ancient law or custom, in the usages of savage tribes and stagnant nations, or in the annals of a few ancient historians, is it possible to reconstruct primitive society as a complete organism. The same process of thought that gave birth to comparative anatomy and comparative philology, at a little later day, brought forth comparative politics and comparative jurisprudence.<sup>5</sup> These new branches of knowledge are simply parts of the general result of the transition that has taken place since the end of the last century from the old or artistic method of historical investigation to the new or sociological. The cause of the transition was the consciousness that the system of permanent, uniform and universal law that regulates growth and decay in the physical world applies as well to the growth and decay of societies as to other phenomena. The French Revolution gave a strong impulse to the new idea, and the French scholars, who were nearest to the upheaval that brought suddenly into view the underlying social forces that had lain

<sup>4</sup> *Das Völkerrecht* (in Marquardsen's *Handbuch*, vol. 1), sec. 1 of the monograph.

<sup>5</sup> As an illustration of the advance that has been made in Germany in the study of Comparative

Jurisprudence under the influence of the historical school of jurists, see the volumes of Dr. Albert Hermann Post, entitled, *Grundriss der ethnologeschen Jurisprudenz*, Oldenburg und Leipzig, 1894.

ominously silent during the dreadful calm of the latter days of the *ancient regime*, were the first to undertake, after the Peace of 1815, the mighty task of rewriting the history of the world from a new point of view. Michaud, the Thierrys, Sismondi, Michelet and Guizot led the way,<sup>6</sup> and upon their heels came Auguste Comte who raised himself to the level of Leibnitz and Descartes by perceiving that social organization must be viewed and explored as a whole because of the connection between each leading group of social phenomena and every other leading group so intimate as to make a change in one result in a corresponding modification in all the rest.

§ 4. Comte as founder of the science of society.—By withdrawing the collective facts of society and history from the region of external volition, and placing them in the region of law, Comte made possible the social science that now describes how men became grouped in political communities, how they separated into high and low, rich and poor, how they formed casts and guilds, how they recognized property, and how they constituted government and law. To use his own language "Not only must political institutions and social manners, on the one hand, and manners and ideas, on the other, be always mutually connected; but further, this consolidated whole must be always connected by its nature with the corresponding state of the integral development of humanity, considered in all its aspects of intellectual, moral, and physical activity."<sup>7</sup> So industrious have been the popular historians in rewriting the general history of mankind, in the light of the new revelation, that Mr. Freeman declared not long ago that all historical writings anterior in date to the end of the eighteenth century have been entirely superseded, with the exception perhaps of Gibbon alone. The time is near at hand when the same thing may be said with equal truth of all, or nearly all, of the older treatises specially devoted to the origin and growth of government and law.<sup>8</sup>

<sup>6</sup> See J. Cotter Morison's article on History, Enc. Brit., vol. xii, p. 19.

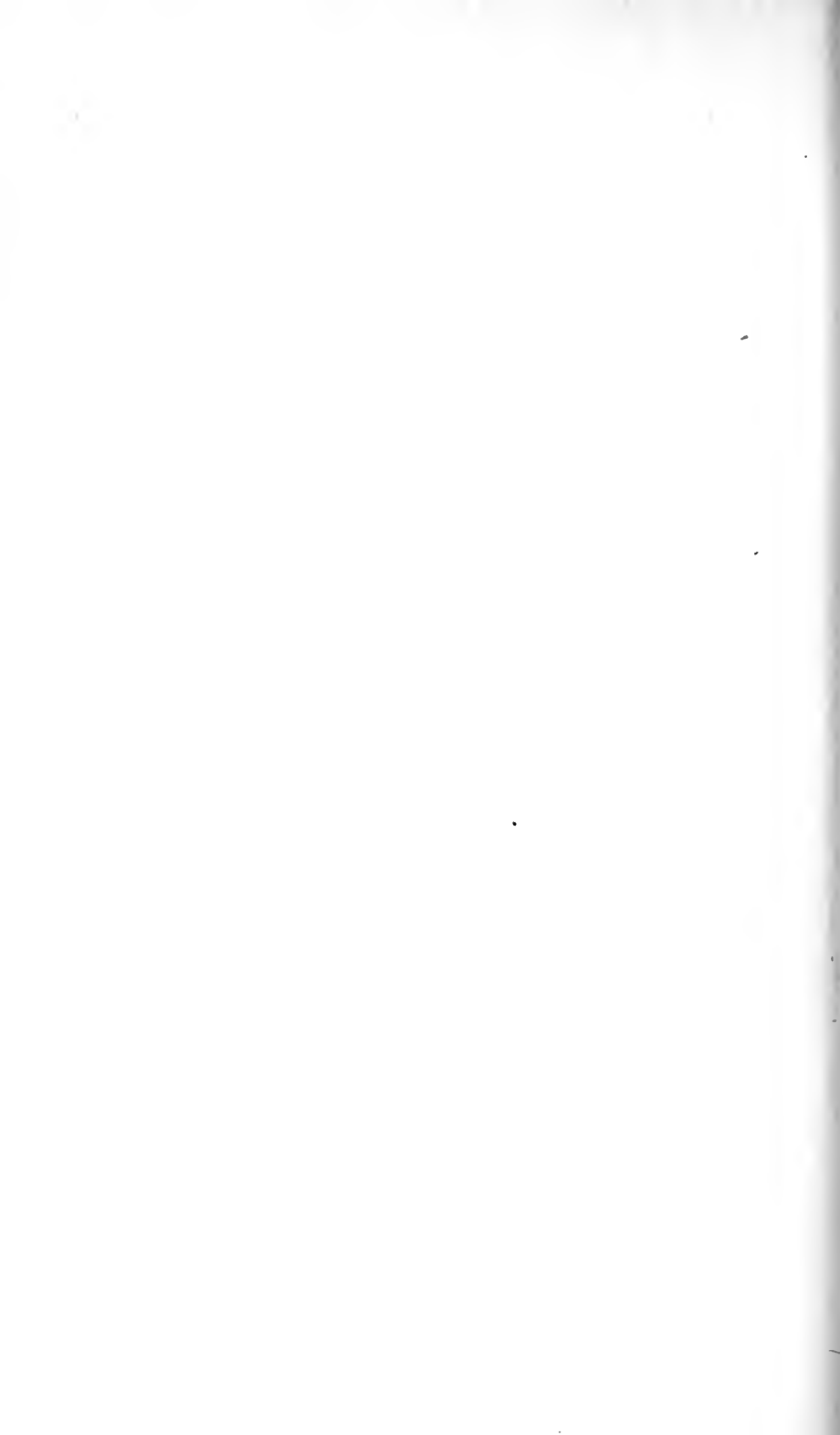
<sup>7</sup> Herbert Spencer admits that to Comte "is due the credit of having set forth with comparative definiteness the connection between the Science of Life and the Science of Society." The Study of Sociology, p. 328.

<sup>8</sup> "Judge O. W. Holmes recently observed that the tendency of our age to 'explain things' by stating the conditions under which they came into being, and noting their growth under the influence of a varying environment from age to age, is as strongly marked in the field of law as in other departments of intellectual activity. This

§ 5. Why international law should be re-examined by historical method.—The entire field of international law should be re-examined in the light of the historical method, because the two great elements involved are the outcome of a gradual and complicated process of historic development. The first element is represented by the high contracting parties upon whose consent the entire fabric depends for existence,—the sovereign, coequal and independent commonwealths that constitute collectively the state-system of modern times. Not until the era of the Reformation did that state-system assume its present form; prior to that time the political relations of the European states as members of the shadowy Christian commonwealth known as the Holy Roman Empire precluded the idea of independent nationalities. It may be true that the Empire was far more of a doctrine or theory than an institution, and yet not until that theory or phantom of a united Christendom vanished was it possible for the independent nationalities that emerged to begin the building up, bit by bit, of the existing system of understandings that has no real counterpart in the ancient or medieval world. The student of international law must therefore ascertain, in the first place, how it was that the existing state-system with which he has constantly to deal came into existence,—an inquiry that necessarily involves a somewhat careful examination of the ancient and medieval state-systems that preceded it. Not until the first branch of the subject has been fully mastered can a clear and definite understanding be had of the process through which the emancipated nationalities were forced by the very necessities of their situation gradually to construct a *modus vivendi* under which they could dwell together in some kind of peace and concord. Thus will the effort be made to unfold, with the aid of the historical method, the several stages of growth through which the system of international law came into existence. When that point has been reached the aid of the analytical method will be invoked, in order that the intent and meaning of the various and complicated rules embodied in that system may be clearly expounded.

method of legal study has done and is doing a great work for English and American law; placing particular doctrines in their proper places, making plainer the relations of one part of the law to

another, sweeping away cobwebs of tradition, and separating the essential from the accidental in respect to institutions." Law Notes, June, 1899, p. 54.



# PART I.

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## ANCIENT AND MEDIEVAL STATE-SYSTEMS.

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### CHAPTER I.

#### THE ANCIENT STATE AS THE CITY-COMMONWEALTH.

§ 6. The normal international person a state.—Holland, in his *Elements of Jurisprudence*, defines international law to be “the body of rules regulating those rights in which both of the personal factors are states. \* \* The normal international person is a state which not only enjoys full external sovereignty, but also is a recognized member of the family of nations,— \* \* an aggregate of states which, as the result of their historical antecedents, have inherited a common civilization, and are at a similar level of moral and political opinion.”<sup>1</sup> In order fully to grasp the nature of the existing aggregate of states viewed as “the result of their historical antecedents,” it will be necessary to examine, to some extent at least, the three great state-systems whose prior histories extend over the immense interval that divides the beginning of authentic tradition from the beginning of modern times.

**Greek, Roman and medieval state-systems.**—The first of such systems was that embodied in the relations, religious and political, existing between the Greek city-states which persistently refused to be merged in any single aggregation that could be called, in any proper political sense, a nation. The second was that embodied in the relations existing between the sovereignty of Rome and the nations beyond the limits of her authority. The third was that embodied in the relations existing between the states bound up for centuries in the strange political fabric known as the Holy Roman Empire. The germs of international comity and morality first appear in a clearly developed form in the Delphic Amphictyony, to the responses of whose oracle not only the

<sup>1</sup> Pp. 345, 349.

Greeks but the Romans—even the Romans of the time of the Empire—often listened with respect. There can be no doubt that Greek ideas as to the proper relations of states to each other were impressed, to a greater or less extent, upon that system of Imperial law whose influence has been so far reaching and so permanent. The magnificent conception of a universal Christian Commonwealth embodied in the Medieval Empire rested upon principles drawn almost exclusively from Roman sources; and when upon the actual dissolution of that fabric at the time of the Reformation the modern state-system of independent nationalities emerged, the jurists who attempted to construct a new set of understandings among them turned instinctively to the same source for their materials. By reason of this interpenetration of principles and ideas, it is impossible to comprehend all the elements that enter into the existing state-system without a cursory examination at least of its three predecessors whose individual histories constitute only distinct stages in one unbroken and progressive development.

§ 7. **Greek city-state an aggregation of village communities.**—The most important single result so far attained by the application of the comparative method to the study of political institutions is embodied in the discovery that the unit of organization in all the Aryan nations, from Ireland to Hindoostan, was the naturally organized association of kindred—the family swelled into the clan—which in a settled state assumed the form of a village community. When we have firmly taken hold of that fact, when we clearly understand that the original unit of organization was the same in all the Aryan nations, whether situated on the shores of the Mediterranean or the Baltic, we have possessed ourselves of the atom or unit that, in different forms and different combinations, everywhere enters into the structure of the state,—a term that has represented radically different conceptions at different periods of the world's history.<sup>2</sup> For the earliest illustration of the ancient conception of the state as the city-commonwealth we must go to the Hellenic world in which the science of politics was born. The dominant political idea we there encounter is embodied in the independent city standing towards all other cities as a sovereign state whose internal affairs are regulated by its own domestic constitution. When the municipal organization

<sup>2</sup> For a more complete statement see *English Constitution*, vol. i, pp.1-3. see *The Origin and Growth of the*.



of such a state is examined the fact is revealed that the city-commonwealth is a composite whole that has arisen out of the aggregation of village communities. The first stage is represented by the gathering of a group of village communities or clans (*γένεα*) into a brotherhood (*φρατρία*); the second by the gathering of brotherhoods into a tribe; the last by the gathering of tribes into a city. "Several families formed the phratry; several phratryes the tribe, several tribes the city. Family, phratry, tribe, city, were, moreover, societies exactly similar to each other, which were formed one after the other by a series of federations."<sup>3</sup> Internal changes that afterwards took place in the primitive constitution of the independent city do not touch the fact that it represented the only practical conception of the state that existed in the Hellenic world. To the Greek mind the state, the city-commonwealth, was an organized society of men dwelling in a walled city with a surrounding territory not too large to allow its free inhabitants habitually to assemble within its limits to discharge the duties of citizens.<sup>4</sup> During the earlier and more brilliant days of Greek history the city and nothing higher or lower was the one acknowledged political unit.

§ 8. Greek state-system as outlined by Aristotle.—In this system of free cities, internally organized at the outset after one general model, were contained the political conditions with which Aristotle, the acknowledged founder of political science, was brought into contact; and, in obedience to his practical temper, he begins his political speculations with a description of the forms of government actually existing around him. It is probable that in order to collect sufficient data to support the statements and conclusions contained in his politics, he made, as a preparatory study thereto, the collection called the Constitutions, which is said to have contained a description of the organization, manners, and customs of one hundred and fifty-eight city-states.<sup>5</sup> In that vast collection were embraced, no doubt, examples of every varying shade of political constitution. In one city sovereignty was vested in a pure democracy, electing magistrates, enacting laws and ratifying treaties in

<sup>3</sup> De Coulanges, *The Ancient City* (Small's trans.), p. 168. See also Freeman's *Comparative Politics*, p. 104.

to its citizens the opportunity to become familiar with each other. *Politics*, vii, c. iv. 13.

<sup>4</sup> Aristotle thought that a state should not be so large as to deny

the main body of materials thus collected has been lost, but the fragments that remain have

an assembly in which every free citizen had an equal voice; in another all the power was vested in a narrow oligarchy; while in a third the supreme authority was confided to a tyrant whose attributes varied widely according to circumstances. And yet despite such internal variations the idea was universal that every Greek city was entitled to a perfectly independent existence, with the full right to regulate its external relations with other states through its own ambassadors. As the master of the history of Greek federalism has expressed it: "Each city is either sovereign or deems itself wronged by being shorn of sovereignty. At a few miles from the gates of one independent city, we may find another, speaking the same tongue, worshipping the same gods, sharing the same national festivities, but living under different municipal laws, different political constitutions, with a different coinage, different weights and measures, different names, it may be, for the very months of the year, levying duties at its frontiers, making war, making peace, sending forth its ambassadors under the protection of the laws of nations, and investing the bands which wage its border warfare with all the rights of the armies and the commanders of belligerent empires."<sup>6</sup> The citizens of each "autonomous city-community" thus circumstanced looked upon its narrow limits as his country (*πατρίς*)<sup>7</sup>; within its walls his self-centered patriotism was confined; and thus he was taught to regard himself not as a Greek or an Italian, but as an Athenian or Roman. The intense love for one's own city thus engendered was more than equaled, however, by the bitter hate that grew out of the ever conflicting interests and jealousies arising between neighboring states whose pride it was to deny any common superior.

§ 9. **Extreme cruelty of laws of war.**—The natural outcome of such conditions was a state of almost perpetual war carried on under laws cruel almost beyond modern conception. Outside the limits of Hellas, a term that applied to every place where Greeks dwelt, all mankind were barbarians or enemies, and as such without claim to any kind of humane consideration.<sup>8</sup> Within the limits of Hellas, while there was a feeling

been collected and annotated by Neumann, and are contained in Bekker's Oxford edition of Aristotle.

<sup>6</sup> Freeman, *Hist. of Federal Government*, vol. i, pp. 35-36.

<sup>7</sup> The same use of the word is common in modern Greek.

<sup>8</sup> Aristotle calmly argued that barbarians were intended by nature to be slaves of the Greeks. *Politics*, I., II., VI. He further

that common blood constituted a local and exceptional tie, between Greek and Greek in a state of war, the laws seem to have been almost if not equally severe. No matter whether we look for the rule to the Greece of Thucydides or to that of Polybios, death or slavery was the state to be expected by the conquered, unless there was an express stipulation to the contrary. The life of a prisoner was not sacred unless the conqueror bound himself by express stipulation to preserve it;<sup>9</sup> and in the same way inhabitants of a conquered city, even when no special provocation had been given, were legally liable to sale in the absence of any personal claim upon their captors.<sup>10</sup> To kill the men and sell the women and children of a conquered Greek city, while it might be an extreme act of severity, was no breach certainly of the letter of the Greek law of nations when no contrary stipulation had been entered into. The perils thus attending war upon land were fully equaled by those of the sea. Piracy, unblushingly practiced by the most civilized nations of antiquity, subjected the peaceful merchant not only to plunder and capture by men with whom his country had no quarrel, but also to the contingency of sale to some barbarian master.<sup>11</sup> Such in brief were the distinguishing features which marked the relations existing in time of war between the numberless independent communities of Greece, that spread themselves first over the European peninsula bearing that name, then along the Ægean coasts of Asia Minor, and finally around the borders of the greater sea in such a way as to justify Cicero's notable declaration that an Hellenic hem was woven about the barbarian lands of the Mediterranean.

§ 10. Status of aliens; isopolity and international courts.— And yet relentless as was the policy of Greek city-states when

contended that it was both natural and honorable to acquire wealth by making war in order to reduce to slavery those who had been thus predestined by nature to that condition. *Ibid.*, I., viii. In the beginning of the Laws Plato declares war to be natural between all states: *πολεμὸς φύσει ὑπάρχει πρὸς ἀπάσας τὰς πόλεις.*

<sup>9</sup> Thucydides, i. 30 et passim.

<sup>10</sup> Ἀλλὰ τοῦτό γε [μετὰ τέχων καὶ γυναικῶν πρᾶθῆναι.]

καὶ τοῖς μηθὲν ἀσεβῆς ἐπιτελεσαμένοις κατὰ τοῦς τοῦ πολέμου νόμους ὑπόκειται παθεῖν. Polyb. II., 57.

<sup>11</sup> Prof. H. Brougham Leech, in his very able Essay on "Ancient International Law" (Dublin, 1877), after a careful review of the authorities, concludes that the usual statements as to the cruelty of the Greeks in war are exaggerations. "To pronounce them insensible to any moral laws," he says, "or to any reciprocal obli-

hostilities were in progress, the more enlightened of them were not unfriendly to peaceful foreigners who came to dwell permanently within their walls. While the aristocratic and agricultural states were averse to the admission of strangers on any terms, the commercial ones favored their introduction. On the one hand Sparta in her earlier and severer days forbade her citizens to go abroad and refused to permit strangers to reside within her bounds;<sup>12</sup> on the other, Athens allowed her domiciled aliens (*μετοικοι*) to enjoy her laws through the agency of a patron (*προστάτης*) subject, however, to a stranger's tax, and to military service by land and sea.<sup>13</sup> In some of the Greek states individual aliens, or even whole communities, were voted such important civic rights as exempted them from taxation, and enabled them to hold real estate and to intermarry. Occasionally, by vote of the community, an alien was endowed with full citizenship. The most notable feature of this liberal policy was that part of it embodied in international conventions providing for the mutual administration of justice to resident foreigners, for the establishment of mixed tribunals, or even for the grant of isopolity.<sup>14</sup> As Laurent<sup>15</sup> has expressed it: "Lorsque deux cités voulaient s'unir intimément, elles convenaient que ceux de leurs membres qui s'établiraient dans la république alliée y jouiraient de tous les droits du citoyen, même du droit de suffrage et de l'admissibilité aux fonctions publiques. On appelait cette alliance étroite *isopolitie*. \* \* \* La justice était le plus profond, le plus légitime des besoins, et les villes commercantes étaient aussi intéressées à assurer ce bienfait aux étrangers, que ceux-ci à le demander. Des conventions spéciales pourvurent à cette nécessité. On y déterminait les règles d'après lesquelles les contestations devaient être jugées; parfois on convenait que les juges seraient pris également chez les deux peuples et formeraient ainsi une *espèce de cour internationale*; on se promettait

gations, except such as were enjoined by treaties, is, even with regard to their relations with non-Hellenic states, and in a much greater degree as between themselves, a libel of the grossest kind." P. 16.

<sup>12</sup> Plut. Ages, 10. Plut. Lycurg., c. 27. Thuc., I, 144.

<sup>13</sup> Thuc., III, 16. Cf. Plut., c. 37.

<sup>14</sup> Arist. Polit., III, 1, 3. Ibid.,

5, 10. The word *ισοπολιτεία* is also used by Plutarch (II, 300) and means "equality of civic rights."

<sup>15</sup> *Histoire du Droit des Gens*, II, 114 seq.; citing Niebuhr, *Histoire romaine*, II, 95 seq. (*traduct. fr. édit de Brux*); *Demost. de Coron.*, § 90 seq., p. 225 seq.; Xenoph. (*Hellen.*, I, 1, 26); Sainte-Croix, *Legislation de Crète*, p. 357-360;

bonne et prompte justice; l'étranger pouvait soutenir ses prétentions devant ces tribunaux, sans avoir besoin d'un patron." Such privileges, extended to barbarians as well as Greeks, swelled the ranks of domiciled strangers at Athens until they equaled one-half of the citizens.

§ 11. Futile efforts of the Greeks to establish political unity.—The spirit of isolation, of exclusiveness that made impossible anything like a fusion through incorporation of the Greek cities of the main land, despite the efforts to establish an interstate citizenship, extended itself in full force to the colonial system. Although each mother city sent out the colonizing group that left her as a part of herself, the parent state retained no political control whatever over its offspring, and the new communities that thus reappeared far from home refused as a general rule to enter into any common system of government even with other Greek settlements upon the same coast. The single universal tie that seems to have impressed these disconnected entities with a sense of their oneness was that which arose out of the consciousness that all Hellas was bound together by a common blood, a common civilization, a common tradition, and last, and most of all, by a common religion. The longing for union first manifested itself in the creation of the several religious leagues formed between neighboring cities encircling some famous shrine which they desired to enrich upon the one hand and to defend upon the other.<sup>16</sup> The most famous and powerful of such associations was that which gathered alternately about the temple of Apollo at Delphi and about the shrine of Demeter Amphictyonis at Thermopylæ, including, at one time, almost all the tribes of central Greece and, in its latter days, members from Dorian states of Peloponnesus. The once prevalent idea that the Delphic Amphictyony embodied a real federal government of all Greece has given way long ago to the conclusion that its primary purpose was purely religious and its political action purely incidental.<sup>17</sup> To preserve the sacred independence of the oracle at Delphi by guarding the surrounding territory from in-

Polyb., XVI, 26, 9; Liv. XXXI, 15; V. Hullmann, *Handelsgeschichte der Griechen*, p. 193-196.

<sup>16</sup> "A league in its simplest form was but the extension of the religious obligation, under which fellow citizens stood towards one

another, as votaries of the same gods." Twiss, *Law of Nations*, § 209.

<sup>17</sup> For an early statement as to the true nature of the League see Sainte Croix, *Des Anciens Gouvernemens Fédératifs*, Paris, an. vii.

vasion and to superintend the common worship of Apollo were the primary purposes of the league; to forbid, while it was thus assembled, any extreme measures of hostility against any city sharing in the common Amphictyonic worship, such as razing it to the ground or cutting off its water supply, were incidental political acts that became blended with its religious functions.<sup>18</sup>

**Primitive conceptions of international law.**—As a part of these primitive conceptions of international law, arising out of the consciousness that all Hellenic peoples were of the same race and religion, may also be noted the general understanding that those who died in battle were to receive burial; that the lives of those who took refuge in the sanctuaries of a conquered city were to be spared; and that those who were journeying to the common seats of Hellenic worship or to the public games<sup>19</sup> were under the protection of what has been termed an early Truce of God. As the only deliberative body in which members from the greater part of Greece habitually assembled it is not strange if, on a few occasions, the Amphictyonic Council did attempt to speak with real dignity as the mouthpiece of a common national feeling. Upon such data rests the statement that the “Council was not exactly a Diplomatic Congress, but it was much more like a Diplomatic Congress than it was like the governing assembly of any commonwealth, kingdom or federation. The pylagoroi and hieromnêmones were not exactly ambassadors, but they were more like ambassadors than they were like members of a British parliament or even an American congress. The business of the Council was not to govern or to legislate, either for a single state or for a league of states; its duty was simply to manage a single class of affairs, in which a number of independent commonwealths were alike interested, but which did not come within the individual competence of any one of their number.”<sup>20</sup>

§ 12. **Athenian Alliance or Empire.**—For political associations pure and simple, whose primary purpose was to regulate the external relations of as many independent cities as would enter into them, we must look to the Greek federal leagues

<sup>18</sup> The old Amphictyonic oath forbade all such extreme measures against any city sharing in the common worship. *Æsch. Fals. Leg.* § 121.

<sup>19</sup> Grote, *Hist. of Greece*, Pt. II, ch. ii.

<sup>20</sup> Freeman, *Hist. of Federal Govt.*, vol. i, p. 140.

whose beginnings, like those of the purely religious associations, often antedate authentic tradition. The earlier and more brilliant period in the history of the Greek commonwealths is that occupied by the supremacy of a few great cities which extended their dominion by reducing other self-governing commonwealths to a state of dependence. Foremost among that class stood the city-state of Athens, which extended her overlordship by reducing her dependent allies to a condition in which they were permitted to enjoy local autonomy under their own constitutions, including the right, in some instances, to retain their own fleets and armies, without the right to participate in any way in the political affairs of the ruling state by whose assembly the foreign relations of the alliance, if alliance it may be called, were absolutely controlled. The most favored members of the Athenian Alliance or Empire, even Chios or Mitylênê, could not be given a voice in the general direction of the Confederacy for the simple reason that Greek exclusiveness rejected to the last the idea of a fusion of any large number of cities into a single body with equal rights common to all.<sup>21</sup> Athens was the ruling state, and her supreme power was vested in an assembly in which no one except an Athenian citizen could possibly appear. The principle of representation was unknown, and the Greek instinct of separateness firmly refused to admit either subjects or allies to a common franchise. By reason of that principle, whose rejection became the corner stone of Roman dominion, the independent cities of Greece were never merged in any larger aggregate that could be called in any proper political sense a nation. The independent city was the Greek ideal, and because the Athenian supremacy cast a shadow upon it, her rival Sparta rose against her with the popular war cry that all Greece must be made autonomous.<sup>22</sup>

§ 13. **Achaian League of Peloponnesus.**—To prevent the greater cities from acquiring abnormal importance by reducing

<sup>21</sup> "Some of them combined from time to time, generally for defensive purposes, in which case the hegemony was assigned to one by express consent or silent recognition; but the system of a central government, though indications of such a tendency appear in the development of Athenian Empire, had not been worked out, and the

individual independence of the several states was never so far infringed upon as to render inaccurate the application of the word 'international' to their relations with one another." Prof. H. Brougham Leech's *Essay on "Ancient Int. Law,"* p. 5.

<sup>22</sup> Thucydides, i, 139, et al.

others to a state of dependence, the weaker and less strictly organized communities began at a very early day to draw together in more or less perfect confederations, whose history, beginning with the minor northern leagues of Phocis, Akarnania, Epeiros and Thessaly, culminated in that of the famous Achaian League of Peloponnesus, revived, about B. C. 280,<sup>23</sup> in order to unite the greatest possible number of Greek cities in opposition to the designs of Macedonia to reduce all Greece under her direct sovereignty or indirect influence. In the efforts thus made to preserve the internal equilibrium of Greece a fully matured treaty system for the maintenance of the balance of power appears in full operation. So perfect was the organization of the Achaian League that it has been classed as a perfect national government,—in German technical language as a *bundesstaat* and not as a mere *staatenbund*.<sup>24</sup> However that may be, the fact is clear that it possessed one attribute vital to the existence of such a government in that provision of its constitution that reserved to the federal head complete supremacy in its relations with other states as to matters affecting the Achaian body as a whole; no single city could, of its own authority, make war or peace or send ambassadors to foreign powers.

§ 14. Greek contributions to federalism and to the law of nations.—When the Greek political system is thus viewed as a whole it appears to have contained, apart from its highly developed forms of independent city life, many of the more important elements that have entered into federalism and into the law of nations as matured in later times. The point at which the capacity of the Greek for the highest type of political organization failed is marked by his inability to fuse the coherent mass of self-governing communities, bound together by the ties of a common language, a common civilization and a common religion, into a single aggregate whose concentrated powers could have been wielded under the name of a Greek

<sup>23</sup> Cf. Polyb., ii, 41.

<sup>24</sup> Helwing, p. 237; Heffter, *Das Europäische Völkerrecht*, §§ 20, 21. Such knowledge of the constitution of the League as the framers of the Federal Constitution of the United States possessed seems to have been drawn from the *Observations sur l'Historie de la Grece* of the Abbé Mably. From the Fed-

eralist (No. xviii), we learn that "Could the interior structure and regular operation of the Achaian League be ascertained, it is probable that more light might be thrown by it on the science of Federal Government, than by any of the like experiments with which we are acquainted."



nation or empire. In the domain of jurisprudence there is a corresponding lack of perfect development. The growth of law began, no doubt, in Greece earlier than in Italy, and up to a certain point it may have developed more brilliantly. If Greece had succeeded in building up an extensive and powerful empire, the outcome might have been a great codification that would have rendered unnecessary the compilations of Justinian. But the fact is that no such thing happened. The Greeks left behind them no complete or imposing legal monuments. Of their conceptions of law and legal procedure we can only catch glimpses from the Homeric poems, from the fragments that remain of the Hellenic codes, from the details of law and practice found in the orations of Demosthenes and other Greek orators, from what Plato tells us in the *Dialogues*, the *Republic*, and the *Laws*, from the outlines of public law to be traced in the politics of Aristotle, and from the fragments of a legal treatise by Theophrastus, referred to in the first book of the *Digest of Justinian*.<sup>25</sup> With the aid of all that can be drawn from these imperfect survivals, distinguished by a lack of order and by an inability to sever law from morality and religion, it is hard to negative the assertion that neither the Greeks themselves, nor any society thinking or speaking in their language, ever developed the smallest capacity for producing anything like a philosophic system of jurisprudence.<sup>26</sup> And yet after all that has been said the fact remains that the very perfect methods of diplomatic intercourse matured between the independent Greek city-states, acting either under their own constitutions, or through the federal bodies to which the right to such intercourse was surrendered; the system for the maintenance, mainly through federal compacts, of the international balance of power,<sup>27</sup> or for concert of action against a foreign foe; the clear distinctions between the rights of peace and war; the efforts of the Amphictyonic bodies to mitigate the horrors of war,—give color at least to the assertion that there was really such a thing as a Greek law<sup>28</sup> of nations to which the peculiar organization of the Hellenic world offered a specially inviting field for development.

<sup>25</sup> Upon the whole subject, see *La Science du Droit en Grèce. Platon, Aristote, Théophraste. Par Rodolphe Dareste, membre de l'Institut Conseiller a la Cour de Cassation, Paris, 1893.*

<sup>26</sup> Maine, *Ancient Law*, p. 343.

<sup>27</sup> Polyb., i, 83.

<sup>28</sup> "The pages of Thucydides contain frequent and definite allusions to a recognized public law in Greece—an International Positive

§ 15. **Italian city-state system.**—When we pass from the Greek to the Italian peninsula we there find the idea of the independent city to be the leading political idea; and we also find the Italian city to be the resultant of the process of aggregation heretofore described in which the village community was the unit or starting point. In their earlier stages the resemblance between the Greek and Latin city-state was complete,—not until the time of the Empire did the government of Rome become radically unlike the governments of Greece. In Italy the village-community appears as the *gens*; out of the union of *gentes* arose the tribe; out of the union of tribes arose the state or city-commonwealth.<sup>29</sup> But the idea of the state as an independent city was never carried out with the same completeness in Italy as in Greece, for the reason that the Italian cities, generally smaller than those of Greece, manifested a greater willingness to join together in confederations. In that way the history of ancient Italy taken as a whole is far more a history of confederations than of single cities.

§ 16. **Rome and the principle of incorporation.**—And yet, as an exception to the general rule, it was upon the soil of Italy that a group of village communities grew into a single vast and independent city<sup>30</sup> that centralized within its walls the political power of the world. The way in which Rome accomplished that marvelous result was by departing from the exclusive policy of the Greek cities that persistently refused to incorporate dependent cities by extending to them their own franchise. As it was beneath the dignity of the sovereign city to confederate with her dependents, and as the expedient of representation was unknown, Rome entered upon a policy of incorporation carried out by the extension of her franchise first to Italy, then to Gaul and Spain, and finally to the whole Roman world.<sup>31</sup> In the end a right so widely

Law—composed partly of treaties, which are referred to as binding documents, and partly of conventional usages, sanctioned by time and general acceptance." Prof. H. Brougham Leech's *Essay on Ancient Int. Law*, p. 7.

<sup>29</sup> De Coulanges, *The Ancient City*, pp. 131-146, 154-177.

<sup>30</sup> Maine, *Early Hist. of Inst.*, p. 84.

<sup>31</sup> Guizot, *Hist. Rep. Govt.*, pp. 181, 182. As to the edict of Antoninus Caracalla, extending the privilege of Roman citizenship to all the free inhabitants of the empire, see Maine, *Ancient Law*, p. 139; Gibbon, *Decline and Fall*, vol. i, pp. 185, 193, 194.

bestowed became of course utterly worthless; but the theory upon which the right was conferred was never for a moment lost sight of. The freeman who received the franchise of the Roman city could only exercise it within her own walls; it was only within the local limits of the ruling city that the supreme powers of the state could be exercised.<sup>32</sup> And so, whether we take for illustration the exclusive Greek city, or the great Latin city extending its franchise to all the world, the ancient conception of the state as the city-commonwealth stands forth clearly and distinctly defined.

§ 17. *Legal science a Roman creation—origin of the Corpus Juris Civilis.*—When the Roman political system is viewed as a whole just criticism can scarcely deny that it was only within the domains of jurisprudence and military organization that the Latin genius produced original and enduring monuments for imitation. Legal science is a Roman creation, an evolution from a code which, in its primitive form, was merely an enunciation in words of the customs of the Roman people, put forth before Roman society had finally emerged from that condition in which religious duty and civil obligation are inevitably confounded.<sup>33</sup> It has been said that Roman law begins with a code and ends with a code. The *Corpus Juris Civilis* was the final outcome of the process of evolution that began with the decemviral code of the Twelve Tables, four centuries and a half before Christ, and ended with the compilations made in the reign of Justinian, more than five centuries after Christ. During that period of nearly a thousand years, during which Roman law was in the process of constant change and development, its expositors consistently adhered to the theory that the entire system rested on the Twelve Tables and therefore upon a basis of written law, just as English lawyers have always assumed that their entire system has been derived from immemorial tradition. With the creation of the primitive code the spontaneous development of Roman law ceased; and then the question of questions that arose was as to the means of adapting an unelastic system of strict and highly formal law, originally confined to a single

<sup>32</sup> "Within the walls of Rome alone could be consummated all the acts of a Roman citizen." Guizot, *Hist. Rep. Govt.*, p. 184.

<sup>33</sup> "For the period preceding the compilation of the Twelve Tables,

the only law which prevailed was that which was under the special protection of the Roman priesthood, which represented the rule of God and of reason, and which derived its force and authority

city, to the ever increasing wants of a society expanding into an empire. That marvelous result was slowly and silently accomplished by the employment in their natural order of Legal Fictions, Equity and Legislation.<sup>34</sup> To the second, as embodied in the equitable jurisdiction of the praetor, Roman society was chiefly indebted for the supplementing of the meager and inadequate provisions of the Twelve Tables, for the mitigation of its harshness and rigor, for the extension of its principles, for the removal of its ambiguities, and for its adaptation to the ever widening requirements of justice. In the discharge of their duties the praetors depended, as a general rule, for counsel upon the jurisconsults who condensed into their learned and subtile opinions, known as *responsa prudentium*, the fruits of the most exhaustive research into almost every branch of human knowledge. In that way was built up an artificial body of equitable jurisprudence, a scientific law literature, whose growth occupies a period beginning 100 B. C. and ending 250 A. D.,<sup>35</sup> a period enriched by the works of Capito, Labeo, Papinian, Paulus, Gaius, Ulpian and Modestinus. With the reign of Severus Alexander that learned and splendid age of creative jurisprudence drew to a close; and then followed a period during which Gibbon tells us, "the oracles of jurisprudence were almost mute." During the creative period in which the jurisconsults were putting forth their wonderful treatises it was that the power of legislation passed from the people to the senate and then through a gradual process of usurpation from the senate to the emperor. When Justinian came to the throne of the Eastern Empire it was with the settled purpose of collecting, revising, and systematizing the entire aftergrowth of Roman law superimposed upon the primitive system during the ten centuries that had intervened between his time (A. D. 527-565) and the adoption of the Twelve Tables (B. C. 450). The outcome was the famous Code of Justinian, the Pandects, and Institutes, which, with the later Constitutions of Justinian, known as Novels, constitute the *Corpus Juris Civilis Romani*.

§ 18. Roman jurisprudence the basis of international law.— It is impossible to comprehend what is now known as interna-

from tradition and custom." Sir W. H. Rattigan's article entitled, The Ancient Jus Gentium of the Aryans, in The Law Quarterly Review for July, 1899, p. 313.

<sup>34</sup> Maine, *Ancient Law*, pp. 20, 22, 24, 27, 28.

<sup>35</sup> Cf. Hadley's *Introduction to Roman Law*, p. 58.

tional law without some understanding of Roman jurisprudence for the simple reason that it is the philosophic basis of the entire system. Therefore for the benefit of those who are not civilians the brief statement just made will be supplemented by a few details that are indispensable. What the Romans called *jus civile* was the embodiment of the immemorial rules and usages, based upon the tribal customs and upon religious sanctions, which were the special property of those who shared in the Roman tradition and worship. In other words the *jus civile* was the special law administered by the *praetor urbanus* between Roman and Roman,—it could not apply as between a Roman and a foreigner.<sup>36</sup> The general rule was that the law of one city had no application to the citizens of another. For that reason Rome permitted the Latin and Italian cities subject to her dominion to retain their own laws for the benefit of their own residents, so far at least as their retention did not contravene her policy and authority.<sup>37</sup>

The *praetor peregrinus* and the *jus gentium*.—As there was a large body of resident foreigners at Rome, who would have been entirely without the benefits of law if they had been forced to rely upon the *praetor urbanus*, it was necessary to constitute a *praetor peregrinus*, the praetor of foreigners, whose duty it was to administer justice between Roman citizens and foreigners, between foreigner and foreigner, and between citizens of different cities within the empire.<sup>38</sup> As such praetor could not rely upon the law of any one city for the criteria of his judgments, he finally turned his eyes to the codes of all the cities from which came the swarm of litigants before him. In the gen-

<sup>36</sup> It could only be extended to members of allied states to which *commercium* and *recuperatio* were guaranteed by treaty. Just. Inst. i. 2, 1. Cf. Muirhead, Roman Law, pp. 103, 225. "The early law of Rome was essentially personal,—not territorial." Ibid. p. 103. "From the period that a *jus gentium* began to be administered by Roman magistrates the stricter *jus civile* of the Roman citizens commenced to experience innovations which gradually changed its whole

character, and moulded it to the requirements of a more progressive age." Sir W. H. Rattigan's article entitled, "The Ancient Jus Gentium of the Aryans," cited above.

<sup>37</sup> Cf. Woodrow Wilson, The State, p. 133.

<sup>38</sup> As early as 247 B. C. a *praetor peregrinus* was appointed at Rome to administer justice in such cases. Hadley, Introd. to Roman Law, p. 91.

eralizations necessarily made upon such data we have the beginnings of comparative jurisprudence whose first fruit at Rome was the ascertainment of the fact that there are certain universal and uniform conceptions of justice common to all civilized peoples.<sup>39</sup> As Muirhead<sup>40</sup> has expressed it in greater detail: "In the earliest stages of its recognition it (*jus gentium*) was 'an independent international private law, which, as such, regulated intercourse between peregrins, or between peregrins and citizens, on the basis of their common *libertas*,' which during the republic was purely empirical and free from the influence of scientific theory, but whose extensions in the early empire were a creation of the jurists,—a combination of comparative jurisprudence and rational speculation. To say that it was *de facto* in observance everywhere is inaccurate; on the contrary, it was Roman law, built up by Roman jurists, though called into existence through the necessities of intercourse with and among non-Romans."

§ 19. Relation of *jus gentium* to *jus naturae*.—Before this new growth, watered by the learning of the jurisconsults, reached its maturity the intellectual life of Rome passed under the dominion of her subjects in Attica and Peloponnesus just after they had yielded to the ascendancy of the Stoic Philosophers who were ever striving to discover in the operations of nature, physical, moral and intellectual, some uniform and universal force pervading all things that could be designated as the law of nature—the embodiment of universal reason—identical with Zeus, the supreme administrator of the universe.<sup>41</sup> Through the mind of the Roman lawyer that splendid conception entered into the *jus gentium* as an expanding and enriching force which finally lifted it into a higher sphere. In that way a broad principle of Greek philosophy became so blended with a particular branch of Roman commercial law that the Antonine jurisconsults finally assumed the position

<sup>39</sup> It seems to be clear that such a conception was well defined as early as the second century B. C. Cic. *de Off.* iii, 69. Cf. Prof. Nettleship, *Journal of Philology*, xii, p. 169; Voigt, *Das Jus Naturale*, passim.

<sup>40</sup> Roman Law, p. 226, citing Voigt (*Jus. Nat.*, vol. ii, p. 661). who distinguishes the *jus civile*,

*jus gentium*, and *jus naturale* as the systems that applied respectively to the citizen, the freeman and the man. Comp. Cic. *De Orat.* i, 13, § 56. See also Voigt, vol. i, pp. 399, 400.

<sup>41</sup> Cf. Chrysippus, *apud Plut. de Stoic. Rep.* 9; *Ibid. apud Diog. Laert.* vii, 88; Holland, *Elements of Jurisprudence*, pp. 30-31.

that the *jus gentium* and the *jus naturae* were identical.<sup>42</sup> Long before their time Cicero had recognized the fact, and had declared that the fruit of the union was not one law for Rome and another law for Athens, one law to-day and another law to-morrow, but one eternal and immortal law for all time and for all nations, just as God the common master and ruler of all is one.<sup>43</sup> The higher authority, the more philosophic dignity thus imparted to the blended product should be viewed, however, rather in the narrower sense given to it by the Antonine jurist Gaius<sup>44</sup> than in the wider and more extravagant sense given to the *jus naturae* by Ulpian<sup>45</sup> who extended it not only to men but to animals. As we shall see hereafter, when the time came for Ayala, Gentilis, Oldendorp and Grotius to discover a source from which could be drawn such rules of justice and right as would command the general acceptance of men's consciences as a voluntary law of conduct between states considered as moral persons with a free will to do right or wrong, they instinctively turned to the blended product of the *jus gentium* and the *jus naturae*, and revived it in the narrower sense in which Gaius and others of his school had expounded it. Thus it was that a branch of Roman private and commercial law, called by Voigt "an independent international private law," originally administered between Romans and foreigners and between foreigner and foreigner at Rome, was set up as the reservoir, midway between the province of morals and that of positive law, from

<sup>42</sup> Maine, Ancient Law, p. 96.

<sup>43</sup> Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac; sed et omnes gentes et omni tempore una lex, et sempiterna, et immortalis, continebit, unusque erit communis quasi magister et imperator omnium Deus. *Fragm. lib. iii, de Repub.*

<sup>44</sup> "Omnes populi qui legibus et moribus reguntur partim suo proprio, partim communi omnium hominum jure utuntur: nam quod quisque populus ipse sibi jus constituit, id ipsius proprium est vocaturque *jus civile*, quasi jus proprium ipsius civitatis; quod vero *naturalis ratio* inter omnes homines constituit, id apud omnes

populos peræque custoditur vocaturque *jus gentium*, quasi quo jure omnes gentes utuntur. Populus itaque Romanus partim suo proprio, partim communi omnium hominum jure utitur. Quæ singula qualia sint, suis locis proponemus." *Inst. i, I.* See also *Inst. Just. i, 2, § 2.*

<sup>45</sup> *Just. Inst. i, 2.* "Ulpian's extravagantly wide application of the term never seems to have gained currency." Holland, *Elements of Jurisprudence*, p. 33. Ulpian's definition of the Laws of Nature and of Nations appears, however, in the Spanish Code of *Las Siete Partidas*.

which has been drawn the rules that now define the rights and obligations of all civilized nations.

§ 20. The *jus fetiale*, the law of negotiation and diplomacy.—The only branch of Roman law that pertained exclusively to the relations of the government of Rome with those of other powers, and consequently the only branch that corresponds to the modern conception of the law of nations, was that known as the *jus fetiale*, the law of heralds as agents of negotiation and diplomacy between different states. The civilized nations of antiquity were very punctilious in making a formal declaration of war before entering upon actual hostilities. With the Greeks the custom was to send a herald, whose person was sacred, to express the hostile intent, either alone or as the companion of an ambassador charged with that duty.<sup>46</sup> At Rome that important function belonged to a college of heralds (*collegium fetialium*) originally composed of twenty patricians, whose duty it was to regulate the practice and procedure connected with all international questions.<sup>47</sup> Until a formal demand for reparation (*res repetere*) and a declaration were first made, Cicero tells us that no just war could begin.<sup>48</sup> In order to exhaust every effort to obtain redress three or four of the college crossed the limits of the offending state, and there through their prolocutor, the *pater patratus* for the time, demanded in a solemn and oft repeated formula the restitution of what was due to Rome. Not until justice had been withheld for three and thirty days, did the king consult the senate, and then, if war was decreed, the *pater patratus* again visited the offending country with a bloody lance which he threw across the border as a visible token that hostilities had actually begun. This custom, that survived until the earlier times of the republic, gave way as the theater of war widened, to the more convenient practice of hurling a lance

<sup>46</sup> Even in the midst of hostilities the Greeks generally respected the herald and the trophy, and truces were fairly kept. Thuc. I, 29, 54; II, 12, 22, 79; III, 24. The slaughter of the envoys of Persia by the Athenians and Spartans was clearly a breach of the general rule. Herod, viii. 136; Thuc. I, 67.

<sup>47</sup> Livy, i, 32; ix, 5; xxxvi, 3.

<sup>48</sup> *De Officiis*, I, 11. As to the

Greeks, see Schömann, *Antiq. Juris Publici*. As to the Romans, Osenbrüggen, pp. 27-84; Bekker-Marquardt, *Röm. Alterthüm.*, iv, 380-388; Guhl and Koner's *Greeks and Romans*, p. 541. As to declarations of war in the Middle Ages, see Ward's *Foundation and His. of the Law of Nations in Europe* (London, 1795), vol. ii, p. 211 et seq.; Woolsey, *Int. Law*, pp. 188-189.



from a pillar near the temple of Bellona towards the offending state,—the actual declaration of war then being made by the military commander of a contiguous province through an ambassador. With that formal and unfruitful branch of Roman jurisprudence the international law of to-day has no definite connection, the most important ceremony embodied in it having become obsolete.

When the difference, both as to origin and character, between the *jus fetiale* and the *jus gentium* is taken into account, it is strange, indeed, to find Wheaton confusing the one with the other. He says, "When the Romans called their feacial law the law of nations, *jus gentium*, we are not to understand that it was a positive law, . . . the design of it was to direct them how they should conduct themselves towards other nations in the hostile intercourse of war."<sup>49</sup> It is stranger still that at this late day Calvo should have repeated Wheaton's error in the declaration that "Les Romains donnaient à cette partie du droit le nom de *droit des gens*, parce qu'elle avait pour objet de déterminer la conduite de Rome à l'égard des autres nations en cas de guerre."<sup>50</sup> Sir Sherston Baker makes the same mistake when he says the *jus gentium* "was simply a civil law of their own for the purposes of war."<sup>51</sup> It is hardly necessary to repeat that the *jus gentium*, as a branch of Roman private law, had nothing whatever to do with the conduct of war.

<sup>49</sup> Hist. of the Law of Nations, p. 26.

<sup>51</sup> First Steps in Int. Law (1899), pp. 2-3.

<sup>50</sup> *Droit International*, I, p. 4.

## CHAPTER II.

### THE MODERN STATE AS THE NATION.

§ 21. The modern state a Teutonic creation.—Out of the settlements made by the Teutonic nations upon the wreck of the Roman Empire has gradually arisen the modern conception of the state as a nation occupying a definite area of territory with fixed geographical boundaries,—the state as known to modern International Law. In the *Germania* of Tacitus we have the contemporaneous observations of one of the greatest and most accurate of historians upon the social and political organization of the Teutonic race while yet in its childhood. By the aid of his invaluable sketch it is possible to establish by direct and positive evidence the existence of those primitive elements of organization, common to the whole Aryan world, whose existence in the Greek and Italian peninsulas can only be inferred from traces and survivals. According to his account the race now called Teutonic, although of the same physical type, and speaking the same language, and although possessed of a common mythology, and a common system of social, political and military institutions, did not possess in its own tongue a common name by which to describe the race as a whole, nor any form of central political organization.<sup>1</sup> This homogeneous race was broken up into an endless number of political communities or tribes which stood to each other in a state of complete political isolation, except when united in temporary confederacies. The typical Teutonic tribe,—the *civitas*—of Caesar and Tacitus,—represented an aggregation of hundreds while the hundred represented an aggregation of village communities.<sup>2</sup> The parallel between the Teutonic, the Greek and the Latin tribe seems to be complete. But there the parallel ceases. In the Mediterranean peninsulas the resultant of a union of tribes was the city-commonwealth,—in Teutonic lands the resultant of a union of tribes was not a city at all but a nation.<sup>3</sup> In ancient Greece and Italy the city became the heart, the center of social and politi-

<sup>1</sup> Tac. *Germania*, cc. 1-4.

Constitution, vol. i, pp. 7, 95-116.

<sup>2</sup> For a more complete statement with the authorities, see The Origin and Growth of the English

<sup>3</sup> The Origin and Growth of the Eng. Const., vol. i, p. 8.

cal life, while in countries inhabited by the Teutonic race the idea of the city never became dominant. The Teutonic city, if it were to be found at all, was simply the dwelling-place of a part of the nation who were in nowise privileged above those who dwelt beyond its bounds. At the time Tacitus wrote the typical Teutonic tribe (*civitas*) was a distinct commonwealth, the largest and highest political aggregate. Not until nearly a hundred years later were these scattered tribes gathered into larger wholes—into nations.<sup>4</sup> When that stage was reached, when tribes were fused into the higher political unit—the nation—the primitive Teutonic conception of the state or commonwealth widened into its full and final development.

§ 22. Transition from tribal to territorial organization—"process of feudalization."—But another stage of growth had yet to be passed before the new unit that thus arose out of the aggregation of tribes reached the full modern conception of the state as a nation possessing a definite portion of the earth's surface with fixed geographical boundaries. The fact must be borne steadily in mind that the primary bond that united the people who composed a Teutonic nation was a personal one,—the national king was first among the people, the embodiment of the national being, but not the king of a particular area or region of territory. The idea of sovereignty was not associated in the Teutonic mind with dominion over a particular portion or subdivision of the earth's surface. The Merovingian line of chieftains were not kings of France, they were kings of the Franks; Alaric was king of the Goths wherever the Goths happened to be, whether upon the banks of the Tiber, the Tagus, or the Danube.<sup>5</sup> The dominant idea which seems to have prevailed among the conquering nations that settled down upon the wreck of Rome was that they were simply encamped upon the land they had won. The conception of sovereignty which the Teutons brought with them from the forest and steppe was distinctly tribal or national and not territorial. The general nature of the transition whereby the primitive notion of tribal sovereignty was gradually superseded by that of territorial sovereignty has been described as a movement from personal to territorial organization;<sup>6</sup> from a state of things in which personal freedom and

<sup>4</sup> Zeuss, *Die Deutschen und die Nachbarstämme*, pp. 303, 304.

<sup>6</sup> Palgrave, *Eng. Commonw.*, pt. i, p. 62.

<sup>5</sup> Maine, *Ancient Law*, p. 100 seq.

political right were the dominant ideas to a state of things in which those ideas have become bound up with and subservient to the possession of land.<sup>7</sup> The most striking single result of the transition,—which, for the want of a better term, has been called “the process of feudalization,”<sup>8</sup>—is that the elective chief of the nation, the primitive embodiment of the tribal sovereignty, is gradually transformed into the hereditary lord of a given area of land.

§ 23. Origin of the state system of modern Europe.—The new conception of territorial sovereignty which thus grew out of “the process of feudalization” did not become established, however, until after the breaking up of the empire of Charles the Great. During the reign of his son Louis its dismemberment really began, but it was not until the third year after his death (843) that the partition was finally accomplished under the famous Treaty of Verdun, by whose terms the empire was divided into three kingdoms. The western, roughly corresponding in geographical area with modern France, was assigned to Charles the Bald; the eastern, Germany, to Louis the Bavarian; Italy, and a long, narrow debatable land between Germany and France, known as Lotharingia, to Lothar who, immediately upon his father’s death, had assumed the imperial title. Thus was broken up the empire of Charles the Great, and out of its fragments have arisen most of the states of modern Europe. The completion of the transition from personal to territorial sovereignty is marked by the accession of the Capetian dynasty in France. When the hundred years’ struggle between the Dukes of Paris and the descendants of Charles the Great ended in the triumph of Hugh Capet, he not only assumed the dynastic title of King of the French, but he also styled himself King of France.<sup>9</sup> Hugh Capet and his descendants were kings in the new territorial sense; they were kings who stood in the same relation to the land over

<sup>7</sup> Stubbs, Const. Hist., vol. i, p. 166.

<sup>8</sup> Maine, Village-Communities, lecture v, entitled “The Process of Feudalization.”

<sup>9</sup> Maine, Ancient Law, p. 104. Mr. Freeman was once inclined to challenge Maine’s statement, but he afterwards wrote me: “I should not say that what Maine says about *Rex Francorum* and

*Rex Franciæ* was other than right in a general way. Those things came in gradually. *Roi de France* comes in pretty early, as early as Wace. I doubt whether *Rex Franciæ* is ever used, till Hen. iv.’s *Rex. Franciæ et Navarræ*, as a formal Latin title.” See also Norm. Conq., vol. i. Appendix, note M, p. 395.

which they ruled as the baron to his estate, the tenant to his freehold. The form thus assumed by the monarchy in France was reproduced in each subsequent dominion established or consolidated, and thus has arisen the state-system of modern Europe in which the idea of territorial sovereignty is the basis of all international relations.<sup>10</sup> And so it may be said that the modern conception of the state as the nation is the outcome of "the process of feudalization" through which the Teutonic nations passed after their settlements within the limits of the Roman Empire.<sup>11</sup>

<sup>10</sup> Ancient Law, 99-108.

<sup>11</sup> Cf. Edward Jenks, *Law and Politics in the Middle Ages*, chapter iii, "The State." "It is, in fact, only in England, and, possibly in Scandinavia, that the state,

even at the close of the Middle Ages, at all approaches that condition of sovereign omnipotence described by Hobbes, and elaborated by Bentham and Austin." p. 96.

## CHAPTER III.

### THE MEDIEVAL EMPIRE AS AN INTERNATIONAL POWER.

§ 24. **Theory of the medieval Empire.**—The separate nationalities, each with its own character, language and institutions, which arose out of the wreck of the Empire of Charles the Great passed through a long childhood under the protecting wings of an institution that illustrated for centuries the enduring power of a political theory. The differences of race, which were supposed to be natural and immovable barriers to political union prior to the conquests of Rome, were gradually eliminated by the extension of Roman citizenship, by the equalizing effects of Roman law, by the even pressure of government upon all classes, and by the movements of population stimulated by commerce and the traffic in slaves. The unity of the Empire and the ease of communication thus brought about paved the way for the rapid dissemination of a religion destined to abolish, by its universality, the host of purely local divinities in whose name the people of one nation were taught to look upon all others as unclean beings, natural foes. Thus it was that political exclusiveness was greatly mitigated on the one hand by a dominion that gave a common citizenship, a common speech and a common law to many nations, while on the other endless local pantheons were forced to yield to the worship of one God before whom all men were equal. "The two great ideas which expiring antiquity bequeathed to the ages that followed were those of a World-Monarchy and a World-Religion."<sup>1</sup> By those two ideas the Teutonic conquerors of Rome were so overmastered that they came to believe that as the dominion of Rome was universal so must it be eternal. Out of such belief gradually arose the strange creation known as the Holy Roman Empire which rested upon the magnificent notion of a vast Christian Monarchy whose sway was absolutely universal.

**Pope and Emperor as chiefs of the world-monarchy.**—The chiefs of that comprehensive society were the Roman emperor and the Roman pontiff,—the one standing at its head in its tem-

<sup>1</sup> Bryce, *The Holy Roman Empire*.—Freeman's brilliant review of that work, p. 87. See also Mr. E. A. Freeman's brilliant review of that work reprinted in his *Essays*.

poral character as an empire, and the other standing at its head in its spiritual character as a church. The theory was that each chief in his own sphere ruled by divine right as the direct vicegerent of God, and that each possessed the hearty sympathy and support of the other. The Roman Empire and the Roman Catholic Church were, according to medieval theory, two aspects of a single Christian Monarchy whose mission it was to shelter beneath its wings all the nations of the earth. The creation of such a fabric was made possible by the fact that as the advancing influence of Christianity widened through a vast and varied sphere of action it became both necessary and expedient to model the ecclesiastical machinery upon the basis of the secular administration. Thus it was that the ecclesiastical organization became the counterpart of the civil,—its provinces and dioceses usually corresponding to the administrative divisions of the Empire with whose boundaries it finally became coterminous.

**Belief that Rome and her empire were to be eternal.**—Such was the political and religious structure of the society upon which the Teutons descended rather as imitators than as mere destroyers.<sup>2</sup> Everywhere their effort was to identify themselves with the system they overthrew. Their belief that Rome and her empire were to be eternal was not destroyed even when the last Caesar of the West yielded to his Eastern brother at Byzantium the sole headship of the Roman world.<sup>3</sup> But when Italy thus passed again, in 476, nominally under the control of the Emperor at Constantinople, she did not carry the rest of Western Europe with her; and during the three centuries and a quarter that followed there survived in the West a longing for unity and guidance under a revived Roman Empire as a necessary part of the world's order. In that longing no one came to participate with more sincerity than the Roman pontiff; the spiritual head of Christendom could not dispense with the temporal; according to the belief of that age, without a Roman Empire there could hardly be a Roman Catholic and Apostolic Church. Under the influence of that idea, accentuated by the pressure of local disorder, Pope Leo III

<sup>2</sup> Cf. *The Origin and Growth of the Eng. Const.*, vol. i, p. 83.

<sup>3</sup> At the bidding of Odoacer the boy, Romulus Augustulus, resigned his power into the hands of the senate; and then a deputa-

tion from that body proceeded to the Eastern court and laid the insignia of royalty at the feet of Zeno because, as they declared, the West no longer required an emperor.

resolved to take the final step, and on Christmas day, A. D. 800, placed upon the brow of the mighty chief of the Franks, Charles the Great, the unquestioned lord of Western Europe, the diadem of the Caesars. From that time the theory of the dual fabric, supposed to embody a perfect accord between the papal and imperial powers, was gradually developed in the course of conflicts which clearly demonstrated the utterly impracticable character of such a union. Whether the supreme temporal ruler, who was admitted into his high office through consecration at the hands of the spiritual chief of Christendom, was in the last resort subordinate to the latter as the lesser to the greater light, or whether their dignities were co-ordinate, and coequal, were the questions over which was fought the great battle between pope and emperor in the days of the world's wonder Frederick II.<sup>4</sup>

§ 25. Limits of the actual authority of the Empire.—The theory of the Medieval Empire failed not only in the requirement that the pope and the emperor should exercise their concurrent sway without conflict of jurisdiction, but also in the idea that their dual overlordship represented Rome's universal dominion. The Empire was never able to extend its authority over the whole of Christendom, much less over the whole world. At the highest point reached by the Hohenstaufen the territories over which they claimed more or less jurisdiction may be grouped under four heads:

First, the German lands within the actual boundaries of the Holy Empire, in which the emperor alone down to the death of Frederick II, was the effective sovereign,—embracing Germany, the northern half of Italy, the kingdom of Burgundy or Arles, Lorraine, Alsace and a portion of Flanders.

Second, the non-German districts of the Empire in which the emperor was in theory sole monarch,—but in practice little regarded,—embracing Bohemia, the Slavic principalities of Mecklenberg and Pomerania, and the pagan Lithuanians or

<sup>4</sup> See Pollock's *Hist. of the Science of Politics*, p. 34. The contention Frederick left un- concluded was continued in the next age by two famous disputants. St. Thomas of Aquin, in his treatise, "Of the Government of Princes," defended the supremacy

of the papacy on the one hand; while Dante, in his "*De Monarchia*," maintained the independence of the empire on the other. As to the authorship of the *De Regimine Principum*, see *Réformateurs et Publicistes de l'Europe*, Paris, 1864.



Prussians, free prior to the establishment among them of the Teutonic knights.

Third, certain outlying countries, governed by kings of their own, over which the emperor's sovereignty had been at some time asserted,—embracing Hungary, Poland, Denmark, France, Sweden and Spain.

Fourth, other European states whose independent rulers generally admitted the emperor's superior rank without yielding to him any actual allegiance,—embracing England, Scotland, Naples and Sicily, Venice, and those remote eastern lands over which Frederick Barbarossa had asserted the rights of Rome as mistress of the world. The Byzantine princes refused of course to admit the emperor's claims in any form whatsoever.<sup>5</sup>

§ 26. **The pope as an international judge.**—After Christianity had substituted for the pagan precept: "Thou shalt hate thy enemy," the novel admonition: "Love your enemies," the new European nationalities continued as of yore to be torn internally by insurrections and bloody civil wars, or to be impelled by race-hatred or the jealousies and ambitions of their sovereigns to perpetual strife with each other. Out of such conditions arose the longing then as now for some acknowledged system of international law and for some supreme tribunal that could so administer it as to settle all contentions without bloodshed. The highest aspiration of the pope in his struggle with the emperor was so to establish his supremacy over all princes, including the emperor himself, as to enable him to offer to Europe the arbitrating power it demanded. The medieval claim of papal supremacy, as restated in our own time by a great English cardinal, was that "The supreme civil power of Christendom was dependent on the supreme spiritual authority. The pontiffs created the Empire of the West; they conferred the imperial dignity by consecration; they were the ultimate judges of the emperor's acts, with power of deprivation and deposition."<sup>6</sup> That judicial supremacy which the pope claimed not only over the emperor but over all other Christian princes, taking its color from the

<sup>5</sup> Bryce, *The Holy Roman Empire*, chap. xii.

<sup>6</sup> See the Monograph by Cardinal Manning entitled *The Pope and Magna Charta*, first published in England, and reprinted in Bal-

timore in 1885. As to the pope's influence for good as an arbitrator between states, see J. S. Mill, *Dissertations and Discussions*, II, 152-158.

dominant political idea of that age, naturally assumed a feudal shape. The theory was that all Christian princes stood to the Roman pontiff as great vassals to a supreme lord or sovereign, and as such supreme lord the pope claimed the right to enforce the duties due to him from his feudal subordinates through an ascending scale of penalties that culminated at last in the absolution of the subject from the bonds of allegiance, and in the deposition of the sovereign himself. Such were the claims of the papal power and such its resources when King John of England found it expedient to kneel at the feet of Innocent III.

**The canon law.**—The august scheme of papal authority was embodied in the canon law, designed by its authors to reproduce and rival the Imperial jurisprudence;<sup>7</sup> and in order to give emphasis to that idea Gregory IX, who was the first to condense the canon law into a code, was entitled the church's Justinian. Thus it was that the Roman pontiff assumed the office of supreme judge of appeals in all causes arising in the ecclesiastical courts of Christendom, especially in matrimonial causes involving the validity of a royal marriage where the result might effect the legitimacy of the issue, and indirectly the peace of a nation. In that way the pope was called upon to arbitrate in the famous case of the divorce between Catherine and Henry VIII.<sup>8</sup>

§ 27. **The emperor as international judge and mediator.**—On the other hand those who like Dante maintained the independence of the Empire, and who wished to substitute for the canonical system secular Roman jurisprudence, attempted, when it was too late, to find in its temporal head an international judge and mediator who, by reason of his severance from local associations and interests, might as "Imperator Pacificus," prevent wars between the states of Europe by hearing complaints and redressing injuries inflicted by sovereigns or peoples upon each other. As a direct heir of those who from Julius to Justinian had moulded the jurisprudence of Europe, he was to be not only peacemaker but the very embodiment of legality<sup>9</sup> and as such the expounder of justice and the source of positive law. The very extravagance of such

<sup>7</sup> For its history, see *The Origin and Growth of the Eng. Const.*, vol. I, pp. 261, 339.

<sup>8</sup> *Ibid.*, vol. ii, pp. 54-74.

<sup>9</sup> "Imperator est animata lex in

terris." Von Raumer, v. 81, quoting from a letter of the bishop of Salzburg and Regensburg to Pope Gregory IX.

pretensions rendered their realization impossible. The wars which such a dominion was designed to check rather increased than diminished in intensity,—the theory of the Empire’s political and legal supremacy never ripened into reality.<sup>10</sup>

§ 28. **Effects of the Reformation on the Empire.**—And yet no matter to what extent the Holy Roman Empire may have failed as an international power, whether arbitrating on its spiritual side through the pope and the canon law, or on its temporal side through the emperor and Imperial law, the fact remains that for centuries it was the one bond of cohesion holding Europe together under the spell of a theory that assumed to provide a complete system of international justice and a supreme tribunal adequate for the settlement of all controversies which could possibly arise between Christian nations. No matter whether the Holy Empire was a theory or an institution, not until the splendid conception of a united Christendom it embodied was wrecked by the Reformation, was the field cleared for the growth of international law as now understood. Many sided as it was in its nature and consequences the great earthquake which began in Germany need be considered here only as a political movement that struck at the very root of the theory by which the Empire had been created and upheld,—the theory that all Christendom consisted of a single body of the faithful held together under the dominion of the Eternal City, ruling through her spiritual head, the bishop of Rome, and through her temporal head, the emperor. The growing spirit of nationality which impelled the Teutonic nations, along with other causes, to break with Rome suggested, as a substitute for the medieval form of a universal faith spreading over vast dominions bound up in a single temporal government, the new theory that the political and religious life of each nation should be one, and that the religion of the people should follow the faith of the prince. For the older form of a universal faith uniting Christians of all nations under the convertible terms, Roman and Catholic, the Lutheran states substituted the principle of territorial religion which acknowledged the right of each nation to determine the form of belief that should prevail within its bounds.<sup>11</sup> So com-

<sup>10</sup> “It can hardly be said that national place.” Holy Roman Empire upon any occasion, except the gathering of the council of Constance by Sigismund, did the emperor appear filling a truly international place.” Holy Roman Empire, p. 244. See also p. 239.

<sup>11</sup> This is well put by Green, Hist. of the English People, vol. ii, p. 181: “For the principle of

pletely did the establishment of the new doctrine overthrow the pretensions of the Empire in northern Europe, that the Protestant jurists of the seventeenth century scoffed at its lordship of the world, and declared it to be nothing more than a German monarchy.<sup>12</sup> Such it became in fact through the results of the Reformation, while in theory it lingered on as a shadow in the hands of the Hapsburg emperors, until August 6, 1806, when the Imperial dignity, by a formal deed,<sup>13</sup> was finally resigned by Francis II, who, after releasing from their allegiance the states that had formed the Empire, retired to his hereditary dominions under the title of "Emperor of Austria."

§ 29. Peace of Westphalia a formal abrogation of the sovereignty of Rome.—The ancient struggle of the German princes for territorial independence, which was greatly advanced by the beginning of the Reformation in A. D. 1521, did not ripen into full triumph until the making of the Peace of Westphalia in 1648, whereby the conflict that had convulsed Germany for more than a century was definitely closed, at the end of the Thirty Years' War, through the two treaties then made,—one signed by the emperor and the French at Münster in October, and the other by the Swedes and the emperor at Osnabrück in August,<sup>14</sup> the Dutch and Spaniards having made peace at Münster during the preceding January.<sup>15</sup> By declaring both Lutherans and Calvinists free from the jurisdiction of the pope or any Catholic prelate, and by rendering the states of the Empire practically independent of the emperor as its federal head, the Peace of Westphalia became a formal abrogation of the sovereignty of Rome, and of the theory of Church and State, with which the name of Rome had been for so long a time associated. As a recent English writer has

Catholicism, of a universal form of faith overspreading all temporal dominions, the Lutheran states had substituted the principle of territorial religion, of the right of each sovereign or people to determine the form of belief which should be held within their bounds." See also *Ibid.*, p. 274.

<sup>12</sup> Cf. *De Ratione Status in Imperio nostro Romano-Germanico* written by Philipp Bogislaw von Chemnitz under the pseudonym of

"Hippolytus a Lapide." That was followed in 1667 by Puffendorf's keenly sarcastic tract *De statu imperii germanici liber unus*, said to be the most important production of that epoch in Germany as to public law and politics.

<sup>13</sup> The original may be found in Meyer's *Corpus Juris Confoederationis Germanicæ*, vol. i, p. 70. See also *Histoire des Traités*, vol. viii.

<sup>14</sup> Dumont, vi, 1, 450, 469.

<sup>15</sup> *Ibid.*, vi, 1, 429.

well expressed it: "That peace set the final seal on the disintegration of the World-Empire at once of pope and emperor, and made possible the complete realization of the doctrine of Grotius, the doctrine of the Sovereignty of States. The Peace of Westphalia did not create international law, but it made a true science of international law realizable."<sup>16</sup>

<sup>16</sup> Walker, *The Science of International Law*, p. 57.



## PART II.

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# SOURCES AND FOUNDATIONS OF MODERN INTERNATIONAL LAW.

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### CHAPTER I.

#### INTERNATIONAL COURTS, CONGRESSES AND CONFERENCES.

§ 30. **Five sources of international law.**—The rules that regulate the conduct of civilized nations in their intercourse with each other, known in the aggregate as international law, have been slowly drawn from sources which may be conveniently grouped under five distinct heads:

1. Decisions of prize courts, awards of courts of arbitration, and acts of international congresses and conferences.

2. The works of great publicists, who perform the double function of verifying the existence of old rules and of creating new ones.

3. Treaties of alliance, peace, commerce and others defining, declaring or modifying pre-existing international law.

4. Instructions given by states for the guidance of their own courts and officers.

5. The history of diplomatic intercourse.

§ 31. **Outline of the customary laws of the sea.**—It is impossible to understand the position of prize courts as international tribunals without some prior knowledge of the history of the customary law of the sea out of which their jurisdiction arose. The mighty forces that finally swept away the Holy Roman Empire as an international power gradually crystallized the elements out of which its successor grew. The Crusades gave an immense impetus to trade, and the Italian cities of Genoa, Pisa, Florence and Venice, through which flowed the swelling stream of intercourse eastward, rose suddenly into greatness. The new commercial activity thus

imparted to the south was rivaled in the north by a movement that drew together about A. D. 1260 a few Baltic towns in the Hanseatic League, gradually extended to no less than ninety cities, whose trade found its way to the Mediterranean through the League of the Rhine formed about A. D. 1250, and through the Swabian League formed A. D. 1376.<sup>1</sup> The influence thus exerted by the Crusades upon commerce and commercial unions upon land extended itself in due time to trade upon the sea, and the outcome was the "Sea Laws," a term employed by writers on maritime law in the sixteenth century to designate collections of usages of the sea that had been recognized as having the force of customary law, either through the decrees of a maritime court, or through the resolutions of a congress of merchants and shipmasters.<sup>2</sup> To the first class belong the usages of the mariners of the Atlantic known as the Laws of Oléron, to the second the customs of the mariners of the North Sea and of the Baltic known as the Laws of Wisbuy.<sup>3</sup> It is believed that the judgments of the marine court of Oléron were drawn up as early as the twelfth century; and it is probable that a record of such judgments was brought into England and published as law by Richard I, upon his return from the Holy Land.<sup>4</sup> At whatever date received such usages and judgments of the sea were entered in

<sup>1</sup> Hallam, *View of State of Europe during the Middle Ages*, iv; Höhlbaum, *Hansisches Urkundenbuch*, I, No. 4, 5, 6; Warnkönig, *Flandrische Staats-und Rechtsgeschichte*, I, 315; Cunningham, *Growth of English Ind. and Com.*, vol. i, pp. 138, 141, 146, 174, 184.

<sup>2</sup> As to the causes which brought about the collection of the judgments of the maritime court of Oléron, see Cleirac's introduction to his work on *Les Us et Coutumes de la Mer*, first printed in Bordeaux in 1647. The first part is devoted to the Laws of Oléron, of Wisbuy and to the Ordinances of the Hanse towns; the second to *Le Guidon*; the third to various ordinances of France, Spain and the Netherlands as to the jurisdiction of the admiralty.

<sup>3</sup> While the first laws of Wisbuy and the customs of Amsterdam should be assigned to the fourteenth century, the sea-code of Wisbuy, borrowed in part from the laws of Oléron and Amsterdam, belongs to the next century. Cf. Hüllman, *Städtewesen des Mittelalters*, i, 182.

<sup>4</sup> Such is the statement of Cleirac. The earliest known text is contained in the *Liber Memorandorum* to be found in the archives of the Guildhall of the corporation of London. To the same century belong the judgments of Damm, the port of Bruges, which began to be of importance before the close of the twelfth century. For the old and true text, see Warnkönig, *Flandrische Staats-und Rechtsgeschichte*, I. Appendix, No. XLI.



the Black Book of the Admiralty as the Laws of Oléron, and thus became "a national code of maritime law for the direction of the admiral; and whatever was defective therein was supplied from that great fountain of jurisprudence, the civil law, which was generally adopted to fill up the chasms that appeared in any of the municipal codes of modern European nations."<sup>5</sup> So great was the authority of the Laws of Oléron in most of the Atlantic ports of France that portions of them were incorporated into that model of marine legislation known as the *Ordonnance de la Marine* of Louis XIV, published in 1681, and expounded less than a century later by Valin in the famous commentary from which English and American jurists and text writers have drawn without stint.<sup>6</sup> The *Ordonnance* of Louis was also enriched from the *Consolato del Mare*, whose authorship is contested by both Spain and Italy. The most probable theory of its origin seems to be that which regards it as a gradual collection of the early maritime customs of the commercial cities of the Mediterranean made between the twelfth and fourteenth centuries.<sup>7</sup> The first edition was that published in the Catalonian dialect at Barcelona in 1494, but by common consent the best is that of Pardessus contained in his *Collection of Maritime Laws*.<sup>8</sup> The greatest importance has been attached to its chapters on marine captures in war, embodying the leading principles of prize law, in regard to which it has in recent times exercised an important influence.<sup>9</sup> Of a more comprehensive character than the *Consolato del Mare*, and of a considerably later date, is the *Guidon de la Mer*, drawn up toward the close of the sixteenth century,<sup>10</sup> probably at the instance of the merchants of Rouen. Far more ancient, however, than all such compilations, and the starting point no doubt of them all are the rubrics relating to ships and shipping contained in the Roman civil law,

<sup>5</sup> Reeves, *Hist. of Eng. Law*, iii, 389.

<sup>6</sup> The *Commentaire sur l'Ordonnance de la Marine* was published in 1760; the *Traité des Prises* in 1763.

<sup>7</sup> Grotius refers to it as containing the constitutions of Spain, France, Cyprus, Syria, the Balearic Isles, Genoa, and Venice.

<sup>8</sup> *Collection des Loix Maritimes*

*antérieurs au XVIIIe Siècle*, (Paris, 1828-1845, 6 vol.), II, c. XII.

<sup>9</sup> "They agree at present with the maritime code of Europe, notwithstanding many attempts to revise their regulations." Manning, *Law of Nations*, p. 15.

<sup>10</sup> The laws of the Hanseatic League belong in the main to the fourteenth and fifteenth centuries.

especially the rubric *de lege Rhodia de jactu*,<sup>11</sup> quoting and confirming the Rhodian law as to jettison. When the time came for English judges to realize that the doctrines of the common law were not equal to the growing exigencies of English commerce by land and sea, they were not slow to expand their simple code by the introduction of new principles drawn from foreign sources. Foremost in the good work was Lord Mansfield, a well-trained civilian, who, in his opinion in the case of *Luke vs. Lyde*,<sup>12</sup> involving the important question of freight *pro rata*, cites the laws of Rhodes, the Digest, the *Consolato del Mare*, the laws of Oléron and of Wisbuy, *Roccus de Navibus et Naulo*, and the Marine Ordinance of Louis XIV.

§ 32. Prize courts as international tribunals.—The only maritime court with which international law is directly concerned is the prize court, a municipal tribunal set up by belligerent states for the purpose of passing upon the validity of captures made by their cruisers. While so engaged the prize court is not supposed to administer the law of the state to which it belongs, but the generally accepted law of nations, which has no locality. In the case of *The Maria*<sup>13</sup> Lord Stowell declared it to be his duty “to administer with indifference that justice which the law of nations holds out, without distinction, to independent states, some happening to be neutral, and some to be belligerent. The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here to determine the question exactly as he would determine the same question if sitting at Stockholm; to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character.” The decrees of prize courts have thus become acknowledged sources of international law,—the greater or less weight to be given to any particular deliverance depending in each case upon the learning, impartiality

<sup>11</sup> Dig. 14, 2. There are, however, many other rubrics of the Roman law relating to shipping. See Dig. 4, 9; 22, 2; 47, 5, 9.

<sup>12</sup> 2 Burr., 882. Roccus, a Neapolitan lawyer, published a large work on maritime law in 1655,

from which was compiled a smaller work published in Amsterdam in 1708, entitled *De Navibus et Naulo*. Cf. Parsons, Maritime Law, vol. I, pp. 8-13.

<sup>13</sup> Robinson, Admiralty Reports, I, 340, 350.

and independence of the tribunal from which it emanates. And as such courts are the outcome of maritime usages that represent the very earliest agreement of civilized nations as to mutual rights and interests—antedating by centuries any general understanding as to the principles that should regulate intercourse on land—their decisions may be justly regarded as the earliest sources of international law, or, as Austin has expressed it, the places where its rules are first found.<sup>14</sup>

§ 33. Courts of arbitration—Alabama, Bering Sea and other cases.—It has been well said that the judgments of mixed tribunals appointed by the joint consent of contending nations should be considered as higher sources of international law than those of mere admiralty courts<sup>15</sup> dependent upon the power and authority of a single state and subject to a certain extent to direction from its executive.<sup>16</sup> The mention of such tribunals brings at once to the minds of all English-speaking people the Alabama and Bering Sea controversies recently settled between Great Britain and the United States by courts of that character. In the case first named the contending states submitted to the Arbitral Tribunal that sat at Geneva in 1872 the question whether or no Great Britain had fully discharged her duty as a neutral power when the same should be viewed in the light of the famous “Three Rules,” agreed upon in the Treaty of Washington of 1871,<sup>17</sup> taken in

<sup>14</sup> Jurisprudence, II, 526-528.

<sup>15</sup> Wheaton, Elements, Dana ed., p. 26.

<sup>16</sup> En Europe, les tribunaux de prises relèvent généralement de l'initiative et de l'action directe du pouvoir exécutif: ce qui tend peut-être à affaiblir la force de leurs décisions comme source du droit international. Aux Etats-Unis, ces tribunaux sont composés de juges indépendants inamovibles, si ce n'est en cas de prévarication, nommés à vie par le président de la république et confirmés par le sénat. Calvo, § 23. Even Lord Stowell, who, in deciding the famous case of *The Maria* in 1799, proclaimed, “It is the duty of the judge to administer that justice

which the law of nations holds out without distinction to independent states, some happening to be neutral, and some to be belligerent,” declared in 1812: “It is strictly true that the king in council possesses legislative powers over this court, and may issue orders and instructions which it is bound to obey and enforce: and these constitute the written law of this court. These two propositions, that the court is bound to administer the law of nations, and that it is bound to enforce the king's orders in council, are not at all inconsistent with each other.”

<sup>17</sup> For a brief and convenient statement, see Wharton, *Int. Law Dig.*, §§ 150g, 396. For a complete

connection with the "principles of international law not inconsistent therewith." The judgment was that she had not. In the Bering Sea case the same parties submitted to a like tribunal that met at Paris in 1893 a question which arose out of the contention of the United States that it had exclusive rights over certain portions of the open sea under a treaty made with Russia in 1867. That treaty ceded to the United States all the rights which had accrued to Russia by virtue of a certain ukase issued by the Tzar in 1821, claiming the Pacific north of latitude 51° as a *mare clausum*, on the ground of first discovery and the possession of both its shores.<sup>18</sup> It was adjudged that as international law never gave to Russia the right to make a *mare clausum* under such circumstances she could not convey it as such to the United States, whose territorial rights in Alaskan waters were thus confined to its bays and gulfs and the marine league along its shores. Beyond those limits it is to have no special property in fur-seals upon the theory that they are semi-domestic animals.<sup>19</sup> In the same category may be mentioned the submission of Great Britain and Portugal of the controversy involving the application of the law of occupation to the case of Delagoa Bay, decided by Marshal MacMahon in 1875;<sup>20</sup> and the submission by Great Britain and Venezuela of the controversy as to their respective boundaries decided in 1900. These cases may be taken as typical illustrations of the advance made in international arbitration by special tribunals, prior to the meeting of the Peace Conference at The Hague in 1899.

§ 34. **International Congresses.**—The most august assemblies in which nations meet together for the purpose of *quasi* legislation are known as congresses, the more famous being those that closed their labors at Westphalia in 1648, at Nimeguen in 1678, at Ryswick in 1697, at Utrecht in 1712, at Rastadt in 1799, at Vienna in 1815, at Verona in 1823, at Paris in 1856 and at Berlin in 1879. So slight is the difference that divides a congress from a conference that Lord

statement, the British and American Cases and Counter-cases presented to the Arbitral Tribunal.

<sup>18</sup> As to Mr. John Quincy Adams' protest against Russia's claim, see below; and also British and Foreign State Papers, IX, 483.

<sup>19</sup> See the Award of the Arbitrators rendered in August, 1893; and consult also for the antecedents, Wharton, Int. Law Dig., §§ 29, 159, 309.

<sup>20</sup> Pitt-Cobbett, Leading Cases in International Law, pp. 262-263.

Beaconsfield confessed in the House of Lords:<sup>21</sup> "I really can not explain the difference between a congress and a conference, because I do not recognize any difference between them. There is a common idea that a congress consists of sovereigns, and a conference of plenipotentiaries; but there is no foundation for this distinction. The Congress of Rastadt, at the beginning of the last century, was composed of plenipotentiaries, and so was the Congress of Paris, 1856." On supreme occasions when treaty settlements are to be made affecting the balance of power and the peace of the world it is usual to dignify the assembly with the title of congress, regardless of the character of the elements that compose it. Only by virtue of a superior dignity of that character can a congress be distinguished from a conference. By far the most splendid and important congress that has assembled in modern times was that of Vienna, composed of both sovereigns and ministers, about a hundred in number. The whole body never met in council, nor was there ever a formal exchange of credentials. The entire business of the congress was transacted by committees of the great powers—Great Britain, France, Austria, Russia and Prussia—to which were added for certain purposes the ministers of Sweden, Spain and Portugal. The task assayed by the publicists and statesmen who met at Vienna involved no less than the reconstruction of the ancient diplomatic fabric of Europe which the Napoleonic wars had shattered,—a task so executed as to restore peace, not seriously disturbed for forty years, upon the basis of new understandings for a long time held sacred by every member of the family of nations. The resistless tide of change has, however, so far obliterated the rearrangements of political interests and territorial rights then made that the only fragments of the work of the Vienna Congress that survive as elements in existing international law are embodied in a few provisions regulating the navigation of international streams, and declaring the slave trade forever abolished.

§ 35. **Notable Conferences of recent times.**—Of the conferences of recent times the most notable are the Conference of St. Petersburg in 1825, which paved the way for the independence of Greece; the Conference of London in 1831, which arranged the separation of the Kingdom of Belgium from Holland; the Conference of Geneva in 1864, which gave direction

<sup>21</sup> Feb. 25, 1878.

to the first European effort to introduce greater humanity into the rules and practices of war; the Conference of St. Petersburg in 1868, which resulted in a Declaration prohibiting the use, on land or sea, of projectiles below a certain weight; the Conference of London in 1871, which modified the treaty of Paris of 1856; the Conference of Brussels of 1874, which met to discuss the laws of warfare on land; the Conference of Constantinople in 1877, which vainly endeavored to obtain from the Porte guarantees for the better government of its Christian subjects; the West African Conference of Berlin in 1884-85, which met to regulate the affairs of that region, including the boundaries and independence of the Congo Free State; the Marine Conference of Washington in 1889, which is said to have been the first world Conference ever held for purposes of *quasi* legislation; the Conference of Brussels in 1890, which resulted in a Final Act for the suppression of the African slave trade; and the Conference of Peace at The Hague in 1899, which embodied the results of its labors in three treaties to be considered more fully hereafter.

**Conferences of Geneva, 1864; of St. Petersburg, 1868; of Brussels, 1874.**—The most enduring part of the work of the Congress of Paris of 1856 is that embodied in the Declaration of new maritime rules as to privateering, blockades, and the seizure of goods at sea. The earnest effort then made to diminish through concerted action the evils of war was soon seconded by the representatives of the fourteen states, which acceded, in the first instance, to the Convention of Geneva of 1864 regulating the treatment of the sick and wounded, and neutralizing all persons and things employed in their service, such as surgeons, chaplains, nurses, hospitals and ambulances, provided such persons and things are distinguished by a badge of a red cross on a white ground displayed on an arm or on a flag, as the case may be. In order to revise and extend the original provisions another Convention was signed at Geneva in 1868, but never ratified, whose Additional Articles, including the neutralization of hospital ships, relate chiefly though not exclusively to warfare at sea. Less than two months thereafter a Military Commission at St. Petersburg, composed of delegates from seventeen states, including representatives from Persia and Turkey, agreed “as between the parties in their wars with one another,—but not in wars with other powers, or in which other powers had a share,—to renounce the employment of any projectile, on the land or the sea, of a

weight below four hundred grammes (fourteen ounces), which should be explosible or loaded with fulminating or inflammable materials.”<sup>22</sup> In the Declaration in which the right to use such projectiles was renounced the parties in interest took occasion to say that the object of the use of weapons in war is “to disable the greatest possible number of men, that this object would be exceeded by the employment of arms which needlessly aggravate the sufferings of disabled men, or render their death inevitable, and that the employment of such arms would therefore be contrary to the laws of humanity.” In 1874, at the invitation of the Emperor of Russia, met the Conference of Brussels, in which appeared the representatives of all the European powers of any importance in the hope of bringing about the adoption by all civilized states of a common code for the regulation of warfare on land. As the delegates were not plenipotentiaries the conference was purely consultative; and the outcome was a series of articles embodied in a Declaration which remained as the basis for future negotiations between the governments concerned. The first effort to codify the rules of war was that made by Dr. Lieber in 1863, at the instance of the government of the United States, the outcome of which exercised as marked an influence upon the proposals agreed to at Brussels as have those proposals on the Manuals for the guidance of their armies subsequently issued by the European states, and on the code adopted in 1880 by the Institut de Droit International.<sup>23</sup> That Institution reached the conclusion that “the project of a declaration agreed upon at Brussels, although having much resemblance to the American instructions of President Lincoln, has the advantage over them of extending to international relations a regulation made for one state, and of containing new requirements at once practical, humane, and progressive.” It is also important to note that the work of the Geneva Conference of 1864 is connected with that of the Brussels Conference of 1874 by the statement embodied in the proposed code of the latter that the duties of belligerents with regard to the sick and wounded are to be regulated by the stipulations of the former.<sup>24</sup>

### § 36. The Peace Conference at The Hague—its basic principle.

<sup>22</sup> Martens (N. R. G.) xviii, 607-629, and 450-476 for text of conventions.

<sup>23</sup> *Tableau Général de l'Institut*, 173-190.

<sup>24</sup> British State Papers, Miscellaneous, No. 1 (1875), pp. 322, 324.

—Among all the conferences of the nineteenth century, vitally important as many of them were, by far the most fruitful in the intellectual order was the last. There are substantial grounds for the hope that the results of its deliberations will mark a turning point in the international relations of the world, just as the making of the second constitution of the United States marked a turning point in its political history. The master builders who accomplished that mighty task seem to have been overcome at its close by the grandeur of their achievement, and when the masses of the people had the opportunity to examine the details of the work, and to feel the practical benefits it wrought in their political condition, they, too, became imbued with a spirit of intense admiration; they put it upon a pedestal and made it a popular idol; as a German historian has expressed it, the new constitution passed through a process of canonization.<sup>25</sup> The uncritical enthusiasts who thus looked upon the framers of the unique federal experiment as demigods and not as men, and who held up their work as a spontaneous creation produced under the effects of intellectual inspiration, unwittingly put upon it the gravest reproach to which it could possibly have been subjected. Just because it was no such thing, it has been able to survive all the trials and vicissitudes through which it has passed. “If the brilliant success of the American constitution proves anything, it does not prove that a viable constitution can ever be ‘struck off’ at a given time by the brain and purpose of man.”<sup>26</sup> Upon the contrary all political history proves that Sir James Macintosh was right when he said that “constitutions are not made; they grow.” Every viable constitution must be the natural outcome of progressive history; it must be the result of the welding together of pre-existing elements just at the moment when such elements are being impelled towards union by their own momentum. Only because the statesmen and publicists who met at The Hague for the purpose of laying the foundations of a federal constitution for the United States of the World were guided by that all-important truth, is there any hope whatever that the results of their labors will endure as a permanent and cohesive force.

**A voluntary system of arbitration.**—Clearly perceiving that the question of questions to be solved was that involved in the

<sup>25</sup> Von Holst, vol. I, pp. 64-70.      The New Princeton Review, Sept.,

<sup>26</sup> Prof. Alexander Johnston in 1887, p. 186.



construction of just such an arbitral tribunal as would embody the advance so far made in that direction by sovereign states unwilling to bow absolutely to any common superior capable of subjecting them to positive law, the delegates wisely resolved to attempt only a voluntary system of arbitration depending upon the moral sentiment of the world for coercive authority. "The only other alternative to a voluntary system of arbitration must necessarily include a sanction, in the shape of an executive power or authority with sufficient force to compel adherence to an agreement for arbitration. \* \* \* They were careful to leave the sovereignty of each state absolutely unimpaired, and trusted exclusively to the force of public opinion and the public conscience for a sanction to enforce the mandates of the newly-established court."<sup>27</sup> Mr. Seth Low was clearly right when he said: "The convention at once gives to arbitration a place among the recognized means of preserving the peace of the world. It is hoped, and it is expected, that it will more and more serve this high function. For this reason, among others, the resort to arbitration, like the resort to good offices and mediation and to international commissions of inquiry, is left wholly voluntary. This, in the judgment of the writer, is the strength, not the weakness, of the plan."<sup>28</sup> In organizing the Permanent Court upon a purely voluntary basis the Conference simply systematized and supplemented the results of the world's experience on that subject. Apart from the establishment of the court itself, the two notable additions made were in the form of a definite code of procedure,—the lack of which was recognized as a serious drawback to international arbitration as early as 1874 by the Institut de Droit International,—and in the statement in that code of the principle that "the tribunal is authorized to determine its own jurisdiction."<sup>29</sup>

**Laws and customs of war on sea and land.**—In the same conservative spirit the Conference proceeded to systematize and supplement the results of international efforts previously made to regulate the laws and customs of war on sea and land. In order to render the sequence of development more obvious

<sup>27</sup> Holls, *The Peace Conference at The Hague*, p. 356.

<sup>28</sup> See his excellent exposition of the results of the conference in *North American Review for November, 1899*.

<sup>29</sup> First convention, Art. XLVIII. The conventions and other interesting documents are printed in the appendices to Mr. Holls's lucid and attractive work cited above.

a brief account was given in the preceding section of the attempts to humanize the laws of maritime war embodied in the Declaration of Paris, and in the Geneva Convention of 1864, as amended in 1868. The "Additional Articles" adopted in the year last named, extending to sick and wounded combatants at sea the same humane provisions guaranteed by the Geneva Convention of 1864 to soldiers on land, did not receive positive sanction until the Conference at The Hague completed its third convention "for the adaptation to maritime warfare of the principles of the Geneva Convention of August 22, 1864." As M. de Martens of Russia has expressed it: "It was this Conference that caused the final adoption by sixteen powers of Europe of the principle whereby the wounded in times of naval warfare shall have the same right to have their person, their life, their health and property respected, as the wounded in case of warfare on land."<sup>30</sup> In the same way the second convention framed by the Conference "concerning the laws and customs of war on land" was simply a development of such laws and customs as had been adopted in 1874 by the Conference of Brussels, but never ratified,—laws and customs first formulated, as stated already, during the American Civil War, at the request of President Lincoln, by Prof. Francis Lieber of Columbia University in the city of New York.

**Calling of the Conference—its composition—its results.**—The original rescript of August 24, 1898, in which the Emperor of Russia initiated the Peace Conference, was supplemented by a circular letter of Count Mouravieff, dated January 11, 1899, defining more precisely the several subjects to be submitted for international deliberation. Foremost among such subjects were those involving agreements among the powers, "not to increase for a fixed period the present effective of the armed military and naval forces, and at the same time not to increase the budgets pertaining thereto;" "to apply to naval warfare the stipulations of the Geneva Convention of 1864, on the basis of the additional articles of 1868;" "to revise the Declaration concerning the laws and customs of war elaborated in 1874 by the Conference of Brussels, which has remained unratified to the present day;" "to accept in principle the employment of good offices, of mediation and facultative arbitration in cases lending themselves thereto, with the object of preventing armed conflicts between nations." After

<sup>30</sup> See article in *North American Review* for November, 1899.

The Hague had been selected as a meeting-place the Netherlands government, on April 7, 1899, issued a formal invitation to each of the invited powers<sup>31</sup> requesting it "to be good enough to be represented at the above mentioned Conference, in order to discuss the questions indicated in the second Russian Circular of the 30th December, 1898 (11 January, 1899), as well as all other questions connected with the ideas set forth in the Circular of the 12th (24th) August, 1898, excluding, however, from the deliberations everything which refers to the political relations of states, or the order of things established by treaties." In response to that invitation more than one hundred delegates from twenty-six powers assembled in the "House in the Woods," May 18, 1899, of which twenty were European, four Asiatic and two American, each power having one vote. After permanent organization had been completed President de Staal stated in his opening address: "We shall also undertake in a special manner to generalize and codify the practice of arbitration, of mediation, and of good offices. These ideas constitute, so to speak, the very essence of our task." The first place was therefore given to that subject in the Final Act of the 29th of July, 1899, reciting that the Conference has prepared for submission to the plenipotentiaries of the powers (1) three conventions, (2) three Declarations; that it has unanimously adopted a resolution to the effect that "The Conference is of the opinion that the restriction of military charges, which are at present a heavy burden on the world, is extremely desirable for the increase of the material and moral welfare of mankind;" and that it has passed, with differing degrees of unanimity six other resolutions, referring various questions for other and later consideration. The constructive work of the Conference was embodied, however, in the three conventions first named, entitled as follows:

(1) Convention for the peaceful adjustment of international differences.

(2) Convention with respect to the laws and customs of war on land.

(3) Convention for the adaptation to maritime warfare of the principles of the Geneva Convention of August 22, 1864.

The contents of each of these conventions will be considered hereafter in connection with the subject to which it specially relates.

<sup>31</sup> No invitations were sent to South American republics were the Holy See and the South African not represented. Holls, pp. 34-35. can republics. The Central and

## CHAPTER II.

### RISE OF THE PUBLICISTS,

§ 37. Revival of the study of jurisprudence.—During the centuries in which the European nations were actively engaged by land and sea in the establishment of commerce in material things, there began a new kind of commerce in intellectual and spiritual things, in ideas, that changed the face of the world. The twelfth century witnessed the enthusiastic revival of the study of Roman law; the thirteenth, the spread of the scholastic philosophy; the fourteenth, the appearance in Italy of a new literature adorned first by the name of Dante, then by that of Petrarch. Along with this literary revival there came a general uprising throughout Europe of the human mind against the entire system of authority, spiritual and temporal, by which men were governed, an uprising that manifested a tendency to apply thought to practical ends through the reorganization of society upon fixed and definite principles. Under these new influences the Middle Ages, essentially unpolitical, gave birth at the close to Politics, and with them appeared “the first of a class of persons whom friends and enemies may both, though with different meanings, call ideal politicians.”<sup>1</sup> Hard as it may be to apply that term in any except a bad sense to Machiavelli, to that epoch he belongs, and with him the modern study of politics begins. Rousseau said that when Tacitus wrote the *Germania*, he intended it as a satire upon Roman manners. Gentilis, one of the founders of international law, who followed upon the heels of Machiavelli, defended him upon the ground that his “Prince” was only a veiled satire upon the vices of princes intended as an exposition of their tyranny and as an admonition to the people. From that point of view the “Prince” may be justly regarded as an outcry for some great deliverer, even for a powerful despot, who might purge Italy of the detestable dissimulation, crime and corruption through which she was misgoverned, and who might build up her unity after driving out the French, German and Spanish invaders who were despoiling and ruining her. It can not be proven that Machiavelli really sanctioned either fraud or treachery. For the first

<sup>1</sup> Bryce, *The Holy Roman Empire*, p. 232.

time since Aristotle we find in him the passionless spirit of a man of science attempting to establish the groundwork of his reasoning through the revival of the neglected separation of ethics from politics in a form so extreme as to reach "even to the point of apparent paradox and scandal." A branch of the Science of Politics thus revived was jurisprudence.<sup>2</sup>

§ 38. Importance of a knowledge of the publicists—their testimony as experts.—It is of paramount importance that students of international law should be familiar with the entire line of publicists for the reason that often by their testimony alone can the existence of its rules be established. As Sir Robert Phillimore has well expressed it, "The consent of nations is further evidenced by the concurrent testimony of great writers upon international jurisprudence. The works of some of them have become recognized digests of the principles of that science, and to them every civilized country yields great, if not implicit, homage."<sup>3</sup> In other words, the existence of any rule as to which the nations have actually agreed as a basis of intercourse must be proven in each case by the consensus of publicists who depose as experts to the fact. Each witness has his own character and his own place in the hierarchy, fixed in advance by his learning, his reputation for impartiality or maybe by his antiquity.<sup>4</sup> In some cases importance is attached to the fact of nationality. For instance, the conduct of any nation could be justly considered specially reprehensible if it should refuse to accept a rule established by a consensus of opinion in which its own publicists had joined. Upon the Continent where the common basis of law is Roman, and where the weight of precedents in the form of actual adjudications has never been the same as within the domain of English law, the tendency is and has been to give greater importance to the *dicta* of publicists when well supported than the judgments even of prize courts.<sup>5</sup>

<sup>2</sup> Pollock, Hist. of the Science of Politics, pp. 32, 42.

<sup>3</sup> Int. Law, vol. i, p. 58.

<sup>4</sup> "Regarding jurists, then, in the light of witnesses, it is their competency rather than their ability which most concerns us. We find a number of men of education, of many different nations, most of them quite uninterested in maintaining any particular thesis as to

the matter now in question, agreeing generally for nearly three centuries in the proposition that the territory of a maritime country extends beyond low-water mark." Coleridge, J., in *The Queen v. Keyn*, Law Reports, Exchequer Division, vol. II, p. 154 (1876).

<sup>5</sup> See the views of Hautefeuille on that subject in *Des Droits et des Devoirs des Nations Neutres*.

On the other hand, in England and America, where it is a habit of life for lawyers and publicists to look to the decisions of judicial tribunals as the most authoritative sources of law, the tendency is in the opposite direction. Such are the leading considerations that must be kept steadily in view when the weight of the testimony of any publicist is under consideration, such weight increasing, of course, with every invocation of his authority by statesmen or jurists, and with every year that passes without dissent from the rules he has solemnly promulgated. It is therefore indispensable for all who attempt either to expound or administer international law to have a thorough personal acquaintance with the character of the witnesses upon whose testimony the facts of its existence depends. For the purpose of facilitating such acquaintance, the leading publicists of the world who have written formal treatises on the subject will be grouped upon the basis of nationality,—the name of the work of each being given with its proper date, and in some instances with an indication of the standing of the author not only in his own country but in the world at large.

§ 39. Spanish and Italian publicists—Gentilis, Suarez, Ayala, Riquelme, Fiore and others.—Albericus Gentilis, just mentioned as the defender of Machiavelli, is regarded by many as the real founder of modern international law. He was born at Sanginesio, July 14, 1552; and after taking his degree in law at the University of Perugia he returned to his native city, whence, while engaged in recasting its statutes, he was forced to flee with his father on account of Protestant opinions common to both. After sojourning in Austria, Albericus arrived at Oxford in the fall of 1580, and seven years thereafter he was appointed Regius professor of civil law. His fame rests upon his application of that part of the Imperial jurisprudence embodied in the *jus naturae* to the new questions that arose out of the relations of modern states resting upon territorial sovereignty. While regarding with great deference the entire body of Roman law, secular and canonical, he adopted as his real guide the *jus naturae*, as the best epitome of the philosophy of law. In order to make a direct application of it to the laws of war he selected that theme as the subject of the law disputations that took place in July, 1588, and in the fall of that year he published at London his *De Jure Belli commentatio prima*. Upon that treatise it was that Grotius founded his *De Jure Belli ac Pacis* (Paris, 1625), whose method and

arrangement, as well as its illustrative erudition, is largely drawn from the earlier source.<sup>6</sup> And yet it is equally true that Gentilis upon his part was dependent upon a group of Spanish scholars developed just before his time at the University of Salamanca, founded in 1243 by Ferdinand III of Castile. In that institution, for a long time devoted chiefly to the study of the civil and canon law, were trained the Jesuit, Francisco Suarez (1548-1617); Francisco de Victoria, a professor at Salamanca about 1546, who published at Lyons in 1557 his *Relectiones Theologicae*, of which the sixth part is entitled *De Jure Belli*; and Dominic Soto,<sup>7</sup> the pupil and successor of Victoria, who published in 1560 the subject matter of his lectures in an elaborate treatise *Of Justice and Law*. The most distinguished member of the group was Suarez, whose extensive work, *Tractatus de Legibus ac Deo Legislatore*, surveys in a general way, and in a method thoroughly scholastic, the field afterwards occupied by Gentilis and Grotius. Side by side with the Jesuit, if not above him, must be ranked another Spaniard, Balthazar Ayala, a judge advocate of the Spanish army in the Netherlands, who published at Antwerp in 1597 his *De Jure et Officiis Bellicis et Disciplina Libri Tres*. Gentilis greatly improved upon the work of his Spanish predecessors, and then transmitted the result as embodied in his *De Jure Belli* to Grotius. From that time both Spanish and Italian publicists seem to have abandoned the field to writers of other nations until the long silence was broken at last by Bertodano who published at Madrid in 1740 a *Collection de traités de paix, d'alliance, de neutralité*, from 1598 to 1700. Not until 1830 did Pinheiro-Ferreira, who annotated Vattel and Martens, publish his radical work entitled *Cours de Droit Public Interne et Externe*, in which the first part of the second volume is devoted to international law. In 1849 Don Antonio Riquelme published at Madrid his *Elementos de derecho publico internacional, con explicacion de todas las reglas que constituyen el derecho internacional espanol*. In 1859 Count Terenzio Mamiani della Rovere, then professor of

<sup>6</sup> Of Gentilis Grotius says: *Cujus diligentia sicut alios adjuvari posse scio et me adjutum profiteor*. Prolegomena, § 39. A new edition of his work, edited by Professor Holland, appeared in 1878.

<sup>7</sup> Soto was appointed arbitrator by Charles V to decide between

Sepulveda, representing the Spanish-American colonists, and Las Casas, representing the natives, in a controversy as to the lawfulness of enslaving them. Upon his decision in their favor was based the edict of Reform of 1543.

the philosophy of history in the University of Turin, published his *Nuovo diretto Europeo* which, after being condemned by the Index, was translated into English under the title, *Rights of Nations*, London, 1860. In 1862 that was followed by the *Estudios sobre el derecho internacional marítimo; exposition razonada de sus principios fundamentales* by Don Ignacio de Negrin, of the administrative corps of the Spanish Marine. In 1867 Ercole Vidari, professor of Commercial law in the University of Pavia, published his *Del rispetto della proprietà privata fra gli stati in guerra*; and in 1868 appeared at Paris a translation from the Italian of the work of Pasquale Fiore, professor of international law in the University of Pisa, entitled,—*le Nouveau droit international public suivant les besoins de la civilization moderne*. The most important Italian works since that time are Carnazza-Amari's *Traité de Droit International Public*, a French translation of which appeared at Paris in 1880-1882, and Fiore's *Droit Int. Codifié*, 1890.

§ 40. German publicists—predecessors of Grotius.—As early as 1539, some years before the appearance of the works of Suarez, Victoria and Ayala, Oldendorp, a professor at Marburg, published at Cologne his *Isagoge, seu Elementaria Introductio Juris Naturæ, Gentium et Civilis*; and in 1548 Conrad Brunus, a German civilian, published at Mainz his elaborate treatise in five books entitled *De Legationibus*, in which he contends, contrary to the opinions of Ayala,<sup>8</sup> that all wars by Christians against infidels are just if undertaken to recover dominions that may be made useful to all Christendom.<sup>9</sup> The only remaining German predecessor<sup>10</sup> of Grotius was Benedict Winckler, first professor of law at Leipzig, then syndic of Lübeck, whose *Principiorum Juris Libri Tres* appeared at Leipzig in 1615.

Puffendorf, a notable disciple of Grotius.—The most notable German among the immediate successors of Grotius was his disciple Samuel von Puffendorf, a native of Saxony, who came into notice through the publication at The Hague in 1660 of

<sup>8</sup> Ayala was bold enough to declare that, *Bellum adversus infideles, ex eo solum quod infideles sunt, ne quidem auctoritate imperatoris vel summi pontificis indici potest, infidelitas enim non privat infideles dominio quod habent*

*jure gentium; nam non fidelibus tantum rerum dominia, sed omnirationabili creaturæ data sunt.*

<sup>9</sup> Lib. IV, c. 5.

<sup>10</sup> As to all of them see Von Kaltenborn, *Die Vorläufer des Hugo Grotius*, Halle, 1848.



his *Elementorum Jurisprudentiæ Universalis Libri Duo*, a youthful production based upon the principles of Grotius and Hobbes, in which he reached the conclusions that there is no voluntary or positive law of nations except that of nature; that the usages nations generally observe in war are of no binding force, and therefore that by their infraction no duties, properly so called, are really violated. Charles Louis, elector palatine, to whom his work was dedicated, created for him at Heidelberg a new chair of the law of nature and of nations (1661); and in 1670 Puffendorf was called to the University of Lund where in 1672 appeared the mature work of his life, entitled *De Jure Naturæ et Gentium Libri Octo*, a resumé of which, under the title *De Officiis Hominis et Civis*, appeared in 1675. In his later work Puffendorf simply widened and systematized his earlier thoughts in such a way as to enable him to derive law from reason, from the civil law, and from divine revelation, and in that way to establish three "disciplines,"—natural law, civil law and moral theology. After clearly subscribing to the declaration made by Hobbes in his *De Cive*<sup>11</sup> that the law of nature and of nations are identical, Puffendorf declared that "there is no other voluntary or positive law of nations properly invested with a true and legal force, and binding as the command of a superior."<sup>12</sup> Realizing the imperfection in the Grotian theory of a law of nature, the persistent effort of Puffendorf was to remedy the defect by demonstrating the inseparable connection between natural and positive law. The Grotian theory thus completed by Puffendorf, with the aid of Hobbes, was sharply and promptly combated by Samuel Rachel, a professor first at Helmstadt, then at Kiel, whose *De Jure Naturæ et Gentium Dissertationes Duo* appeared at the place last named in 1676. Thus it was that "This controversy about the origin and obligation of international law gave rise to two conflicting sects among German public jurists of the latter part of the seventeenth century. The one, adhering to Puffendorf, denied altogether the existence of any other law of nations than the law of

<sup>11</sup> \* \* lex, quam loquentes de hominum singulorum officio naturalem dicimus, applicata totis civitatibus, nationibus sive gentibus, vocatur jus gentium, c. xiv, § 4. See also Leviathan, p. 63.

lib. II, c. 3, § 23. It seems to be customary to quote Leibnitz's statement that Puffendorf was a *Vir parum jurisconsultus, et minime philosophus*,—the words of a bitter rival.

<sup>12</sup> *De Jure Naturæ et Gentium*,

nature applied to independent communities; whilst the latter adopted the doctrine of Rachel, founding the law of nations upon the law of nature as modified by usage and express compact."<sup>13</sup>

**Leibnitz and Wolf.**—Passing over the work of J. W. Textor, a defender of the views of Rachel, who published his *Synopsis Juris Gentium* at Bâle in 1680, and that of Christian Thomasius, a learned disciple of Puffendorf, who put forth his *Fundamenta Juris Naturae et Gentium* at Halle in 1705, mention must be made of the collection of treaties and other diplomatic acts that appeared in 1693 with a preface by Leibnitz, intended as a commentary upon the principles of international law. The most notable name that next occurs is that of Christian F. von Wolf (1679-1754), a disciple of Leibnitz both in philosophy and jurisprudence who, upon the recommendation of his master, was made a professor at Halle, where the Leibnitzian philosophy survived in a Wolfian form until it was superseded by that of Kant. The last of his nine quarto volumes upon the law of nature is devoted to the law of nations,—a work followed in 1749, when he was seventy years old, by his *Jus Gentium Methodo Scientifica Pertractatum, in quo jus gentium naturale, ab eo quod voluntarii, pactitii et consuetudinarii est, accurate distinguitur*, of which his *Institutiones Juris Naturae et Gentium*, that appeared in the following year, was an abridgment. After declaring in the preface to his *Jus Gentium* that “in the great society of nations it becomes necessary to establish a law of positive institutions more or less varying from the natural law of nations,” he concludes that such law, “the voluntary law of nations, derives its force from the *presumed consent of nations*, the conventional from their *express consent*; and the consuetudinary from their *tacit consent*.”<sup>14</sup> All such artificial distinctions would have been forgotten long ago, along with their author and his philosophy, had it not been for the fact that Wolf’s materials were skilfully worked over and popularized by his disciple Vattel, a Swiss publicist of note, of whom more will be said hereafter.

**Heineccius, Moser, Martens, Klüber, Heffter and others.**—In 1738 J. G. Heineccius, a professor at Halle, published at that

<sup>13</sup> Wheaton, *Hist. of the Law of Nations*, p. 105.

<sup>14</sup> Proleg. §§ 3, 25. The presumed assent of nations to the

voluntary law is based upon the fiction that Nature herself has established a great commonwealth of which all nations are members.

place his *Elementa Juris Naturae et Gentium*, in which *ius gentium* is viewed as the sum of rights that find their application to societies of every sort; and in 1777-81 were published at Frankfort-on-Main and Tübingen the more important works of the publicist John J. Moser: *Versuch des Neuesten Europäischen Völkerrechts in Friedens-und-Kriegszeiten*, etc., and *Beyträge zu dem Neuesten Europäischen Völkerrechts in Friedenszeiten und in Kriegszeiten*. Moser, usually called the father of the positive school, manifested his eminently practical tendency by disclaiming all intention to write either a scholastic or philosophical exposition based upon the application of natural law to the relations of states. International law was, he said, only a collection of rules established by the practice of nations, whose intrinsic force rested entirely upon treaties and usage; and his primary purpose was to illustrate their meaning through modern examples. In 1785 George Frederick von Martens, a professor at Göttingen, published at that place his *Primae Liniae Juris Gentium Europæarum Practici*, a syllabus of his lectures, afterwards enlarged into the summary of the European law of nations that appeared in 1788 as *Précis du Droit des Gens Moderne de l'Europe fondé sur les Traités et l'Usage*.<sup>15</sup> Martens believed, with Vattel, that Wolf was right, when he said that, as the mere law of nature is insufficient to regulate the intercourse of states, it must be modified and supplemented by mutual consent, out of which arises the positive or special law of nations, resting either upon compact, express or implied, or upon mere usage. Upon that basis he reasoned out a general theory of a positive European law of nations that had great weight in its time. He also began to publish in 1791 the *Recueil des Principaux Traités de Paix, d'Alliance, etc., depuis 1761 jusqu'à nos jours*,—a work continued by C. de Martens, Saalfeld, Murhard, Samwer, Hopf, and Stoerk, until the series in 1887 extended to sixty-four volumes.<sup>16</sup> In 1779 appeared the com-

<sup>15</sup> Published in German at Göttingen in 1788, with a 2nd ed. in French in 1801. In 1831 a fourth edition appeared in French with notes by Pinheiro-Ferreira, and in 1855 a fifth by Pinheiro and Vergel. It was also translated into English by Cobbett and printed at Philadelphia in 1795.

<sup>16</sup> Prior to the appearance of the

*Recueil*, a general collection of treaties was published by Leibnitz in 1693, entitled *Codex Juris Gentium*, and containing documents from 1097 to 1497; followed in 1700 by the *Mantissa*; in 1726-39 was published Dumont's *Corps Universel Diplomatique du Droit des Gens*, continued by Barbeyrac and Rousset, and containing treaties

pleted work of Günther entitled, *Grundriss eines Europ. Völkerrechts, nach Vernunft, Verträgen, Herkommen, etc.*; in 1819, J. L. Klüber's *Droit des Gens Moderne de l'Europe*; soon republished, in a modified form, in his own tongue as *Europäisches Völkerrecht*; in 1818-1819, at Rudolstadt, J. Schmelzing's *Systematischer Grundriss des Praktischen Europ. Völkerrechts*; in 1817, at Berlin, T. Schmalz's *Europ. Völkerrecht*; in 1823, at Tübingen, F. Saalfeld's *Handbuch des Positiven Völkerrechts*; in 1841, at Heidelberg, C. S. Zachariae's seven volumes entitled, *Vierzig Bücher vom Staate*; the fifth volume of which contains his *Völkerrecht*; in 1844, at Berlin, the great work of August W. Heffter, of the highest authority in Germany, entitled *Das Europäische Völkerrecht der Gegenwart*; translated into French by M. Jules Bergson;<sup>17</sup> in 1877, at Leipzig, A. Bischof's *Katechismus des Völkerrechts*; and in 1895, at Berlin, Dr. Quaritsch's *Compendium des Europäischen Völkerrechts*.

#### § 41. Dutch publicists—Grotius, Bynkershoek and Huber.—

The work of Huig van Groot, generally known as Hugo Grotius, who stands not only at the head of the Dutch publicists, but at the head of all, as the father of modern international law, will subsequently be made the subject of special consideration by reason of its paramount importance. The Dutch publicist next in fame is Cornelius van Bynkershoek, born at Middleburg in Zeeland in 1673, who became an advocate, and settled at The Hague, where he published, in 1702, his *De Dominio Maris*; and in the following year was made a member, and afterwards president, of the supreme appellate court for the provinces of Holland, Zeeland and West Friesland. In 1710 appeared his *Observationes Juris Romani*; in 1721 his *De Foro Legatorum*; and in 1737 his *Questiones Juris Publici*,—dissertations that placed him in the front rank of publicists despite the fact that he wrote no systematic work.

from 838 A. D. to 1738; in 1781-95 was published Wenck's *Corpus Juris Gentium Recentissimi*, containing treaties from 1735 to 1772. Besides these each nation has its own collection.

<sup>17</sup> This standard work was, after Heffter's death, re-edited by Dr. F. Heinrich Geffcken in a seventh edition, 1880. While Geffcken left the

text unaltered, in valuable notes [bracketed with a G], he has brought the work up to date, omitting in the 8th edition, 1888, some sections deemed antiquated. Geffcken's notes are for all present purposes of greater value than Heffter's text. What Dana was to Wheaton, Geffcken was to Heffter.

After his death complete editions of his writings were published at Geneva in 1761, and at Leyden in 1766, and translated into French by Duponceau. The most important part of his work, so far as international law is concerned, is the first book of his *Questiones Juris Publici* entitled, *De Rebus Bellicis*, in which he enters, for the first time, into a critical and systematic exposition of the rules that should regulate maritime commerce between neutral and belligerent states. Therein he dissents from Grotius as to the application and extent of the ancient law of France as to neutral ships and goods.<sup>18</sup> In his *De Dominio Maris* (c. v.) he admits that certain portions of the sea may be susceptible of exclusive dominion, that is to the extent of a cannon shot from shore, a rule he extends to such seas as are completely surrounded by the adjacent territories of any particular state. As to the general foundation of international law, he derives it from reason and usage (*ex ratione et usu*), and usage he bases on the evidence of treaties and ordinances made in harmony with general custom.<sup>19</sup> Another Dutch publicist, standing in between Grotius and Bynkershoek, was Ulric Huber, a lawyer, historian and philologist, born at Dockum in Dutch territories, in 1635. His treatise, *De Conflictu Legum*, is to be found in his *Prælectiones Juris Civilis*. He died in 1694.

§ 42. English publicists—Zouch, Selden, Rutherford, Jenkinson.—In the order of time the English publicists must next be considered, because as early as 1650 appeared the *Juris et Judicii Fetialis, sive Juris inter Gentes et Questionum de eodem Explicatio* of Dr. Zouch, the distinguished English civilian, who succeeded Albericus Gentilis as professor of Roman law at Oxford, and who was in 1641 judge of the High Court of Admiralty. In Zouch's work, which is a mere abridgment of that of Grotius, is emphasized the master's fundamental distinction between natural law and the law established by general consent, which governs, or should govern, all independent communities. It is likely that Zouch would never have been remembered at all if it had not occurred to him to describe the kind of law last named as *jus inter gentes*, in contradistinction to the *jus gentium* of the Roman lawyers, which had become the equivalent of *jus naturae*. Ten years prior to the appearance of Zouch's work, John Selden, a jurist and oriental scholar, had published his *De Jure Naturali et Gentium juxta*

<sup>18</sup> Q. J. Pub., lib. i, c. xiv.

<sup>19</sup> Ibid., lib. i, c. x.

*Disciplinam Ebracorum*, a work of monstrous erudition, in which is described the peculiar institutions of the Jews, with an exposition of their understanding of *jus gentium*, and of their international usages in war and peace. While he makes no direct reference to the doctrines of Grotius, he adopts his basic principle, dividing the laws of nations into the primitive or natural, and the secondary, derived from convention and custom. Selden is, however, far better known as the author of the *Mare Clausum*, published in 1635 as a counter blast to Grotius's *Mare Liberum*.<sup>20</sup> It had been written sixteen or seventeen years before, and dedicated to James I, who prohibited its publication for political reasons. It was finally put forth by his successor as a kind of state paper, in which the sovereignty of Great Britain over the surrounding seas was asserted in such a way as to deny to the Dutch the right to fish off the coasts. In 1754 Thomas Rutherforth, a Cambridge professor, published his lectures upon Grotius as *Institutes of Natural Law*; and in 1757 Charles Jenkinson, first earl of Liverpool, issued a *Discourse on the Conduct of Great Britain in respect to Neutral Nations*.

**Hobbes and Bentham.**—In the same general way in which German students of international law regard Leibnitz and Savigny, French students Montesquieu and the Abbé Mably, English and American students regard Hobbes and Bentham, as publicists who in their explorations of the entire field of jurisprudence have shed light incidentally upon that branch in which they are specially concerned. Beginning with the postulate that man's natural state is a state of war, Hobbes applies the principle, not only to men in their individual relations, but to states in their political relations, thus reaching the conclusion that every state has the right to do whatever it pleases to all other states. He divides the natural law "into the natural law of men, and the natural law of states, commonly called the Law of Nations. The precepts of both are the same \* \* that law, which when speaking of individual men we call the Law of Nature, is called the Law of Nations when applied to whole states, nations, or people."<sup>21</sup> His dreadful creed of perpetual war was mitigated, however, by the admission that "reason suggesteth convenient Articles of

<sup>20</sup> First published anonymously at Leyden in 1609, as a protest against the extravagant claims of Spain and Portugal to exclusive rights in the Atlantic and Pacific oceans by virtue of the decree of Pope Alexander VI, made in 1493.

<sup>21</sup> *De Cive*, c. xiv, § 4.

Peace, upon which men may be drawn to agreement. These Articles are they which otherwise are called the Laws of Nature.”<sup>22</sup> Whenever either men or states may find it convenient and useful to substitute peace for war through contract, the right to do so is conceded to them. The same utilitarian idea of convenience underlies Bentham’s incomplete essay on international law, in which, after reviewing its general character, especially in relation to the causes and consequences of war, he attempts to formulate a plan to secure universal and perpetual peace through a league of European states to be governed by laws enacted by a federal legislature, and enforced through a federal judicature. The motive, he contends, that should prompt men to set up an international code is embodied in the idea of general utility in so far as nations may abstain from injuring other nations, and may do actual good to them, without any special detriment to their own well being. In the event of inevitable wars the code was so to provide as to mitigate as far as possible the evils necessarily resulting from them.<sup>23</sup> Thus “the formula of the greatest happiness is made a hook to put in the nostrils of Leviathan, that he may be tamed and harnessed to the chariot of utility.”<sup>24</sup>

Wildman, Manning, Phillimore, Twiss, Hall, Dicey and others.—In 1829 were published Richard Wildman’s *Institutes of International Law*; in 1839 William Oke Manning’s *Commentaries on the Law of Nations*, in which special consideration is given to the rights of neutrals in maritime war; in 1848 Archer Polson’s *Principles of the Law of Nations*, with practical notes and supplementary essays on the law of blockade and on contraband of war; in 1854-61 Sir Robert Phillimore’s notable and comprehensive *Commentaries upon International Law*; in 1858 John Westlake’s *Treatise on Private International Law or the Conflict of Laws*; in 1861 Sir Travers Twiss’s (Regius Professor of Civil Law at Oxford) *The Law of Nations, considered as Independent Political Communities*, and in 1863 *Rights and Duties of Nations in Time of War*; in 1876 Sir Edward S. Creasy’s *First Platform of International Law*; in 1884 James Lorimer’s *Institutes of the Law of Nations*; in the

<sup>22</sup> Leviathan, p. 63.

suggested by Saint Pierre and Rousseau, see Wheaton, History, p. 343.

<sup>23</sup> Bentham’s Works (Bowring ed.), Pt. viii, pp. 537-554. As to the resemblance of Bentham’s project of perpetual peace to those

<sup>24</sup> Pollock, Hist. of the Science of Politics, p. 101.

same year W. E. Hall's masterful *Treatise on International Law*; in 1889 H. Nelson's *Private International Law*; in 1893 Thomas A. Walker's *Science of International Law*; in 1895 T. J. Lawrence's thoroughly digested and brilliant volume entitled *The Principles of International Law*; in 1896 A. V. Dicey's *Conflict of Laws*; in 1899 Sir Sherston Baker's *First Steps in International Law*; and in 1900 F. E. Smith's *International Law*.

Special reference should be made not only to Prof. T. E. Holland's *Studies of International Law* (1898), but also to the invaluable expositions of that subject contained in his *Elements of Jurisprudence*, declared by an eminent critic to be "the first work of pure scientific jurisprudence which has appeared in England—that is, of the general science of law distinctly separated from the ethical part of politics."<sup>24a</sup>

§ 43. Swiss publicists—Vattel, Burlamaqui and Bluntschli.—The short yet notable line of Swiss publicists was founded by Emeric de Vattel, who was born at Couvet in the principality of Neuchâtel in 1714. Turning from theology to philosophy he became a disciple of Leibnitz, whose system he defended against Crousaz in a publication that appeared at Geneva in 1741. Thus it was that Vattel was drawn to Wolf, another and stronger disciple whom Leibnitz had installed as his expounder at Halle, and of whose work on international law a brief description has been given already. We learn from Vattel himself that "The treatise of the philosopher of Halle on the Law of Nations is dependent on all those of the same author on philosophy and the law of nature. In order to read and understand it, it is necessary to have previously studied sixteen or seventeen quarto volumes which precede it. Besides, it is written in the manner and even in the formal method of geometrical works."<sup>25</sup> As Wolf thus spoke in an unknown tongue, Vattel deemed it necessary "that some brother having the gift of interpretation should expound the invaluable jargon."<sup>26</sup> So it was that he became to Wolf what Dumont was to Bentham,—an interpreter who, after condensing and systematizing the materials of his principal, reproduced the refined product in such neat, clear and precise French as to command universal attention and admiration. By such means the skillful editor succeeded in making a popular abridgment

<sup>24a</sup> Pollock, *Hist. of the Science of Politics*, p. 63.

<sup>26</sup> Macaulay, on Dumont's *Memoir of Mirabeau*, *Essays*, vol. i, p.

<sup>25</sup> *Droit des Gens*. Préface, xii.

757.



which has saved not only his own fame, but that of his master, from oblivion. In the hope of clothing himself with some kind of originality, Vattel attempted to differ from Wolf as to the process through which should be established the foundations of the voluntary law of nations, based by the latter upon the fiction of a great republic set up by nature herself to shelter within its fold all the nations of the earth.<sup>27</sup> Against that assumption Vattel formulated the simple rule, that "the Law of Nations is originally no other than the Law of Nature applied to nations."<sup>28</sup> Although the application of that law to states differs from its application to individuals, both Wolf and Vattel agreed that its precepts were equally binding upon both, and for that reason both termed it the *necessary* law of nations, because all were necessarily bound to observe it. Like the law of nature herself this necessary law could neither be changed nor dispensed with by any state, in the forum of conscience, by treaty or by any less formal act. To obviate practical difficulties the necessary law thus defined was subdivided into an internal law, or law of conscience, and an external law, or law of action. A treaty might be void under the precepts of the former, and yet perfectly valid under the terms of the latter. Proceeding from different premises, master and disciple both reached the conclusion, that there was a *voluntary law* of nations, and in addition thereto a *conventional law*, resulting from compacts, and a *customary law* resulting from usage.<sup>29</sup> All flowed from a common source, the will of nations,—as Wolf has expressed it, the voluntary, from their "presumed consent, the conventional from their express consent, and the consuetudinary, from their tacit consent."<sup>30</sup> When all such unfruitful distinctions have been entirely forgotten, Vattel will still be remembered by reason of the fact that he really did original work in advancing the growth of the law of neutrality, which was in so imperfect a state in the time of Grotius that even he declared that when two states are members of a league one may defend a third power from the attack of its ally without a breach of the general peace between them. The good work of developing the law of neutrality, greatly accelerated by Bynkershoek, was

<sup>27</sup> See above, p. 58, note 14.

<sup>28</sup> *Préliminaires*, § 5.

<sup>29</sup> *Droit des Gens*, *Préliminaires*, §§ 17, 21, 24, 25.

kinds of Law of Nations, the

*Voluntary*, the *Conventional*, and the *Customary*, together constitute the *Positive Law of Nations*," § 27.

<sup>30</sup> *Proleg.*, § 25.

carried on twenty years later by Vattel, who added many rules to the growing doctrine, that in order to secure all the advantages of neutrality, a neutral nation "must in all things show a strict impartiality towards the belligerent powers."<sup>31</sup>

A contemporary of Vattel was Jean J. Burlamaqui, the famous writer upon the law of nature and of nations born at Geneva in 1694, whose chief works are *Principes du Droit Naturel et des Gens*, 1747; and *Principes du Droit Politique*, 1751.

In our own time the name of another Swiss publicist has become as familiar throughout the world as that of Vattel. Reference is made to Johann Kaspar Bluntschli<sup>32</sup> of Zurich, who was for a long time a professor at Zurich, Munich and Heidelberg. His principal works are *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbach dargestellt*, Nordlingen, 1878; *Das Beuterecht ün Kriege*, 1878; and *Geschichte des allgemeinen Staatsrecht*, 1881.

§ 44. French publicists—Valin, Pothier, Foelix, Massé, Ortolan and others.—French publicists, who were not among the first to devote themselves to the special study of international law, have by the general excellence of their subsequent contributions more than balanced the original deficit. In 1762-64 appeared at Paris De Real's work in eight volumes entitled *La Science du Gouvernement*—the fifth of which embraces the Law of Nations. The first great name, however, connected with the subject is that of René J. Valin, who published at Rochelle in 1760 his *Commentaire sur l'ordonnance de la marine du mois d'aout 1681*; and in 1763 his *Traité des Prises, ou principes de la jurisprudence française concernant les Prises qui se font sur mer*,—a subject also considered by Pothier in his *Traité de Propriété*. In 1811 appeared Gérard de Rayneval's *De la liberté des mers*; and in 1832 a new edition of his *Institutions du droit de la nature et des gens*. In 1833 appeared the *Traité complet de la diplomatie, ou Théorie générale des relations extérieures des puissances de l'Europe* of comte de Garden; in 1843 the *Traité du droit international privé* of the Parisian advocate Foelix; in 1844 *Le droit commercial dans ses rapports avec les droits des gens et le droit civil* of M. G. Massé, a counselor of the Court of Cassation; in 1845 the notable *Règles internationales et Diplomatie de la mer* of Theodore Ortolan; in 1848 the *Droits et devoirs des*

<sup>31</sup> *Droit des Gens*, p. 332.

<sup>32</sup> He was born in 1808 and died in 1881.

*nations neutres en temps de guerre maritime* of L. B. Hautefeuille, who also published in 1858 his *Histoire des origines, des progrès et des variations du droit maritime international*, and in 1868 a book entitled *Questions de droit maritime international*. In 1851 appeared the *Des Moyens d'acquérir le domaine international ou propriété d'Etat entre les nations, d'après le droit des gens public* of Eugene Ortolan; in 1858 the *Traité des prises maritimes* of M M. Pistoye et Duverdy; and in 1862 *Le droit maritime international considéré dans ses origines et dans ses rapports avec les progrès de la civilization* of Eugène Cauchy, a work crowned by the Academy of Moral and Political Sciences.

§ 45. North American publicists—contributions to law of neutrality.—While American publicists were necessarily the last to make contributions to international law, by common consent they have rendered already invaluable services in developing the law of neutrality, and international private law, or conflict of laws. An eminent British statesman once said in parliament, while a minister of the crown, “that if he wished for a guide in a system of neutrality he should take that laid down by America in the days of Washington and the secretaryship of Jefferson,”<sup>33</sup>—a statement strengthened by Sir Robert Phillimore<sup>34</sup> who said that when the United States were sorely tried during the war of the first French Revolution, “in 1793 under the presidency of Washington, they put forth a proclamation of neutrality, and resisting both the threats and the blandishments of their recent ally, took their stand upon sound principles of international law, and passed their first neutrality statute of 1794. The same spirit induced the Government of these states, at that important crisis when the Spanish colonies in America threw off their allegiance to the mother country, to pass the amended foreign enlistment statute of 1818; in accordance with which, during the next year, the British statute, after a severe struggle, and mainly by the great powers of Mr. Canning, was carried through parliament.” Such was the general character of the work performed by the early publicists of the United States in the official conduct of its foreign affairs prior to the advent of those who have expounded the principles of international law in formal treatises.

<sup>33</sup> Cf. Wharton, Int. Law Dig., vol. i, Preliminary Remarks.

<sup>34</sup> Int. Law, vol. i, p. 559, 3ed, 1879.

**James Kent.**—At the head of that line stands James Kent, who, after ably assisting in laying the foundations of American equity jurisprudence as a chancellor of the State of New York, resigned in order to accept, at the age of sixty, the professorship of law in Columbia College. Out of the lectures there delivered grew the famous *Commentaries on American Law* published in 1826-30, the first part of which is devoted to a brief yet luminous exposition of the principles of the "Law of Nations" as then accepted in this country. Chancellor Kent also published a separate *Commentary on International Law*, a second edition of which, edited by J. T. Abdy, appeared in London in 1878.

**Henry Wheaton.**—The greatest of American expounders of international law was Henry Wheaton, a lawyer, diplomat, and historical scholar who was born in the State of Rhode Island in 1785. After thorough academic and linguistic training, he removed to the city of New York, where he published, in 1815, his work on the *Law of Marine Captures*, which brought at once genuine reputation. After having filled the office of reporter of the Supreme Court of the United States from 1816 to 1827 he was appointed in the year last named as *Chargé d' Affaires* at Copenhagen, where he remained until his transfer in 1835 to Berlin, first as Minister Resident, and finally as Minister Plenipotentiary. From Berlin came, in 1836, his *Elements of International Law*, the notable work which has passed through so many editions, augmented and improved as it has been by the voluminous notes of Richard Henry Dana, Jr., and William B. Lawrence, who thus became involved in prolonged litigation. The work, however, upon which Wheaton's fame chiefly depends is his *History of the Law of Nations in Europe and America*, to be noted hereafter in its proper place.

**Joseph Story.**—Next to John Marshall, Joseph Story, born in the State of Massachusetts in 1779, is the most famous of the group of notable judges who defined the powers of the federal judiciary of the United States in the series of formative decisions and opinions that extends from 1812 to 1832. To Story, more than to any other one, is due the upbuilding and defining of our admiralty jurisdiction. As a prize court judge he made such contributions to international law as associate his name with the English Stowell, and the French Portalis. His most notable contribution to that subject is, however, his *Conflict of Laws*, which appeared in 1834 at a time when, as he tells us in his preface, "There existed no treatise upon it in the English

language; and not the slightest effort has been made, except by Mr. Chancellor Kent, to arrange in any general order even the more familiar maxims of the Common Law in regard to it. The subject has been discussed with much more fullness, learning, and ability by the foreign jurists of continental Europe. But even among them there exists no systematical treatise embracing all the general topics." Thus Story was the first to place the study of international private law upon a systematic and scientific basis.

**Woolsey, Halleck, Field, Wharton and others.**—In 1860 appeared Dr. Theodore D. Woolsey's well known and very useful *Introduction to the Study of International Law*; and in 1861 Henry W. Halleck, a general in the army of the United States, published a work on *International Law, or Rules Regulating the Intercourse of States in Peace and War*, which has received very decided recognition. In 1872 David Dudley Field made an important move in the right direction when he published *Outlines of an International Code*.—a scheme "embracing not only a codification of existing rules of international law, but the suggestion of such modifications and improvements as the more matured civilization of the present age should seem to require." In 1873 Dr. Francis Wharton, favorably known as a writer on other branches of law, published his *Conflict of Laws*, and in 1886 his exhaustive *Digest of the International Law of the United States*. In the same year appeared John Norton Pomeroy's *Lectures on International Law in Time of Peace*; in 1887 George B. Davis's *Outlines of International Law*; in 1895 Glenn's *International Law*; and in 1898 Freeman Snow's *International Law*.

§ 46. **South American and Russian publicists**—Calvo, Bello, Martens.—In 1868 South America did honor to the New World through the very notable contribution of M. Carlos Calvo which, after a first appearance in Spanish under the title of *Derecho Internacional Teorico y Practico de Europa y America*, was translated into French as *Le Droit International Théorique et Pratique*, the title by which it is now generally known. Calvo, who came to this country as minister from Paraguay, speaks in the highest terms of his compatriot André Bello (born in Caracas in 1780), the author of *Principios de derecho de gentes*. According to Calvo "*Bello est le premier qui ait signalé l'insuffisance des principes émis dans l'ouvrage de Vattel et ait tenté d'y suppléer.*"<sup>35</sup>

<sup>35</sup> *Droit International*, vol. i, p. 86.

No account of the leading publicists of the world would be at all complete that omitted the name of Fedor Fedorovitch Martens, the eminent Russian, born at Pernau in 1845, and educated at St. Petersburg, where he was appointed professor of international law at the age of twenty-five. On the death of Prince Gortschakof he was made a permanent member of the Council of Foreign Affairs, and as such he has represented his government at various international conferences. Many of his works on international law have been translated into French, the most important of which are *Les Consulats et la Jurisdiction Consulaire en Orient*, 1873; *La Conflict entre la Chine et la Russie*, 1881; *Traité de Droit Internationale*, 3 vols. 1883-87. To these must be added his collection of treaties and conventions concluded by Russia with foreign powers, of which eleven volumes or more have been published, beginning in 1874. By his honorable services as arbitrator in several international controversies he has won from his friends the soubriquet of "Lord Chief Justice of Christendom."

§ 47. History and literature of international law.—Having now grouped the principal expounders of international law according to their origin, brief mention must be made of the more important works of those who have specially devoted themselves to its history and literature. To Germany belong Von Ompteda's *Literatur des gesammten, so wohl natürlichen als positiven, Völkerrechts*, Ratisbon, 1785, continued by Von Kamptz, *Neue Literatur des Völkerrechts seit dem Jahre 1784*, Berlin, 1817; E. Osenbrüggen's *De Jure Pacis et Belli Romanorum, liber singularis*, Leipzig, 1836; K. Th. Pütter's *Beiträge zur Völkerrechtsgeschichte und Wissenschaft*, Leipzig, 1843; Müller-Jochmus's *Geschichte des Völkerrechts im Alterthum*, Leipzig, 1848; and Robert V. Mohl's *Die Geschichte und Literatur der Staatswissenschaften*, Erlangen, 1855-1858, in the first volume of which is contained an excellent monograph, with criticisms upon the more recent literature touching the subject. To England belong Robert Ward's *Enquiry into the Foundation and History of the Law of Nations in Europe, from the Time of the Greeks and Romans to the Age of Grotius*, London, 1795; and J. Hosack's *Rise and Growth of the Law of Nations as Established by General Usage and by Treaties from the Earliest Time to the Treaty of Utrecht*, London, 1882. To Belgium belongs F. Laurent's *Histoire du droit des gens et des relations internationales*, Ghent, 1850, Paris, 1851, Bruxelles, 1861-68. To the United

States belongs Henry Wheaton's *History of the Law of Nations in Europe and America from the Earliest Times to the Treaty of Washington, 1842*, a work originally written and published in French as a *Mémoire* in answer to the following prize question proposed by the Academy of Moral and Political Sciences in the Institute of France: *Quels sont les progrès qu'a fait le droit des gens en Europe depuis la Paix de Westphalie?* In 1841 Wheaton published as an answer to that question an essay entitled *Histoire du progrès du droit des gens en Europe*, which, in being rendered into English, was expanded into the work in question.<sup>36</sup>

§ 48. Publicists as creators of international rules.—Publicists must be viewed, however, not only as witnesses to the existence of rules laid down by others, but as creators of rules evolved from their mere sense of law, which have won their way through their own merits to general acceptance. Reference has been made already to the splendid age of creative jurisprudence in the history of Roman law that ended with the reign of Severus Alexander,—an age in which the *responsa prudentium* of the jurisconsults, enriched from nearly every branch of human knowledge, laid the foundations of a scientific law literature adorned by the names of Papinian, Gaius, Ulpian and Modestinus.<sup>37</sup> The foundations of modern international law were laid in the same way through the successive efforts of Suarez, Ayala, Gentilis, Grotius, Puffendorf, Wolf, Bynkershoek and Vattel, and of the other less notable authorities of that epoch who worked with them. It is certain that the greater part of the present law of Occupation and Jurisdiction was derived from the application made by the Spanish casuists and Protestant civilians of the rules of Roman law to the momentous international problems presented by the discovery of the New World.<sup>38</sup> In the chapters in which Grotius pleads on account of his *temperamenta belli* may be found stated, perhaps for the first time, many humane rules which have become the undisputed basis of belligerent theory and practice.<sup>39</sup> To the views of Bynkershoek are largely due the rules that now govern as to the extent of a state's territorial waters,<sup>40</sup> while to Vattel must be given special credit for an amplification of the rules through which he has

<sup>36</sup> I am indebted for a knowledge of a few of the works named in this and preceding sections to Calvo, *Le Droit International*, vol. i, pp. 81-91, and to Woolsey, *Introd. to Int. Law*, Appendix 1.

<sup>37</sup> See above, p. 20.

<sup>38</sup> See below, p. 127 et seq.

<sup>39</sup> *De Jure Belli ac Pacis*, III. c. xi, § 14.

<sup>40</sup> See above, p. 61.

tened the growth of the then rapidly developing law of neutrality.<sup>41</sup> There is no adequate foundation for the assumption that the formative period of international law has ended. It is "a living organism,"<sup>42</sup> growing with the growth of nations, and as such it develops new rules to meet new conditions as they arise out of advancing civilization. Its formative period cannot end until it has evolved an international code, and an international tribunal to interpret it.

**Institut de Droit International.**—If it be true that individual publicists, acting in isolation, may evolve from their mere sense of law new rules capable of winning general acceptance, certainly greater importance still should attach to such as are formulated, after patient and exhaustive deliberation, by a collegiate body of those expounders of international law the world over who have attained the greatest celebrity. Such is the constitution of the Institut de Droit International whose annual meetings and weighty publications are doing so much to lead the thoughts of publicists and statesmen into those paths in which progress is most possible. The more notable recommendations so far made by the Institut may be summarized as follows: Its resolutions adopted in 1875 as to the duties of neutrals, founded upon the three rules of the Treaty of Washington, and its declarations as to the inviolability of private property at sea; its code of procedure of the same year for the use of tribunals of arbitration; its proposal of 1877 that neutral governments shall be charged with the duty of preventing shipments of contraband goods from their ports to a belligerent destination; its resolution of 1879 defining the scope of the assumed right of a state to punish foreigners for acts done outside of its jurisdiction; its assent in 1880 to the *Manuel des Lois de la Guerre sur Terre*; its proposed *Règlement des Prises Maritimes of 1882*, and its condemnation in that year of the decision in the Springbok case;<sup>43</sup> its declaration in 1887 as to pacific blockade; its project of 1888 designed to temper the practical application of the right of expelling foreigners; and its resolution of 1894 as to the extension of the three-mile limit. While recommendations thus made have no intrinsic authority, they are entitled to the deference and consideration due to disinterested efforts to reach the wisest conclusions made by those who are able to unite the greatest learning with the widest experience.

<sup>41</sup> *Ibid.*, p. 65.

<sup>42</sup> For that phrase I am indebted to Lawrence. Preface to Principles of Int. Law.

<sup>43</sup> *The Bark Springbok v. The United States*, 5 Walls., 1-28. This case will be considered fully in its proper place.



## CHAPTER III.

### GROTIUS AND THE AFTERGROWTH OF HIS SYSTEM.

§ 49. **Huig van Groot, known as Hugo Grotius.**—At the head of the array of publicists just grouped according to nationality there stands one who has passed through a process of canonization as “the Father of the Law of Nations,” an epithet which has become almost a part of the name of Huig van Groot, generally known as Hugo Grotius, born at Delft, in the Province of Holland, April 10, 1583. The historical school strives neither to make nor unmake heroes; its business is so to place each actor in the line of causation as to make it possible fairly to estimate his thoughts, and their influence, with just reference to those of his predecessors and successors in the same field of activity. It appears from what has been said already as to the works of the predecessors of Grotius—Oldendorp, Suarez, Victoria, Soto, Ayala, Gentilis, and Winckler—that he was not the first to perceive or to declare that some fresh understanding between the sovereign states of Europe should be substituted for the international power of the Holy Roman Empire, finally swept away in the storm of the Reformation. It is not necessary for the fame of Grotius that his predecessors should be deprived of their due meed of praise. Even the stingy spirit in which he himself acknowledged the merits of Ayala and Gentilis should be a rebuke to his adulators.<sup>1</sup> Coming upon the scene at a turning point in European history, Grotius was by his faith and nationality, by his special training as jurist, historian, theologian and man of letters, and above all by his insight, specially qualified for the execution of a task whose scope and necessity were clearly indicated by the political conditions actually existing around him. When the nature of his achievement is viewed in the light of his environment, the origin of his two fundamental conceptions may be traced to sources which are by no means veiled in mystery.

§ 50. **His substitute for the supremacy of the Holy Roman Empire.**—From the time of the establishment of the world dominion of the Roman Empire, the doctrine of subordination of

<sup>1</sup> *De Jure Belli ac Pacis*, Proleg., § 39.

states to a common superior, became so firmly settled in the minds of men, that it seemed a part of the natural order that subject nations and their rulers should look for the settlement of all grave disputes, personal and national, to Caesar, as the supreme source of law and political authority. So completely did that idea overshadow the barbarian hordes which finally wrecked the Empire of the West that they refused to believe in the reality of their own achievement. In the firm belief that the overlordship of Rome was destined to be eternal they assisted in the creation of the new fabric known as the Holy Roman Empire, which, during the interval that divides the coronation of Charles the Great from the Reformation, grew into an international power so potent that its spiritual head in the person of Gregory VII claimed, in the second excommunication passed upon Henry IV, the right "to give and to take away empires, kingdoms, principedoms, marquisates, duchies, countships, and the possessions of all men."<sup>2</sup> While that magnificent conception of a common superior, before whom all states and princes were expected to bow, was passing forever away in the midst of political and social disorder and perpetual war, there developed a longing for the creation of some new central force, which could take the place of the old and perform the mission of peace it had so signally failed to discharge. The first outcry which came from Machiavelli<sup>3</sup> was repeated a century later by Grotius, who was impelled to write, as he tells us himself, because he "observed throughout the Christian world a licentiousness in regard to war, which even barbarous nations ought to be ashamed of; a running to arms upon very frivolous or rather no occasion; which being once taken up, there remained no longer any reverence for right either divine or human, just as if from that time men were authorized and firmly resolved to commit all manner of crimes without restraint."<sup>4</sup> We know now that the dream of impressing upon his contemporaries the necessity for the establishment of a "divine and human law," as a substitute for the obsolete overlordship of the Holy Empire, entered into the mind of Grotius at a very early age. The discovery in 1868 by Professor Fruin of the *De jure praedae*, written by Grotius in 1604, settles the fact that the principles and plan of the

<sup>2</sup> Bryce, Holy Roman Empire, p. 155. As to the belief of the barbarians in the eternity of the Empire, see p. 18.

<sup>3</sup> See above, p. 52.

<sup>4</sup> *De Jure Belli ac Pacis*, Proleg., § 39, Eng. trans., with notes by Barbeyrac, London, 1738.

*De Jure Belli ac Pacis*, published in 1625, were clearly conceived by an abnormally precocious youth of twenty-one, who had made good Latin verses at nine, and who was ripe for the university at twelve.<sup>5</sup> Such was the natural aptitude and training, such the environment, of the author of a work which has been made the subject of extravagant praise upon the one hand, and of unjust depreciation upon the other.<sup>6</sup> Its merits rest in the main upon the presentation of two fundamental conceptions that will be considered separately.

§ 51. Independent and coequal states—territory and jurisdiction coextensive.—All publicists who have written recently admit that the corner-stone of the Grotian system, if such it may be called, was laid when its author made a full and frank admission of the obvious historical fact, that, with the passing of the Holy Empire, the typical modern state, resting upon the idea of territorial sovereignty, reached its full and final development. The effort has been made already to explain how it was that the personal and tribal organizations of the conquering hordes that settled down upon the wreck of the Roman Empire finally became tied to the land through “the process of feudalization,” a process that contributed to the modern world only one new element through the conversion of tribal into territorial sovereignty. In that way the elective king of the migratory nation was gradually transformed into the hereditary lord of a given area of land to which he stood as the baron to his estate, the tenant to his freehold.<sup>7</sup> As soon as the new states thus organized were deprived of a common superior through the collapse of the theory of a universal supremacy, two corollaries became irresistible: first, that each state is independent, and as such coequal with all the rest; second, that territory and jurisdiction are coextensive. Grotius, clearly comprehending these simple truths, emphasized

<sup>5</sup> Cf. Mark Pattison’s article on Grotius in *Enc. Brit.* (9 ed.), vol. xi, p. 218. The *De jure prae- dae* was printed at The Hague under the auspices of Prof. Fruin.

<sup>6</sup> De Quincey said that the work of Grotius is equally divided between “empty truisms and time-serving Dutch falsehoods.” On the other hand Adam Smith declared it to be: “A monument which can only perish with the

civilized intercourse of nations, of which it has laid down the master principles with a master’s hand. Grotius first awakened the conscience of governments to the Christian sense of international duty.” For Mackintosh’s estimate, see *Miscell. Works*, p. 166; for Bluntschli’s, *Geschichte des allgemeinen Staatsrechts* (Munich, 1864).

<sup>7</sup> See above, pp. 28-29.

the fact of the independence of the sovereign states about him by formally repudiating the obsolete doctrine of a temporal and spiritual head of Christendom,<sup>8</sup> armed with the right to exact universal obedience. His primary contention was that each state is absolutely independent of all external human authority.<sup>9</sup> Having thus established a common basis of equality, the difficulty that remained was how to subject sovereign states, through their own volition, to the yoke of legality.

§ 52. Blended product of *jus gentium* and *jus naturae* seized upon by Grotius.—No more novel or difficult problem was ever presented for solution than that which confronted the publicists of the sixteenth and seventeenth centuries when they were called upon to furnish rules adequate, by virtue of their intrinsic weight and dignity, to compel the obedience of the freshly emancipated European nationalities, without the coercive force of any recognized central authority. As imitation is always easier than invention, it is not strange that every mind which attempted to solve the problem should have turned instinctively to Roman jurisprudence as the only source from which the vacuum could be filled. The most enduring outcome of Roman civilization, surviving the wreck of two empires, was Roman law, whose revived study during the twelfth century, in the schools of Italy, Spain, France and England, caused it to be regarded, in the modern as in the ancient world, as the perfection of human wisdom, the only true and eternal law. A special effort has heretofore been made to draw out in some detail the process through which a particular branch of Roman private law, administered by the *praetor peregrinus*, and known as the *jus gentium*, was blended with the Stoic conception of law in the higher sense, as "right reason, pervading all things," and proceeding "from Zeus and the common Nature."<sup>10</sup> Even in Cicero's time the fusion of the *jus gentium* with the *jus naturae* was so complete as to induce him to declare them identical.<sup>11</sup> In that way the *jus gentium* was clothed with a higher authority, a philosophic dignity which tends to obscure its humble origin as a mere division of

<sup>8</sup> *De Jure Belli ac Pacis*, II, c. xxii, §§ 13, 14. State immortal? Ibid., II, c. ix, § 3. How it may die or cease to be.

<sup>9</sup> Can parts of a state be alienated without their own consent? See *De Jure Belli ac Pacis*, II, c. vi, § 4. Ibid., II, c. ix, § 4.

<sup>10</sup> See above, p. 22.

<sup>11</sup> *Lege naturæ, id est gentium, De Off.* i, 23.

private law. To this cause may be attributed the fact that the term *jus gentium* was, in a few exceptional cases,<sup>12</sup> used out of its normal and proper sense to indicate a branch of law binding on all nations in the direction of their international relations as *jus commune gentibus*. And so it may be true that "there floated also always before the eyes of the later Roman jurists a vision of a '*jus naturale*'; a universal code, from which all particular systems are derived, or to which they all tend, at least, to approximate: a set of rules, the matter, or contents, of which is of universal application."<sup>13</sup>

**Effort to give to it a strained construction unsuccessful.** — The effort to give to the blended product of *jus gentium* and *jus naturae* a strained construction was never successful. It was not the extravagant interpretation of Ulpian, but the more restricted and more reasonable one of Gaius, that finally determined its meaning in the time of the Antonines.<sup>14</sup> As Sir Henry Maine has expressed it: "At last, at a peculiarly felicitous conjuncture, Ayala and Grotius were able to obtain for it the enthusiastic assent of Europe, an assent which has been over and over again renewed in every variety of solemn engagement. \* \* \* Having adopted from the Antonine juriconsults the position that the *jus gentium* and the *jus naturae* were identical, Grotius, with his immediate predecessors and his immediate successors, attributed to the law of nature an authority which would never perhaps have been claimed for it, if 'law of nations' had not in that age been an ambiguous expression. They laid down unreservedly that natural law is the code of states, and thus put in operation a process which has continued almost down to our own day, the process of engrafting on the international system rules which are supposed to have been evolved from the unassisted contemplation of the conception of nature."<sup>15</sup> As Grotius and his predecessors were well trained civilians, there is no basis for the assumption that they were befogged as to the true nature of *jus gentium* and *jus naturae* as convertible terms. The fact that the *jus gentium* was only a branch of Roman private law, and not a system of rules which had been previously

<sup>12</sup> Hoc vos, Fecliales, juris gentibus dicitis? Livy ix, II. Populum Romanum neque recte neque pro bono facturum, si ab jure gentium se prohibuerit, Sallust, Bell. Jug., c. xxii. Cf. Prof. Nettleship's arti-

cle on *Jus Gentium* in the Journal of Philology, vol. xiii, No. 26.

<sup>13</sup> Holland, Elements of Jurisprudence, p. 6.

<sup>14</sup> See above, p. 23.

<sup>15</sup> Ancient Law, pp. 95-96.

applied to the relations of states, was no reason why it should not have been lifted into a higher sphere. Before Grotius appeared upon the scene his Spanish and Italian predecessors had surveyed the whole field,—Gentilis in particular having specially emphasized the fact that the *jus naturae* was the highest embodiment of human reason, by which all historical precedents were to be tested, and, if necessary, set aside.<sup>16</sup> And yet, acute and learned as they were, the predecessors of Grotius were not able to catch the ear of the world. It was his good fortune “to come along behind them and pick up their brains,” and to fuse, through his rare art of exposition, their scattered and fragmentary thoughts into one coherent whole which appealed in due time to all mankind, and thus “first awakened the conscience of governments to the Christian sense of international duty.”

§ 53. The Grotian law of nature—an alternative basis resting on consent alone.—Nothing could be more clear or vivid than Grotius’s definition of natural law as the Antonine jurist had understood it. In his prologomena<sup>17</sup> he declares that “the principles of that law, if you rightly consider, are manifest and self-evident, almost after the same manner as those things are that we perceive with our outward senses, which do not deceive us, if the organs are rightly disposed, and if other things necessary are not wanting.” And in the body of his work he adds: “Natural right is the rule and dictate of right reason, showing the moral deformity or moral necessity there is in any act, according to its suitableness or unsuitableness to a reasonable nature, and consequently, that such an act is either forbid or commanded by God, the author of nature.”<sup>18</sup> One can almost imagine that he hears the great Stoic Chrysippus speaking of the natural law as “the right reason, pervading all things,”<sup>19</sup> and “proceeding from Zeus and the common nature.”<sup>20</sup> Grotius, following in the footsteps of Suarez and Gentilis, accepted the dominant idea of the age that nature was a lawgiver. His dream was to place her as such upon the vacant Imperial throne, and then to interpret her mandates

<sup>16</sup> See above, p. 54.

<sup>17</sup> *De Jure Belli ac Pacis*, § XL.

<sup>18</sup> *De Jure Belli ac Pacis*, I, c. i, § 10.

<sup>19</sup> See above, p. 22.

<sup>20</sup> Grotius declared in so many words: “And in this sense Chrys-

sippus and the Stoics said, that the original of right is to be derived from no other than Jupiter himself; from which word Jupiter it is probable the Latins gave it the name *jus*.” Proleg., § XII.

to nations who would admit no other superior. "The law of nature is," he says, "so unalterable that God himself cannot change it. For though the power of God be immense, yet may we say, that there are some things unto which this infinite power does not extend. \* \* \* For instance then, as twice two should not be four, God himself cannot affect; so neither can He, that what is intrinsically evil should not be evil." The practical difficulty inherent in this splendid conception was its vagueness, the same difficulty that beset Comte's system of religion, in which Humanity as a concrete conception was exalted to the throne occupied by the Supreme Being under monotheistic systems. Eternal and unalterable as the Grotian law of nature was said to be, it was in fact indeterminate, although in theory it might be assumed to be otherwise. Interpreted by one mind, it meant one thing, by another, something quite the opposite. Therefore, without some kind of common consent as to what its precepts were, it was nothing more than a glittering abstraction. Clearly perceiving that difficulty, Grotius very discreetly formulated an alternative basis for the new system which enabled it to rest upon consent alone. Alongside of the law natural, he said, there was a law voluntary whose nature was twofold, divine and human. While the former could never conflict with the law natural, the latter might. This human voluntary law he divided into three parts; first the law made for the benefit of a single society, the civil law; second, the law of the particular condition; third, the law made for the benefit of all societies, the law of nations.<sup>21</sup> The authority of that law he said was derived from the approval of all, or at least of many nations,—the proof of it consisting of continued usage and the testimony of experts.<sup>22</sup> Thus it was that Grotius reached the common sense basis upon which the law of nations now reposes,—the abstract and transcendental foundation embodied in his first postulate having been finally swept away.

§ 54. International law regarded as positive law by transcendental school.—False and unhistorical as the obsolete theory of natural law really is, there can be no doubt that it served a useful purpose in its day, in giving moral dignity to

<sup>21</sup> *De Jure Belli ac Pacis*, I, c. i, §§ 13, 14, 15.

<sup>22</sup> *Latius autem patens est jus gentium, id est quod gentium omnium aut multarum voluntate vim*

*obligandi accepit. \* \* Probatur autem hoc jus gentium pari modo quo jus scriptum civile, usu continuo et testimonio peritorum.* Ibid., § 14.

the new system by reason of the then prevalent idea, that it was the highest and most sacred of all law, and, as such, binding upon all who aspired to stand above the brute creation. The original force of the idea must certainly have been great, if it may be estimated by the permanency of its influence. It is marvelous to see how a large majority of the best writers upon international law, even down to our own time, have persisted in deriving its principles from a transcendental source; such as Nature, Reason, and the Divine Will. While each member of that school has striven, through some ingenuity of his own, to make the old doctrines more manageable or reasonable, beneath it all there is a common undertone that cannot be mistaken. The general assumption is that not only does international law flow from a transcendental source, but that it has all the qualities of positive law imparted by a law-giver,—command, and the power to enforce the command. In mitigation of the conclusion that such law is binding upon all nations, *proprio vigore*, ingenious refinements are indulged in by one sect to prove that it must be adopted by the conscious act of each independent community, while another claims that a tacit assent may be presumed from the acts of governments in their mutual dealings.<sup>23</sup> The following extracts from well-known authors will be given as typical expositions of the general theory, without the special qualifications through which some of them have attempted to limit it or explain it away. Puffendorf, a disciple of Grotius who went beyond his master, assuming that the natural *jus gentium* is included in the wider science of *jus naturae*, accepted Hobbes's statement that "the natural law may be divided into the natural law of men, and the natural law of states, commonly called the law of nations."<sup>24</sup> Beyond that Puffendorf declares "there is no other voluntary or positive law of nations properly invested with a true and legal force, and binding as the command of a superior power."<sup>25</sup> Vattel, the disciple of Wolf, who believed that the law of nations was the natural law applied to international affairs, avers that "we call that the necessary law of nations which consists in the application of the law of nature to nations. It is *necessary* because nations are *abso-*

<sup>23</sup> See the elaborate opinions of Lord Coleridge, C. J., and of Cockburn, C. J., in *The Queen v. Keyn*, Law Rep. 2. Exchequer Division, pp. 63-239.

<sup>24</sup> *De Cive*, c. xiv, § 4.

<sup>25</sup> *De Jure Naturae et Gentium*, II, c. iii, § 23.



lutely bound to observe it. This law contains the precepts prescribed by the law of nature to states, on whom the law is not less obligatory than on individuals. \* \* \* This is the law which Grotius, and those who follow him, call the *internal law of nations*, on account of its being obligatory upon nations in point of *conscience*.”<sup>26</sup> Hautefeuille declares that “international law, then, has its foundation in the divine or primitive law; it is from this source that it entirely flows. By the help of this law alone, I firmly believe that it is not only possible, but easy to regulate all the relations which exist, or which can exist, between the peoples of the world. This common and positive law contains all the rules of justice; it exists independently of all legislation, of all human institutions. It rules peace and war, and traces out, in every position of affairs, their rights and duties.”<sup>27</sup> Sir Robert Phillimore believed that “moral persons are governed partly by Divine law (*leges divinae*), which includes natural law—partly, by positive instituted human law, which includes written and unwritten law or customs (*jus scriptum, non scriptum consuetudo*). States, it has been said, are reciprocally recognized as moral persons. States are therefore governed, in their mutual relations, partly by Divine, and partly by positive law. Divine law is either (1) that which is written by the finger of God on the heart of man, when it is called natural law, or (2) that which has been miraculously made known to him, when it is called revealed or Christian law. The primary source, then, of international jurisprudence is divine law.”<sup>28</sup> To the mind of Sir Robert the usage of nations was the evidence of, but not the origin of, that law,—usage only expressed “the consent of nations to things which are *naturally*, that is, by the law of God, binding upon them.”<sup>29</sup> Even Bluntschli declared that “the law of nations is that recognized universal law of nature which binds different states together in a humane jural society, and which also secures to the members of different states a common protection of law for their general human and international rights.”<sup>30</sup>

§ 55. International law not positive law—Austin, Holland, Wilson.—The foregoing are fair examples of the formulas in which the old transcendental school has been accustomed to

<sup>26</sup> *Droit des Gens*, Préliminaires,

§ 7.

<sup>27</sup> *Des Droits et des Devoirs des Nations Neutres*, introd. ch.

<sup>28</sup> *Int. Law*, vol. i, p 15.

<sup>29</sup> *Ibid*, preface, p. v.

<sup>30</sup> *Das Völkerrecht*, § 1.

aver, (1) that international law finds its origin in some super-human source; (2) that by virtue of its origin it is really positive law, unchangeable, and binding upon all nations without any expressed or implied assent upon their part. The first assumption, whose vital infirmity has been pointed out already, has been assailed both by the analytical and historical schools, and has been rejected by both because it is at once unnecessary, unscientific and unhistorical. The second assumption, that international law is positive law, has broken down long ago under the principles laid down by Austin, who defines law, "in the most general and comprehensive acceptation in which the term, in its *literal* meaning, is employed," to be rules of conduct "laid down for the guidance of an intelligent being by an intelligent being having power over him." Under that definition are embraced (a) Laws set by God to Men, styled Laws of God, or Divine Law, and (b) Laws set by Men to Men." Laws of the latter class are set by authors, determinate or indeterminate, and are accordingly laws proper or improper. A law set by a determinate author is styled a law proper, and to that class belong the laws of God and also certain of the laws set by men to men. To the small division of law proper set to men by men, being political superiors acting as such, Austin applies the term positive law, in order to distinguish it from divine law, positive morality, and law metaphorical. "The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors."<sup>31</sup> The essence of Austin's quaint and pedantic description of positive law is that it must be a command, armed with a definite sanction, issuing from a determinate author,—a "law set by political superiors to political inferiors." International law is thus excluded from the domain of positive law because its mandates do not issue from a common superior armed with power to enforce obedience. "It differs from ordinary law in being unsupported by the authority of a state. It differs from ordinary morality in being a rule for states and not for individuals. It is the vanishing point of jurisprudence; since it lacks any arbiter of disputed questions, save public opinion, beyond and above the disputant parties themselves, and since, in proportion as it tends to become assimilated to true law by the aggregation of states into a larger society, it ceases to be itself, and is

<sup>31</sup> The Province of Jurisprudence Determined, lecture 1.

transmuted into the public law of a federal government.”<sup>32</sup> Because international law is only enforceable through the public opinion of civilized states, it is set by an indeterminate author, and is therefore law improper, that is, no law at all. For that reason it has been assigned by Austin a place in his positive morality, alongside of those customary rules observed among mankind for whose breach no authoritative punishment can be inflicted. As an eminent publicist of our own has recently stated it: “The province of international law may be described as a province half way between the province of morals and the province of positive law. It is law without a forceful sanction.”<sup>33</sup> While international law must thus be content to abide for a time in the borderland to which recent classification has assigned it, there is no reason to believe that current classifications and definitions of law are destined to be final. Already the Austinian system is under a fire that may sweep it away before the incoming of the next generation.

§ 56. International law defined by those who do not regard it as positive law.—To illustrate the actual result of the rejection of the theories that international law originates in a transcendental source, and that it is really positive law, it will be necessary to place in juxtaposition the definitions of such representatives of the new school as ignore both assumptions. Austin says that “international law is founded on the opinions generally received among civilized nations, and its duties are enforced only by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility and incurring its probable evils, in case they should violate maxims generally received and respected;”<sup>34</sup> Holland,<sup>35</sup> that “the body of rules regulating those rights in which both of the personal factors are states is loosely called ‘the law of nations’, but more appropriately ‘jus inter gentes,’ or international law;”<sup>36</sup> Lawrence, that “international law may be defined as the rules which determine the conduct of the general body of civilized states in their dealings with one another;” Hall, that “international law consists in certain rules of conduct which modern civilized states regard as

<sup>32</sup> Holland, *Elements of Jurisprudence*, pp. 345-346.

<sup>33</sup> Woodrow Wilson, *The State*, p. 628.

<sup>34</sup> *Province of Jurisprudence Determined*, pp. 147-148.

<sup>35</sup> *Elements of Jurisprudence*, p. 345.

<sup>36</sup> *Principles of Int. Law*, p. 1.

being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement;"<sup>37</sup> Bulmerincq,<sup>38</sup> that international law "is the totality of legal rules and institutions which have developed themselves touching the relations of states to one another;" Prof. Cairns, that "international law is the formal expression of the public opinion of the civilized world respecting the rules of conduct which ought to govern the relations of independent nations, and is, consequently, derived from the source from which all public opinion flows,—the moral and intellectual convictions of mankind;"<sup>39</sup> Calvo, that "the law of nations or international law should be understood to be the sum of the rules of conduct observed by the different nations in their relations with each other; in other words, the totality of mutual obligations of states,—that is to say, of the duties they ought to fulfil, and the rights they ought to defend in regard to each other;"<sup>40</sup> Lord Coleridge, that "the law of nations is that collection of usages which civilized states have agreed to observe in their dealing with one another;"<sup>41</sup> Sir Travers Twiss, that "the science of the law of nations may be accordingly defined to be the science of the rules which govern the international life of states."<sup>42</sup> Not only is there an entire absence from these definitions of any reference to the origin of international law in a transcendental source, but in all of them such understandings or customs as actually exist between civilized nations are carefully designated as "rules" or "usages" in order to emphasize the fact that they are not laws in the current acceptance of that term. And yet while that fact is perfectly understood by all special students of the subject, the term "international law," in the limited and technical sense that has been given it, is universally used by all publicists as a convenient phrase in the absence of a more perfect designation.

§ 57. **Alternative proposition of Grotius basis of modern system.**—By the sweeping away of the transcendental theory of

<sup>37</sup> Int. Law, p. 1.

<sup>38</sup> *Das Völkerrecht* (in Marquardsen's *Handbuch*, vol. i), § I of the monograph.

<sup>39</sup> Quoted in Dana's notes to Wheaton's *Elements*, p. 23.

<sup>40</sup> *Le Droit International*, vol. i, p. 93.

<sup>41</sup> *The Queen v. Keyn*, Law Rep. 2 Exchequer Division, p. 154.

<sup>42</sup> *Law of Nations*, vol. i, p. 2.

the origin of international law, and by the consequent severance of its connection with what is generally known as divine law, the existing system of rules now regulating the intercourse of nations can find no other basis upon which to rest than that embodied in the alternative proposition of Grotius, which declares that the law of nations derives its authority from the unanimous approbation of all, or, at least, of many nations; its proofs are continued usage and the testimony of the *jurisperiti*.<sup>43</sup> The fact must be remembered, however, that when Grotius formulated that alternative, his primary assumption stood above it as a reservoir full of the moral force and dignity inherent in the *jus gentium* as the equivalent of *jus naturae*. "The habit of identifying the Roman law with the law of nature, for the purpose of giving it dignity, was of old date in Europe. When a clergyman or a lawyer of an early age wishes to quote Roman law in a country in which its authority was not recognized, or in a case to which Roman law was not allowed to apply, he calls it 'natural' law."<sup>44</sup> Since the old reservoir has been removed, to what source can we go for a moral force adequate to the task of sustaining a system of mere rules that do not rise to the dignity of laws, and which apply only to states as such? The obvious answer is, that such states are in their corporate capacity moral beings, clothed with all the rights and duties that pertain to the individual members of which they are composed. As Pinheiro-Ferreira has well expressed it: "The sole difference there is between citizens united in a single state and the different peoples of the earth is that for a settlement of their differences the first resort to the decisions of their legislators and judges, while the second rarely submit to such methods, preferring to adjust their conflicts by an appeal to force. And yet as no one will maintain that might makes right, it must be admitted that, prior to the employment of force, there were rights on the one hand and duties on the other. It is these rights and duties, *outside the sphere of force and legislation*, that constitute what is called the law of nations."<sup>45</sup> The founders of modern international law fancied they had discovered infallible criteria for the definition of all such rights and duties in what they called laws of nature;—"precepts, obedience to which, whether it be or be not commanded by the state, is

<sup>43</sup> See above, p. 79.

<sup>45</sup> Cf. Calvo, *Le Droit Interna-*

<sup>44</sup> Maine, *International Law*, p. tional, pp. 93-94.

insisted upon by a deep rooted public sentiment. Resting essentially upon public sentiment, they are rules of morality; but having reference only to such outward actions as are thought fit for political enforcement, they form only one class of such rules."<sup>46</sup>

§ 58. **Author's definition of international law.**—Public sentiment is really the reservoir from which the rules now regulating the mutual relations of states have been slowly drawn through the experience, the usage of nations. Usage or "custom is, as it were, the filter-bed through which all that comes from the fountains must pass before it reaches the main stream."<sup>47</sup> Or to borrow a stronger simile from the astronomers, that vast and universal conception of morality and legality constituting the public opinion of the civilized world is the central light, which, like the sun, has thrown off the nebulous envelopes or rings that have gradually hardened into the compact international rules which rise almost to the dignity of positive laws. The hope this simile suggests is embodied in the fact that no matter how much it may have thrown off, the original nucleus of light remains unimpaired. For that reason the statement has heretofore been made that there is no adequate basis for the assumption that the formative period of international law has closed. With that fact clearly in view, *international law may be defined to be the aggregate of rules regulating the intercourse of states, which have been gradually evolved out of the moral and intellectual convictions of the civilized world as the necessity for their existence has been demonstrated by experience.* In the light of such a definition the relation of international to natural law loses its importance, while the ancient and arbitrary divisions of the former into a natural and voluntary, or into a natural or necessary, voluntary, conventional, and customary law of nations fade into mere archaisms.

§ 59. **Origin of the phrase, "international law."**—It is not strange that the close connection between international and Roman law should have caused it to be occasionally called civil law, *ius civile*. It was so described by Bishop Ridley in a speech made as Visitor to the university of Cambridge in the reign of Edward VI; and about a century and a half

<sup>46</sup> Holland, *Elements of Jurisprudence*, p. 29.

<sup>47</sup> Lawrence, *Principles of Int. Law*, p. 91.

later it was so designated by Locke in his work on Education.<sup>48</sup> The title given by Gentilis to his book was *De Jure Belli* (1588), to which Grotius so added as to make the title of his work, *De Jure Belli ac Pacis* (1625). Then followed the work of Zouch, the English admiralty judge, entitled *Juris et Judicii Fecialis, sive Juris inter Gentes*<sup>49</sup> (1650). In the same way in which Zouch attempted to identify the new system with Roman Fetial law, Puffendorf attempted to identify it with the *jus naturae* by entitling his work *De Jure Naturae et Gentium* (1672). Nearly a century later Vattel added to the difficulty by naming his production *Droit des gens* (1758), the French equivalent of the Latin *jus gentium*. In order to diminish the confusion thus increased by the suggestion that *jus gentium* was that part of the law of Rome that regulated her relations with other independent states, Jeremy Bentham,<sup>50</sup> in 1780, coined the phrase "international law," which still survives as the only available description of a set of rules excluded by the current method of classification from the domain of positive law.

§ 60. **Limits of its original sphere.**—The original sphere of international law was defined by the boundaries of those states which belonged to the new European system brought into being through the Peace of Westphalia,—a system admitting in theory the absolute independence and equality of every state upon the basis of territorial sovereignty while limiting in fact such independence by an assumption, for a long time considered axiomatic, that the leading European states should possess only such a nicely adjusted proportion of power as would make it impossible for any one of them ever to acquire a preponderating influence. That system, whose primary purpose it was to preserve the balance of power, originally embraced only the Christian states of Europe,—it did not extend either to the New World, or to the civilized yet non-Christian nations recently received into the fold. How the New World was in due time added to the domain of international law, and how a new principle has been here established as the equivalent of the Old World doctrine of a balance of

<sup>48</sup> Nys, *L'Histoire Litteraire et Dogmatique du Droit International en Angleterre*, p. 27; Lawrence, pp. 8-9.

verted Zouch's new term into *Droit entre les Gens*, Oeuvres, iv, p. 267.

<sup>50</sup> Works. *Morals and Legislation*, Pt. 1, p. 149, Bowring ed.

<sup>49</sup> Chancellor D'Aguesseau con-

power, will hereafter be made the subject of special consideration.<sup>51</sup>

§ 61. **How a state may assent to an international rule.**—If the question be asked, as to the manner in which the older European states originally acknowledged the binding force of the new international system, the answer must be given, that many of them were initiated at its birth without formal ceremony, and that since that time they have confirmed their membership in the family of nations by a series of acts which constitute the long history of their mutual intercourse. The relation Great Britain bears to the system was thus expressed by Sir Alexander Cockburn in his judgment given in the famous Alabama Controversy settled at Geneva in 1872: “As Great Britain forms part of the great fraternity of nations, the English common law adopts the fundamental principles of international law and the obligations and duties they impose; so that it becomes, by force of the municipal law, the duty of every man, so far as in him lies, to observe them, by reason of which any act done in contravention of such obligations becomes an offense against the law of his country.” Four years thereafter the English Court of Criminal Appeal decided the notable case of the *Queen vs. Keyn*<sup>52</sup> (popularly called the “Franconia” case) which arose out of the conviction for manslaughter of a German captain of a German ship who, within two miles and a half from the beach at Dover, through negligence, as the jury found, ran into a British ship, sank her, and caused the death of one of her passengers. The great question on appeal was whether or no the English criminal courts of common law had jurisdiction over such crimes committed within the three mile zone. Certainly there was no jurisdiction unless such zone (leaving out of view its exact width), was British territory; and, as the common law never extended itself so far from shore, it could only have become such by virtue of Great Britain’s adoption of the general rule of international law on that subject. As Lord Chief Justice Cockburn stated it: “It thus appearing, as it seems to me, that the littoral sea beyond low-water did not, as distinguished from the rest of the high seas, originally form part of the territory of the realm, the question again presents itself, when and how did it become so? Can a portion of that which

<sup>51</sup> See below, p. 127 *seq.*

<sup>52</sup> Law Rep., 2 Exchequer Division, pp. 63-239.



was before high sea have been converted into British territory without any action on the part of the British government or legislature—by the mere assertions of writers on public law—or even by the assent of other nations? And when in support of this position, or of the theory of the three-mile zone in general, the statements of the writers on international law are relied on, the question may be asked, upon what authority are these statements founded? When and in what manner have the nations, who are to be affected by such a rule as these writers, following one another, have laid down, signify their assent to it? To say nothing of the difficulty which might be found in saying to which of these conflicting opinions such assent had been given.” The Court by a majority of one only, including the Chief Justice, held that the assent of a nation to such a rule of international law, as the one in question, must be manifested by some formal act performed by it in its sovereign capacity—such, for instance, in the case of Great Britain, as an act of parliament or the judgment of a competent tribunal. The result was that the conviction was quashed, upon the ground that the court which tried the prisoner had no jurisdiction; and two years thereafter parliament enacted the ‘Territorial Waters Jurisdiction Act’<sup>53</sup> by which the jurisdiction of the English courts that had succeeded to the jurisdiction of the Admiral of England was declared to extend, according to the international rule prevailing everywhere else, over the three-mile zone. Thus was Great Britain saved from the inconvenience of a judgment, declared to be unsound by one of the greatest English jurists since Bentham,<sup>54</sup> that would have placed her in conflict with the whole civilized world as to the form in which the assent of a nation to the rules of international law should be manifested. Lord Coleridge, in his dissenting opinion, stated the general rule correctly when he said, in substance, that while a nation could only become subject to international law through its assent, in the case of Great Britain and all other civilized powers such assent has been given already, either by express action or declaration, or at all events by a non-dissent.

§ 62. Original sphere widened by admission of states, new and old.—The original sphere of international law has been con-

<sup>53</sup> 40 and 41 Vic. c. 73. Cf. Sir J. F. Stephen, *Hist. of the Crim. Law*, vol. ii, p. 29 *et seq.*      <sup>54</sup> Sir Henry Maine, *International Law*, pp. 39-44.

siderably widened through its extension to new states which have come into existence since its foundations were laid, and to a few old non-Christian states received recently into the family of nations. In the first class are included such states as have been constituted during the present century by civilized men in heretofore uncivilized countries. As an illustration reference may be made to the Republic of Liberia, which grew out of the efforts of The American Colonization Society, that obtained in 1821 from native African chiefs a cession of territory on the coast of Upper Guinea upon which a community was formed that established its independence, and, in 1847, assumed the name of the Republic of Liberia. Through the formal recognition of the new state by Great Britain in a treaty made in 1848,<sup>55</sup> and by like acts upon the part of other nations, the national existence of the negro republic has been clearly established. In 1835 a company of Dutch farmers left Cape Colony and settled first in what was known as the Colony of Natal, whence, upon its annexation to the British Empire, they removed beyond the river Vaal into a new country, in which they established the Transvaal or South African Republic, recognized in 1852 by Great Britain as an independent state, and in due time by other nations. Although deprived through subsequent events of a part of its external sovereignty, the Transvaal continued to exist as a distinct political community down to its recent subjugation. A philanthropic society directed by the King of the Belgians, and known as the International Association of the Congo,<sup>56</sup> founded in the basin of that river civilized communities for the purpose of breaking down the slave trade and for opening up the country to commerce and peaceful settlement. After acquiring for itself vast territories through treaties made with many native tribes, the boundaries of the Association were clearly defined in a series of declarations and conventions negotiated in 1884 and 1885 with the several states represented at the West African Conference at Berlin, which there recognized the new community founded by the Association as an independent nation, and its flag as that of a friendly power.<sup>57</sup> To states thus organized must be added such as have established a

<sup>55</sup> Twiss, *Law of Nations*, preface to 2nd ed.

<sup>56</sup> In 1876 Leopold II invited representative geographers to his palace for a conference to discuss

the exploration and civilization of Africa through the development of commerce and the abolition of the slave trade.

<sup>57</sup> See above, p. 46.

distinct political existence through successful revolt from the mother state and subsequent recognition of their independence by other nations. At the head of that class stands the federal republic of the United States, whose successful revolt from Great Britain and subsequent recognition by the nations of the earth paved the way for the emancipation of the Latin communities in South America which broke away from Spain and Portugal, and for the emancipation of Texas from Mexico.

§ 63. All dealings with infidels once deemed unlawful.—The original theory of the Christian states that founded the international system was that all dealings, whether by treaty or otherwise, with heathen or infidel nations were unlawful. It was, however, no crime to make war upon them or to deprive them of their territories.<sup>58</sup> Not until 1720 was a Russian minister permitted to reside at Constantinople, and not until after the beginning of the present century did it become the custom for the European states to admit the Sultan into treaty relations. Thus by degrees ancient prejudice gave way before the conviction that heathen communities should become entitled even to formal admission into the family of nations whenever they are found to possess stable and organized governments recognizing to some extent at least the fundamental principles of European civilization. Under these changed conditions Turkey was received in 1856 through the Treaty of Paris, whose seventh article declared “the Sublime Porte admitted to participate in the advantages of the public law of Europe and the system of concert attached to it;” and since then China, Japan, Persia and Siam have been with adequate formality accorded like recognitions. In that way the sphere of the international system, widening beyond the limits of Christian states, has become practically coterminous with civilization.

§ 64. Qualified extension of international law to non-Christian states.—And yet it would be erroneous to assume that the reciprocity existing between Christian states has been extended absolutely to such as are non-Christian; or that the former have been disposed to force the ethical rules recognized among themselves in all their severity upon those who have not reached the same stage of advancement. In 1804 when Lord Stowell was called upon to enforce the public law

<sup>58</sup> For the then current opinions as expressed by Conrad Brunus, see above, p. 56.

of Europe against Turks he said, in the case of *The Madonna del Burso*,<sup>59</sup> that "The inhabitants of the Ottoman Empire are not possessors of exactly the same law of nations with ourselves. In consideration of the peculiarities of their situation and character, the court has repeatedly expressed its disposition not to hold them bound to the utmost rigour of that system of public law, on which European states have so long acted in their intercourse with one another." And in the case of *Mahoney v. The United States*<sup>60</sup> (1870),—in which it was held that upon Algiers becoming a French province, the functions of an American consul previously accredited to that country were *ipso facto* changed,—the court said: "The full reciprocity, which, by the general rule of international law, prevails between Christian states in the exercise of jurisdiction over the subjects or citizens of each other in their respective territories, is not admitted between a Christian state and a Mohammedan state in the same circumstances; and in our treaties with Mahometan powers, express stipulations are made for the enjoyment by our citizens of certain extra territorial rights with respect to their persons and property." And to that may be added the declaration of Mr. David Dudley Field, who said that as a general rule "it may be considered certain that the law of nations, as understood in Christendom, is not yet extended in its plenitude to the rest of the world. The reason is obvious. That law was first planted in Europe, and has been cultivated only in Europe and America. Its object is the intercourse and community of nations. The object of all people outside of Christendom has been conquest or isolation and non-intercourse."<sup>61</sup> The limited reciprocity thus extended to non-Christian states is usually defined in treaties in which, so far as the United States is concerned, it is usually provided that American consuls shall have exclusive jurisdiction over civil controversies between American citizens.

<sup>59</sup> 46 Robinson's Adm., p. 172.

<sup>60</sup> 10 Wallace, p. 62.

<sup>61</sup> Paper presented to the Institute of Int. Law, and entitled "Ap-

plicability of Int. Law to Oriental Nations." Printed in Appendix to his Int. Code, pp. 663-670.

## CHAPTER IV.

### TREATIES AS SOURCES OF INTERNATIONAL LAW.

§ 65. Treaties as mere agreements affecting special interests.—If international law, ancient, medieval and modern, may be justly regarded as one unbroken development, treaties should be ranked among the primary sources from which its rules have been drawn. In “Greek diplomacy, which, considering the ground it covers is vastly fuller than that of modern times, \* \* \* there were eight or ten technical terms to express the different sorts of treaties into which nations might enter.”<sup>1</sup> As sources of modern international law, treaties appear in only three aspects, each of which will be considered in the order of its importance. In their humblest and narrowest aspect treaties are mere agreements between states for the settlement of their current interests or controversies, made either with a tacit admission of the existence of a common law of nations, or with an express stipulation that some principle of that law shall be changed or modified in a particular case. As Madison expressed it: “They may be considered as simply repeating or affirming the general law; they may be considered as making exceptions to the general law, which are to be a particular law between the parties themselves.”<sup>2</sup> As an example of a treaty between two nations for the establishment of a special rule peculiar to themselves, reference may be made to that executed between Prussia and the United States in 1785, in which it was agreed that in case one was at war while the other was at peace, the belligerent would be content simply to detain contraband goods found upon a neutral vessel in lieu of the manifest right of confiscation.<sup>3</sup>

How a special stipulation may grow into a general rule.—While nothing could be, *per se*, more unlike a source of international law than such a stipulation, it is perfectly possible even for such an exception to grow into a general rule, if, in the process of time, its wisdom and convenience are demonstrated by

<sup>1</sup> Prof. H. B. Leech's Essay on Ancient International Law, p. 22.

<sup>2</sup> Examination of the British Doctrine, etc., p. 39.

<sup>3</sup> Treaties of the U. S., p. 903.

experience. Such a special rule may work so well in practice that nation after nation will adopt it until in the end all will accept it as a part of what is generally known as the common law of nations. In such a case the first treaty in which the special stipulation occurred must be regarded as the source from which the new general rule has been drawn. A notable illustration of the working of such a process may be found in the history of the famous rule that free ships make free goods, a rule that has slowly worked its way, through its own merits, into general acceptance during the long interval that has elapsed since 1650, when, for the first time, it was introduced into a treaty between Christian powers through a negotiation concluded in that year between Spain and the Netherlands.<sup>4</sup>

§ 66. *Treaties declaring new general rules or modifying old ones.*—A second and higher relation in which treaties are usually considered as sources of international law is that assumed when their makers deliberately and avowedly lay down new rules or modify old ones. In that aspect, Madison says, that “treaties may be considered a voluntary or positive law of nations.”<sup>5</sup> Certainly they cannot become such until assent is manifested according to the Grotian rule which requires the approbation of all, or at least of many nations. In theory, no state, however small, can be bound by a new rule until it has accepted it; in fact it becomes morally subject to it after many of the greater nations have, during a considerable period of time, actually observed it. An ideal treaty of the kind in question would be one in which all nations, great and small, should explicitly agree upon all the precepts necessary to determine their mutual relations, with a permanent tribunal to construe and apply them. In the absence of such an ideal, groups of nations have from time to time striven to approach it by the making of new rules binding upon themselves in the hope that they will ultimately win universal acceptance. The practical value of such efforts necessarily depends upon the weight and number of the signatories, and upon the length of time during which the new rules continue in force. A hopeful example of treaties of that class may be found in the Declaration of Paris made in 1856<sup>6</sup> by France, Great Britain, Russia, Sardinia, Austria, Prussia, and the Ottoman Porte,—without

<sup>4</sup> Dumont, *Corps Diplomatique*, vol. vi, Pt. I, p. 571; Laurence, p. 99.

<sup>5</sup> Examination of the British Doctrine, etc., p. 39.

<sup>6</sup> Martens (N. R. G.), XV, 791.

the signature of the United States, Spain and Mexico,<sup>7</sup>—wherein new maritime rules were laid down as to privateering, blockades, and the seizure of goods at sea. Despite the lack of unanimity privateering has been practically abolished as a result of the agreement actually made. In the Treaty of Washington of 1871, the United States and Great Britain agreed upon three rules to be taken as applicable to the international *cause célèbre*, generally known as the Alabama case,—rules which were to govern the arbitrators in their decision, along with the “principles of international law not inconsistent therewith.”<sup>8</sup> As the United States contended that all three rules were in force when the acts in question were committed, the treaty was, as to her, purely declaratory; while as to Great Britain, who denied that assumption, it was creative of new rules by which she agreed to be judged in that case. In contrast with the assent thus given by only two nations to rules, admitted to be new by only one of them, may be cited the assent of the civilized world to the Final Act of the Brussels Conference of 1890 for the suppression of the African Slave Trade,—a conference, called by Belgium at the instance of Great Britain, whose work was crowned with the assent of all upon its ratification by France in January and by the United States in February, 1892.<sup>9</sup> The three conventions signed at the Peace Conference at The Hague in 1899 are, however, by far the most important illustration that has so far occurred of a successful effort upon the part of many nations to agree upon a system of rules to determine their mutual rights and duties in reference to certain vital concerns.

§ 67. Treaties as bases of concerted action for maintenance of balance of power.—A third and higher relation still in which treaties stand to international law, is that assumed when, as bases of some great concerted action between all or nearly all of the states of Europe, they have been made so to change the status of territories, and so to determine the fate of dynasties, as to preserve the balance of power which the Concert of Europe is supposed specially to guard. Since the Peace of Westphalia the general treaty system then established, whose

<sup>7</sup> The United States declined because the principles in question were not so extended as to secure from capture all private property at sea. See Mr. Marcy, Sec. of State, to M. de Sartiges, Minister

of France, Wharton, Int. Law Dig., vol. iii, § 385.

<sup>8</sup> Treaties of the U. S., p. 481.

<sup>9</sup> British State Papers, Africa, No. 7 (1890); Ibid., Treaty Series, No. 7 (1892).

primary purpose was to preserve the balance of power then established, has been inseparable from its offspring. In order, therefore, fully to grasp the development of the public law of Europe since that time the two systems must be considered together. The underlying motive which shaped the results of the effort made in 1648 to rebuild the state-system of Europe by the aid of diplomacy, must be found in the fact that when Richelieu flung France into the Thirty Years' War the essence of his policy was to break the power of the house of Hapsburg, and to render impossible the unity of Germany under its leadership. While he did not live to see the triumph of his plan, it was fully realized when upon the exhaustion of all the combatants France and Sweden, who had borne the brunt of the battle against Ferdinand II and his son, were able to dictate the treaties of Münster and Osnabrück which became the basis of the new Germanic constitution.<sup>10</sup>

§ 68. Peace of Westphalia basis of public law of Europe down to French Revolution.—In the preliminaries signed in 1641 it was agreed that Congresses should be held at Münster and at Osnabrück in Westphalia. Meeting simultaneously in both of those towns in July, 1643, the French mediating minister represented the Catholic party at Münster, and the Swedish minister represented the Protestants at Osnabrück. The Empire, the Pope, Spain and Venice were also represented. After much delay and conflict, the outcome of the complicated negotiations was the two famous treaties of 1648<sup>11</sup> that established the religious equality of the Catholic, Lutheran and Reformed churches in Germany by confirming to the Lutherans, and extending to the Reformed or Calvinistic churches the religious freedom guaranteed by the Treaty of Passau<sup>12</sup> and by the religious peace of Augsburg.<sup>13</sup> In order to make the settlement permanent it was provided that if any territorial sovereign should change his religion, or acquire sovereignty over a land where a creed other than his own was established, he should not have the power to force his faith upon his people. Thus was the attempt made to check further religious innovations and secularizations of ecclesiastical property. To stay the progress of Germany towards national unity three

<sup>10</sup> Cf. Bryce, *Holy Roman Empire*, p. 324. for the French, Dumont, vi, 1, 450, 469.

<sup>11</sup> For the original Latin see Gillany, *Manual Diplom.*, i, 1-100; <sup>12</sup> Aug. 2, 1552; Dumont, iv, 3, 42. <sup>13</sup> Sept. 25, 1555; *Ibid.*, iv, 3, 88.



hundred and fifty German princes were made almost independent of the Emperor, their federal chief, and the blow thus struck at the house of Austria, as the temporal head of the Catholic body, was made more effective by measures that paved the way for the growth of Prussia, its predestined rival, as the natural leader of the Protestant party. To narrow the limits of the Empire, two countries, Holland and Switzerland,<sup>14</sup> once integral parts of Germany, were during the year 1648 declared independent. As a means of upholding the provisions of the settlement, France and Sweden, the chief beneficiaries, were given the right to intervene in the internal affairs of Germany, a right that greatly encouraged the aggressive policy of Louis XIV, so fruitful of future complications. In January, 1648, nine months before the Peace of Westphalia was consummated, Spain and Holland made a separate peace at Münster wherein the freedom and sovereignty of the United Provinces was recognized,<sup>15</sup> and the Scheldt with certain water-courses connected with it closed,—each party retaining the places in its possession, and Spain renouncing all claim to such as had been won by the Dutch from Portugal.<sup>16</sup> Such, in brief, was the general character of the treaty settlement made during the year 1648 in the first body that can be called a diplomatic congress, in the modern sense of that term,—a settlement that survived without a break as the basis of the public law of Europe down to the French Revolution.

§ 69. How a written code may be subordinate to a higher law.

—In tracing the growth of institutions it often becomes necessary to describe a phase of development in which a well defined and accepted theory is found to be in open conflict with actual conditions. As a familiar illustration reference may be made to the unwritten and conventional code of tacit understandings—out of which the English ministerial system has been slowly evolved, and from which it derives moral and political, as distinguished from legal, authority—that has grown up during the last two centuries alongside of the older code of written constitutional law, from which it must be

<sup>14</sup> Switzerland had long been in fact independent. The Peace of Westphalia formally recognized that fact.

<sup>15</sup> Nearly seventy-five years before that time the Netherlands had

declared their independence, which in the meantime was recognized by all the states of Europe except Austria. Dumont, v, 507; vi, 429; Mackintosh's Works, iii, 444.

<sup>16</sup> Dumont, vi, 1, 429.

sharply distinguished.<sup>17</sup> Under the written code, all of the legal prerogatives vested in the English crown at the end of the Revolution of 1688 remain intact; under the unwritten or conventional code, the exercise of all such prerogatives is vested in a body of ministers known as the cabinet, which is nothing more nor less than a committee of the majority of the house of commons. Thus in theory, and under the terms of the written law, the sovereignty of England is vested in an hereditary king; in fact, it is vested by virtue of the conventional constitution in the majority of an elective assembly. With that illustration of a written code, alongside of which there is a higher law embodied in a set of tacit understandings, clearly in view, it will be easier to explain how it is that the legal rights of the theoretically equal European states are held subject to the higher or conventional law upon whose authority rests the primacy or overlordship vested in the few great states that constitute the Concert of Europe. As heretofore explained, the Grotian system depends upon a full and unqualified recognition of the doctrine of territorial sovereignty from which flow the corollaries that all states are formally equal, and that territory and jurisdiction are coextensive.<sup>18</sup> Such was the basis of the settlement embodied in the Peace of Westphalia, so far as the written treaty law was concerned, and upon that basis it has been claimed from that day to this that, before the law of nations, the legal rights of the greatest and smallest states are identical. But such rights and such equality have always been enjoyed *sub modo*,—that is, subject to the irresistible power vested by the conventional or higher law in a committee composed of the representatives of a few of the greater states acting in behalf of the whole. That primacy or overlordship, gradually developed outside of the written treaty law since the Peace of Westphalia, represents the common superior who actually succeeded to the place made vacant by the collapse of the Holy Roman Empire as international director. How to limit and restrain that primacy or overlordship, whether vested in one or more of the greater states, has ever been and is to-day the problem involved in the maintenance of the balance of power.

§ 70. System of balance as defined by Gentz, Fénelon, and Earl Grey.—Chevalier von Gentz, who published in 1806 his *Frag-*

<sup>17</sup> Cf. The Origin and Growth of the Eng. Const., vol. ii, pp. 437-440.

<sup>18</sup> See above, p. 75.

*ments Upon the Balance of Power in Europe*,<sup>19</sup> after defining such balance to be "a constitution subsisting between neighboring states more or less connected with one another, by virtue of which no one among them can injure the independence or essential rights of another, without meeting with effectual resistance on some side, and consequently exposing itself to danger," suggested the maintenance of four conditions as the necessary basis of such an equilibrium: (1) that no state must ever become so powerful as to coerce all the rest; (2) that every state which infringes the conditions is liable to be coerced by others; (3) that the fear of coercion should keep all within the bounds of moderation; and (4) that a state having attained a degree of power to defy the union should be treated as a common enemy. The idea of a "union" thus expressed is more fully developed in the *Instructions*, drawn up by Fénelon for the guidance of the Duc de Bourgogne, who was told that "Christendom is a kind of universal republic, which has its interests, its fears, and its precautions to be taken. All the members of this great body owe it to one another for the common good, and owe it to themselves for the security of their country, to prevent the progress of any other members who should seek to overthrow this balance, which would turn to the certain ruin of all the other members of the same body."<sup>20</sup> To repress the house of Hapsburg, and to keep Germany disunited, were among the leading purposes of the Peace of Westphalia in which the foundations of the system of balance were laid,—a system that proved strong enough to save from annihilation or annexation all of the smaller states down to the partition of Poland begun in 1772 by three great powers, jealous of each other, and indifferent to the rights of sovereignty and nationality, and to the good opinion of the world. With only one notable interruption the system of balance thus established has, with all its defects, continued down to our own time. Even so recent a statesman as Earl Grey declared that "the poorest peasant in England is interested in the balance of power, and that this country ought to interfere whenever that balance appeared to be really in danger." Upon that principle Great Britain joined with France in the Cri-

<sup>19</sup> In the same year he published *War Between Spain and England*. In 1814 he was made first secretary to the Congress of Vienna, of whose secret proceedings he has left a curious account. He, in fact,

drafted the treaties finally signed by all the powers.

<sup>20</sup> Cf. Henry Reeves' excellent article on Balance of Power in *Enc. Brit.*, vol. iii, pp. 267-272, 9th ed.

mean War of 1854, whose primary purpose was to preserve the balance of power in Eastern Europe, by preventing the aggrandizement of Russia through the dismemberment of the Ottoman empire and the capture of Constantinople. While it may be true that the tendency manifested at times by Great Britain during the present century to assume a position of isolation, and the recent military preponderance of Germany, may have seriously modified the idea of a system of balance as understood in Europe fifty years ago, such system can not be said to be obsolete. Nothing is better understood in European diplomacy to-day than the fact that a primacy or overlordship is still vested in the Concert composed of Great Britain, Germany, Russia, France and Austria, a combination into which Italy was invited in 1867. No student of international law can fully comprehend the nature of that Concert without having in mind an outline, at least, of the history of the more important European treaties made during the long interval that divides the Peace of Westphalia from the Treaty of Berlin.

§ 71. **Treaties aggrandizing France and Sweden at the expense of Spain and the Empire.**—From the Peace of Westphalia to that of Utrecht the central figure ever moving upon the stage of European politics was Louis XIV, the prime object of whose policy was to make permanent the triumph of France over both branches of the house of Austria,—a triumph made possible when, in the midst of the exhaustion and dissension incident to the religious wars, Richelieu turned the scale against that house through alliances with Sweden, the United Provinces, and the Protestant princes of Germany. The first fruits of that triumph,—reaped jointly by France and Sweden through the treaties of Münster and Osnabrück in which Mazarin closed the Thirty Years' War,—were greatly augmented, so far as France was concerned, when in 1659 the Peace of the Pyrenees<sup>21</sup> ended a twenty years' war between that power and Spain, through stipulations which, apart from large additions of territory to France and some restitutions to Spain, arranged a marriage compact between Louis XIV and the infanta Maria Theresa, who renounced, in consideration of a dowry never paid, all her rights to the Spanish crown and to the possessions incident thereto. While Louis was thus settled upon his throne as the most powerful monarch in Christendom, the king of Sweden was careful to enlarge his

<sup>21</sup> Dumont, vi, 2, 264-293.

possessions through the Treaty of Oliva, executed May 3, 1660, with the king of Poland, who was induced to renounce for himself and his line all claims to Sweden and Finland, to give up to Sweden the greater parts of Esthonia and Livonia, and entirely to sever the duchy of Prussia from the suzerainty of Poland in favor of the Elector of Brandenburg.<sup>22</sup> On the 6th of June followed the Treaty of Copenhagen<sup>23</sup> between the kings of Denmark and Sweden which, after securing the provinces of Halland, Schonen, Bleckingen, the isle of Hween, Bahus and its precinct to Sweden, and after restoring the island of Bornholm and Drontheim in Norway to Denmark, arranged as to the right of passage through the Sound and Belt. Thus did France and Sweden continue to add to the advantages originally secured through treaties that left the Empire depressed and disorganized, and Spain sadly weakened through a series of misfortunes, chief among which may be noted the independence of Holland, the revolt of Portugal, the ruin of her fleet by the Dutch, and the annihilation of her infantry by Condé's victory at Rocroi.<sup>24</sup>

§ 72. *Treaties of Breda, 1667—Triple Alliance, 1668.*—The growing commercial prosperity of Holland soon brought her into a rivalry with England, which culminated in 1651 in the passage of the memorable Navigation Act of that year designed to destroy the carrying trade of the Provinces by prohibiting the importation in foreign vessels of any but the products of the countries to which they belonged. The struggle for the lordship of the sea thus begun soon ripened into a conflict which was closed by the Treaties of Breda,<sup>25</sup> executed July 31, 1667, between England and Holland, England and France, and England and Denmark. Between the two first named it was agreed that each should hold what it had won in the war, and in that way England retained the settlement of New Amsterdam on the Hudson, soon to be better known as the colony of New York, and Holland Surinam, in addition to a gain of the isle of Polaroon on the coast of Bombay. It was also stipulated in favor of Holland that the Navigation Act of 1651, reenacted by Charles II, should be so modified as to permit merchandise coming down the Rhine to be imported into England in Dutch vessels. In exchange for

<sup>22</sup> Dumont, vi, 2, 303, 319.

<sup>24</sup> Cf. Green, *Hist. of the Eng.*

<sup>23</sup> Confirming in part that of *People*, iii, p. 348.

Roetskild, March 8, 1558. *Ibid.*, vi, <sup>25</sup> Dumont, vii, 1, 40-56.

2, 205.

Acadia (Nova Scotia), England received from France, Antigua, Montserrat, and the English part of St. Christopher's in the West Indies.

Such was the condition of things on January 23, 1668, when Sir William Temple succeeded in forming the Triple Alliance<sup>26</sup> between England, Holland and Sweden, in order to check the aggressive policy of Louis XIV, whose purpose to invade the Netherlands was then manifest. On February 23, through the mediation of England, was executed the Treaty of Lisbon<sup>27</sup> between Spain and Portugal, wherein the independence of the country last named was virtually acknowledged, and all territory, except Ceuta in Africa, restored. In May of the same year followed the treaty of peace concluded at Aix-la-Chapelle between France and Spain, which provided for the restoration of Franche Comté to the latter and the retention by the former of the places taken by her in the Spanish Netherlands.<sup>28</sup> The steady aim of French diplomacy from that moment was to break up the Triple Alliance, and so to isolate the United Provinces as to secure the long contemplated French invasion against outside interference. In that, however, Louis was disappointed. Enemies finally rose against him on every side, and in 1674 the English parliament forced Charles II to make peace with the Dutch, an advantage sealed by the marriage in November, 1677, of William of Orange with Mary, daughter of the duke of York, and presumptive heiress of the English crown.

§ 73. Peace of Nimeguen, 1678-79—summary of results.—Shortly after that event was made the Peace of Nimeguen, 1678-79, a general pacification that ended the Dutch war, to which England, France, Sweden and some of the smaller states of the Empire were parties on the one hand, and Holland, Spain, the Elector of Brandenburg, Denmark, and some of the smaller German states on the other. On account of her interest in Holland, England was represented for the first time in a continental congress, whose results were embodied in a

<sup>26</sup> Dumont, vii, 68-70. "The diplomatic history of England in its modern sense dates from this period; and the foundations of British foreign policy were laid by Sir W. Temple. \* \* Louis XIV. was extending French territory on every side at the expense of Spain; and France, under his rule, was rap-

idly becoming supreme on the Continent." Spencer Walpole's Foreign Relations, p. 14.

<sup>27</sup> Ibid., 1, 70.

<sup>28</sup> Ath, Armentières, Binche, Bruges, Charleroi, Courtray, Douay Furnes, Lille, Oudenarde, Tournay, and the fort of Scarpe.

series of treaties of which the following were made at Nimeguen: that made by France with Holland, August 10, 1678; that made by France with Spain, September 17 of same year; that made by the Emperor with France, and also with Sweden, February 5, 1679; and that made by Holland with Sweden, October 12, of that year. Denmark made a treaty with France September 2, 1679, at Fontainebleau, and with Sweden September 26 of the same year, at Lund.<sup>29</sup> The general results of the pacification thus brought about may be thus summarized: (1) France gained greatly on her eastern border at the expense of Spain, while the Emperor ceded to her Freiburg in the Breisgau, he recovering Phillipsburg for the Empire, and procuring on very onerous conditions the restoration of the duke of Lorraine to his duchy and estates. (2) To Holland France was required to restore all places taken from her during the war, while by a special stipulation she restored to the Prince of Orange, Orange and other estates within her dominions. (3) To Spain were returned important possessions in the Netherlands, the town and duchy of Limburg, the towns of Leuve and St. Ghilain, and the town of Puycerda in Catalonia. (4) From Denmark Sweden recovered what the former had conquered, including Wismar and the isle of Rügen; from the Elector of Brandenburg what he had taken from her in Hither Pomerania, upon the surrender of the lands beyond the Oder, except the towns of Dam and Golnow.

§ 74. **League of Augsburg, 1686; Grand Alliance, 1689; Peace of Ryswick, 1697.**—While Holland, the original cause of the war, was saved by the Peace of Nimeguen, that peace made Louis XIV, despite his concessions, the arbiter of Europe; and against him all were soon forced to combine in order to check his aggressive policy of “reunions,” as they were called, through which he applied old feudal rules to the acquisition of territories and towns in time of peace. Thus it was that he seized Strasburg in 1681. Aroused by that event, and by subsequent menaces still more serious, the German princes for mutual protection drew together in 1686 in the great League of Augsburg,<sup>30</sup> whose making marks the beginning of the long struggle between France and the rest of Europe. In February, 1689, William and Mary, under the Declaration of Right, were seated upon the English throne, whereupon the exiled

<sup>29</sup> Dumont, vii, 1, 351 *seq.* On France and Sweden at St. Germain-en-Laye. June 29, 1679, the Elector of Brandenburg made a treaty with

<sup>30</sup> Signed at Vienna in 1687.

James was graciously received at St. Germain as if he were still the king of England. Thus defied, William completed in the summer of that year the Grand Alliance<sup>31</sup> which soon girt France on every side, save that of Switzerland, with a ring of foes. To close the war that ensued of nearly ten years' duration was made the Peace of Ryswick (so called from a castle near The Hague), embodied in treaties signed on September 20 and October 30, 1697, by France with England, Holland, Spain, and the Emperor and the Empire.<sup>32</sup> Louis's great concession to William was embodied in an acknowledgment that he was the lawful king of England, coupled with a promise not to help his enemies, meaning of course James II. England and France then mutually restored what each had taken from the other in the war. In consideration of the return of Pondicherry in India to the French East India Company, Holland received from France many valuable commercial privileges, in addition to the right to maintain a Dutch garrison in each of the Spanish Netherland barrier-fortresses. With eighty-two places excepted, France restored to Spain all the "reunions" made since the Peace of Nimeguen. The Emperor had less cause to be satisfied. William had pledged himself that Strasburg should be restored, but, as neither England nor Holland would support him, it was given up in express terms to France. In restoring the "reunions" gained from the Empire, an exception was likewise made of Alsace, which thus ceased all connection with the imperial system and became an integral part of the territory of France. On the other hand Breisach and Freiburg were ceded to the Emperor, Phillipsburg to the Empire, the duchy of Zweibrücken (Deux-ponts) to the king of Sweden, as Count Palatine of the Rhine, and Mumpelgard to Württemberg, while among other stipulations of less importance a declaration was made in favor of the free navigation of the Rhine.

§ 75. Spanish succession and partition treaties of 1698 and 1700.—Exhausted as he was by a long war and its great sacrifices, it is quite clear that Louis would never have made the concessions embraced in the Peace of Ryswick, if he had not been eager to free his hands for the contest inevitable upon the approaching death of the childless Charles II, the last of

<sup>31</sup> England and Spain acceded 12, 1689. Dumont, vii, 2, 229-230, to the alliance, originally concluded between Holland, the Emperor and Empire at Vienna, May 241, 267.

<sup>32</sup> Dumont, vii, 2, 399 *seq.*



the male line of the Austrian sovereigns who had occupied the throne of Spain for two centuries. At that moment the claimants of the Spanish succession—nations were then considered as the private inheritance of princes—were the Emperor Leopold, head of the house of Austria, and a son of Charles's aunt; the French Dauphin, Philip, the grandson of Maria Theresa, half sister to Charles; and the Electoral Prince of Bavaria, the only male cousin of the Spanish king, and his nearest male relation.<sup>33</sup> Such was the menace to the peace of Europe that forced mutual concessions from the signatories of the treaties at Ryswick; and on October 11, 1698, England, Holland and France, in the hope of removing that menace, concluded at The Hague the first Partition Treaty,<sup>34</sup> in which the succession of the Electoral Prince of Bavaria was recognized on condition that the Italian possessions of Spain should pass to his two rivals,—the duchy of Milan to Archduke Charles, the second son of the Emperor, the two Sicilies with the border province of Guipuzcoa to the French Dauphin. Upon the death of the Electoral Prince, the chief beneficiary, early in 1699, the first settlement became void; whereupon a second Partition Treaty<sup>35</sup> was concluded between the same parties in the next year (London, March 13, The Hague, March 25, 1700), wherein it was provided in general terms that Spain, the Netherlands, and the Indies were to pass to the Archduke Charles of Austria, and the whole of the Spanish territories in Italy to the Dauphin,—it being also provided that Milan should be exchanged for Lorraine, whose duke was to be transferred summarily to the new duchy. To such a settlement Austria refused to assent, while the resentment excited at Madrid by the proposed dismemberment of the monarchy finally induced Charles II to sign another will in which he bequeathed the whole of his great inheritance to the second son of the Dauphin, Philip, duke of Anjou. Louis's rash resolve then made to place his grandson on the throne of Spain, and to unite the two crowns in the house of Bourbon raised anew the whole question of the balance of power in Europe, while it was generally conceded that such a union would be fatal to the independence of all other states, would replace the Stuarts upon the throne of England, and would give to France at the

<sup>33</sup> All three claimants derived Spain, could neither inherit nor their titles through females, who, transmit the inheritance. according to the ancient law of

<sup>34</sup> Dumont, vii, 2, 442.

<sup>35</sup> *Ibid.*, n. s., 477.

head of the Catholic party an undue religious preponderance. To prevent such results William, who was the soul of the opposition to France, in September, 1701, drew Great Britain, Holland and the Empire into the Grand Alliance, soon joined by Denmark, Sweden, the Palatinate, Portugal, Savoy and the bulk of the German states. After the power of France had been greatly reduced, the long war carried on against her by the Alliance was concluded by the Peace of Utrecht embodied in separate treaties made by France with Great Britain, Holland, Prussia, Portugal and Savoy (April 11, 1713); by Spain with Great Britain (July 13), with Savoy (August 13), and with Holland (June 26, 1714); by Spain with Portugal (February 6, 1715). Thus deserted by his allies, the Emperor was forced to make peace with France for himself and the Empire at Rastadt (March 6, 1714) in a treaty finally concluded at Baden in Switzerland on the 7th of the following September.<sup>36</sup>

§ 76. **Peace of Utrecht, 1713-14—its leading stipulations.**—By the Peace of Utrecht, denounced by the English parliament as an inglorious end of a glorious war, Philip was left in possession of the Spanish throne, upon his renunciation of all right to the crown of France, coupled with like renunciations by the dukes of Berry and Orleans of their claims to that of Spain. Thus it was declared to be the inviolable law that the two crowns should never be united on the same head. In addition to that assurance Great Britain received from France an express recognition of the Hanoverian succession as settled by parliament, consent to the expulsion of the Pretender from her soil, a promise that Dunkirk should be dismantled and the harbor filled up, in addition to a cession or restoration of Hudson's Bay and Straits, St. Kitts, Nova Scotia, and Newfoundland with the adjacent islands,—France reserving, however, Cape Breton and the islands at the mouth of the St. Lawrence, with the right to catch and dry fish on certain parts of the Newfoundland coast. So far as the Continental powers were concerned, the Peace of Utrecht, adopting the principle embodied in the earlier Partition Treaties, stripped Spain of even more than they had originally proposed to take from her. While Philip was permitted to retain Spain and the Indies, he was required to cede to Charles of Austria, who had now become Emperor, his possessions in Italy, the Spanish Netherlands and the island of Sardinia in satisfaction of his claims. At the same time the isle of Sicily was handed over to the

<sup>36</sup> Dumont, viii, 1, 329, *seq.*, 345, 353, 366, 393, 401, 415, 436, 444.

duke of Savoy. To Great Britain Spain was required to cede Gibraltar and Minorca with Port Mahon, strongholds that secured to the former the command of the Mediterranean.<sup>37</sup>

**Barrier Treaties of 1709, 1713, and 1715.**—France, who purchased peace upon easier terms than Spain, in addition to her concessions already mentioned to Great Britain, was required to consent to the reëstablishment of the Dutch barrier upon a grander scale than ever before,—a subject that can only be fully mastered by a study of the three barrier treaties made October 29, 1709; January 30, 1713, and November 15, 1715.<sup>38</sup> The result was to erect a barrier in favor of Holland against France by the transfer of the Spanish Netherlands to Austria. Such in general terms were the leading features of the Peace of Utrecht which secured the repose of Europe for thirty years, despite the fact that it made no treaty arrangements between the Emperor and Spain,—the former failing to recognize his Bourbon rival, Philip V, and the latter refusing to ratify the dismemberment of its dominions through which the Emperor was so largely benefited.

§ 77. **Peace of Carlowitz, 1699.**—At this point mention may be conveniently made of the Peace of Carlowitz, which followed the annihilation by Prince Eugene of the Turkish army at Zenta, September 11, 1697,—a peace consisting of treaties concluded January 26, 1699,<sup>39</sup> by the Sultan with the Emperor, with the king of Poland, and with Venice. In addition to a stipulation for a twenty-five years' truce with the Emperor, the Sultan surrendered his suzerainty over Transylvania, acknowledged it to be an Austrian province, and agreed that the southern bank of the Danube should mark the line between his dominions, and Hungary,—Venice retaining possession of what it held in Greece except Lepanto, and of Castelnuovo and Risano in Dalmatia.

§ 78. **Treaties of Nystadt, 1721; Berlin, 1742; Dresden, 1745; Aix-la-Chapelle, 1748.**—With the advent of the eighteenth century the European Concert,—made up in the main prior to that time of France, Spain, Austria, Sweden and Holland, with the occasional intervention of Great Britain when her interests were specially involved,—was widened by the addition of new elements that entirely changed the politics of the world.

<sup>37</sup> Upon condition that neither Moors nor Jews were to reside there.

<sup>38</sup> Dumont, viii, 1, 243, 322, 458.

<sup>39</sup> *Ibid.*, vii, 2, 448-458.

Such elements were represented by the new empire of Russia built up in the north by the genius of Peter the Great and Catharine; by the powerful and independent kingdom of Prussia, lifted from a secondary place in the German empire by the military ambition of Frederick II; by the colonial possessions of Great Britain, France, Spain, Portugal and Holland in the continents of Asia and America, and in the eastern and western isles; and by the federal republic whose birth in the west was proclaimed in the Declaration of Independence. One of the first important treaties following that of Utrecht was that known as the Peace of Nystadt,<sup>40</sup> concluded August 30, 1721, in Finland, between the Tzar and Sweden, wherein the latter, in consideration of two million rix dollars and the return of certain parts of Finland which Peter had conquered, ceded to Russia Livonia, Esthonia, Ingermanland, part of Carelia, Riga, Rivel, Wiborg, the isle of Oesel, along with certain other towns and forts. Prussia then comes prominently into view in the preliminary Peace of Breslau, June 11, 1742, and in the definitive Peace of Berlin, July 28,<sup>41</sup> made between Frederick II and Maria Theresa, who had been confirmed in her rights as heir to her father Charles VI by the famous Pragmatic Sanction constituting her the inheritor of the entire mass of the Austrian monarchy. Although that sanction was guaranteed by France in the preliminary treaty of Vienna, definitely signed November 18, 1738,<sup>42</sup> and at different times by most of the other European powers, in the confusion that followed the death of Charles in October, 1740, the king of Prussia marched suddenly into Silesia and took possession of that country. As a settlement of the contest the Peace of Breslau ceded to Prussia upper and lower Silesia (excepting the mountains and the towns of Troppau and Jägerndorf) and the country of Glatz. By the Peace of Dresden, December 25, 1745, Frederick confirmed that of Breslau, and acknowledged the grand duke of Tuscany, the husband of Maria Theresa, as Emperor. By the definitive Peace of Aix-la-Chapelle, October 18, 1748,<sup>43</sup> between France, Great Britain, and Holland.—Spain, Austria, Genoa and Modena being accessories,—the general war growing out of the Austrian succession was closed by a general restitution of con-

<sup>40</sup> Dumont, viii, 36.

<sup>42</sup> *Ibid.*, i, pp. 1-88.

<sup>41</sup> Wenck's *Corpus Juris Gentium*, 1, 734 *seq.*; ii, 191 *seq.*

<sup>43</sup> *Ibid.*, ii, 310 *seq.*

quests, and a renewal of treaties that placed the combatants in nearly the same position occupied when the struggle began.

§ 79. **Treaty of Naples, 1759—Family Compact, 1761.**—The Treaty of Naples, October 3, 1759,<sup>44</sup> between Charles III of Spain, Austria, and the Two Sicilies, specifying the conditions under which the last named might be united to the Spanish crown, was followed by the treaty known as the Family Compact, August 15, 1761,<sup>45</sup> between France and Spain, and such other members of the house of Bourbon as might be invited to join it. The purpose of the Compact was so to bind the French and Spanish branches in an offensive and defensive alliance as would guarantee not only their own dominions but those of the two other Bourbon sovereigns.

§ 80. **Peace of Paris, 1763—Peace of Hubertsburg, closing Seven Years' War.**—The famous Peace of Paris, February 10, 1763,<sup>46</sup>—which closed between Great Britain, France, Spain and Portugal the world-wide contest, made possible by reason of their colonial dominions, greatly to the advantage of the first named,—marked the transition from a condition of things in which the relative weight of European states had depended entirely upon their possessions within Europe itself. The world had learned already that wars begun within the original limits of the European Concert might have to be fought out on the banks of the Ganges and the St. Lawrence. By England's triumph on the heights of Abraham France's dream of empire in the west was broken; she was forced to give up her priceless possessions and to retire from North America. Among the fragments retained by France may be mentioned the right of fishery on the Newfoundland coast as defined in the Treaty of Utrecht, and also the same right in the Gulf of St. Lawrence three leagues from British coasts, and at a distance of fifteen leagues from Cape Breton. The middle of the Mississippi was to separate the territories of the two nations, east of which only the Isle of New Orleans was to remain a French possession. France had, however, by the secret treaty of November 3, 1762, already ceded Louisiana, including New Orleans, to Spain,<sup>47</sup> but possession was not taken until 1769. In the West Indies France ceded to Great Britain the islands of Granada,

<sup>44</sup> Wenck, iii, 206.

<sup>45</sup> *Ibid.*, iii, 278 *seq.*; Martens (R), i, 16-18.

<sup>46</sup> Wenck, iii, 329; Martens, (R), i, 104-166.

<sup>47</sup> "Thus old Louisiana was dismembered, and the Mobile District was to go to England." P. J. Hamilton's *Colonial Mobile*, p. 176. By the Treaty of St. Ildefonso, Octo-

St. Vincent, Dominique, and Tobago, in addition to the restoration of Minorca. In return she recovered Guadaloupe, Desirade, Mariegalante, Martinique, Belleisle and St. Lucia, and also Pondicherry and a certain district on the coast of India. The cession of Florida by Spain to Great Britain,<sup>48</sup> already agreed upon, was completed by that treaty. The month that witnessed the conclusion of the Peace of Paris witnessed also the conclusion of the Peace of Hubertsburg between Prussia, Austria and Saxony, closing, without loss of territory upon the part of Prussia, the Seven Years' War, a turning point in the world's history.

§ 81. Three partitions of Poland, 1772, 1793, 1795.—So far the European Concert, resting upon a recognition of territorial sovereignty, and the consequent right of every state to maintain an independent existence, had been able to preserve the weakest of its members from annihilation and annexation,—even the little republics of Geneva and San Marino had survived as distinct nationalities. The basic principle conceding to each state the equal right to live, was first violated by the revolutionary proceeding that ended in the First Partition of Poland, arranged July 15, 1772,<sup>49</sup> in treaties between Russia and Austria, and Russia and Prussia, three jealous powers whose declared reason for their act was the security of neighboring nations against the internal discords of the smaller state. In that way a third of the territory of Poland, with five millions of its inhabitants, passed to the three powers named in proportions agreed upon among themselves; and to the dismemberment thus begun the Diet of Poland, in August, 1773, was forced to assent through a committee appointed for that purpose. The Second Partition appears in the form of treaties made between Russia and the king and Republic of Poland, July 13 and October 16, 1793, and of a treaty between Prussia and Poland, September 25 of the same year. After the insurrection of 1784 had ended with the fall of Warsaw, what remained of Poland was finally divided between Prussia, Austria and Russia, who settled the boundaries of their respective acquisitions by a convention dated St. Petersburg, January 3, and October 24, 1795. Prussia held the capital with the

ber 1, 1800, Louisiana was retroceded to France. For the treaties of 1762 and 1800 see De Gardien, *Histoire des Traités de Paix*, viii, 50.

<sup>48</sup> In consideration of the return of Cuba and Philippines.

<sup>49</sup> Martens (R), ii, 89 *seq.*

territory as far as the Niemen; Austria, Cracow, with the country between the Pilica, the Vistula and the Bug; the rest went to Russia.<sup>50</sup>

§ 82. **Definitive treaties signed at Versailles, Sept. 3, 1783.**—While Poland was thus passing from the map of Europe, a new member came into the family of nations through the preliminary articles of peace settled at Paris, November 30, 1782, between Great Britain and the United States. Owing to the delay incident to contentions as to boundaries, as to fishing rights on the banks of Newfoundland, and as to the collection of debts incurred before the war,—a delay increased by the efforts of France and Spain to postpone the final settlement until their own claims against Great Britain could be adjusted,—the definitive treaty in which the independence of the United States was recognized, with certain concessions as to fishing rights and boundaries, was not signed until September 3, 1783.<sup>51</sup> On that day were also signed the definitive treaties of Versailles,<sup>52</sup> between Great Britain, France and Spain, in which France, who had borne herself brilliantly in the war by protecting Holland on the one hand and aiding the United States on the other, received important restitutions of territory both in the East and West Indies, in addition to a reaffirmance of her rights of fishery near and on Newfoundland and a recognition that she held the islands of St. Pierre and Miquelon in full sovereignty. The articles of the treaty of Utrecht and of subsequent treaties as to Dunkirk were at the same time abrogated. To Spain Great Britain ceded Florida and Minorca in consideration of the return of Providence Island and the Bahamas, with a reaffirmance of the right of the British to cut logwood within limits clearly defined. Not until May 20, 1784, was a final peace made between Great Britain and Holland, in which the former returned to the Dutch nearly all of the conquests made during the war.

§ 83. **Intervention of great powers in affairs of France.**—The right of intervention, so mercilessly applied by Austria, Russia and Prussia in the case of Poland, stood as a precedent to guide those states that deemed it their duty to interfere with the internal affairs of France when the principles of the French Revolution threatened to extend themselves to all other countries. As early as July 6, 1791, the emperor of

<sup>50</sup> Martens (R), v, 531 *seq.*; vi, 168 *seq.*

<sup>51</sup> *Ibid.* (R), iii, 495, 553.

<sup>52</sup> *Ibid.* (R), iii, 503 *seq.*

Germany invited the great powers of Europe to inform the French nation that the sovereigns "would unite to avenge any further offenses against the liberty, the honor, and safety of the king and his family; that they would consider as constitutional laws only those to which the king should have given his free assent; finally that they would employ every means of terminating the scandal of a usurpation founded on rebellion, and of which the example was dangerous to every government;"<sup>53</sup> and on the 27th of the next month Leopold of Austria and Frederick William of Prussia, in the conventions of Pilnitz, invited the same sovereigns to join with them in applying "the most efficacious means to put the king of France in a state to enable him with perfect freedom to lay the foundations of a monarchical government, equally consistent with the rights of sovereigns and the welfare of the French nation; in which case the Emperor and the king of Prussia were resolved to act promptly, and with necessary forces to obtain the proposed common object."<sup>54</sup> Difficult as it was for England,—who had within the century and a half preceding that time brought one king to the block and sent another into exile as incidents to revolutionary changes in her own constitution,—to join in the declaration that foreign powers have the right to intervene and prevent such changes, she was finally impelled by the work of French emissaries, sent to foment disturbances within her borders, to enter in 1793 the general coalition formed to carry on against France what Pitt happily termed "the war of armed opinion." Never before had the principle of the balance of power, in the sense of mutual defense, been asserted on so grand a scale, and in the end the intervention was effective. Napoleon, whose schemes contemplated the overthrow of the European Concert, was crushed, and the throne of France restored to the house of Bourbon.

§ 84. **Ancient diplomatic fabric of Europe shattered.**—Before the end came the ancient diplomatic fabric of Europe was shattered,—old landmarks were swept away, many of the smaller states annihilated, and new ones created. As we have seen already the Holy Empire was finally dissolved in 1806;<sup>55</sup> a new league known as the Confederation of the Rhine was formed of its lesser members; the ancient republics of Venice,

<sup>53</sup> Wheaton, History, etc., pp. 347-348, citing Schoel, vol. iv, p. 185.      <sup>54</sup> Ibid., p. 348.

<sup>55</sup> See above, p. 36.



Genoa and Holland were overthrown; the house of Braganza was expelled from Portugal, and the two branches of the house of Bourbon in Spain and Naples subverted; the final partition made of Poland by Russia, Prussia and Austria was ignored; and the Spanish and Portuguese colonies in America emancipated. In the mighty struggle with his enemies Napoleon's primary purpose was to force them to withdraw, one by one, from the coalitions against him. In the Peace of Basel made between France and Prussia, April 5, 1795,<sup>56</sup> the latter promised to give neither aid nor comfort to the enemies of the French Republic, and to forbid their passage through her territories; in the treaty made May 15, 1796,<sup>57</sup> between France and the king of Sardinia, the latter renounced the coalition and ceded to France the counties of Nice; in the treaty of St. Ildefonso<sup>58</sup> made August the 19th of the same year, Spain became the ally of France; in the treaty made between France and the Pope, February 19, 1797,<sup>59</sup> the latter renounced the coalition, in addition to many serious grants and concessions; the treaties made between France and the Emperor at Campo Formio, October 17, 1797, at Lunéville February 9, 1801, at Presburg December 26, 1805,<sup>60</sup> and at Vienna, October 14, 1809,<sup>61</sup> embodied successive humiliations and sacrifices for Austria, while with the triumphant Peace of Tilsit made with Russia and Prussia, July 7 and 9, 1807,<sup>62</sup> Napoleon may be said to have reached the highest point of his fortunes. As early as 1795 Holland had been conquered and, under a new constitution in harmony with that at Paris, had emerged as the Batavian Republic in close alliance with France. The one great enemy Napoleon could neither cajole nor conquer was England, by whose sea power the fleets of Holland and Spain were annihilated, and both Holland and France stripped of their foreign possessions. To save Louisiana from the grasp of England, Napoleon, with a clear comprehension of its value, threw it into our lap for a song in the treaty made at Paris between the French Republic and the United States, April 30, 1803.<sup>63</sup>

<sup>56</sup> Martens (R.), vi, 45-52.

<sup>57</sup> Ibid. (R.), vi, 211.

<sup>58</sup> Spain had made peace with France in 1795. The treaty of San Ildefonso was virtually a renewal of the Family Compact of 1761.

<sup>59</sup> Martens (R.), vi, 239 *seq.*

<sup>60</sup> Martens (R.), vi, 385, 420; vii, 296; viii, 388.

<sup>61</sup> Ibid. (N. R.), i, 210.

<sup>62</sup> Ibid. (R.), viii, 637, 661.

<sup>63</sup> Ibid. (R.), vii, at the close. The sacrifice must have been a

§ 85. Work of reconstruction—first Peace of Paris and Congress of Vienna, 1814-1815.—On April 11, 1814, Napoleon abdicated, and on May 30 the first Peace of Paris<sup>64</sup> was embodied in treaties almost identical between Louis XVIII and each of the four great powers, in which France, after renouncing her sovereignty over all parts of Europe outside of her own limits, agreed that those limits should be reëstablished, with some additions to her eastern and northern frontiers, as they had existed in 1792. After settling in general terms the basis upon which the European system was to be reëstablished, the 32d article of the Peace provided that “within two months all the powers which had been engaged in the war on either side should send plenipotentiaries to Vienna to settle, at a general Congress, the arrangements required to complete the provisions of the Treaty of Peace.” On November 1, 1814, the Congress opened; after long delays and serious disagreements the great treaties of Vienna were signed on June 7, 1815; on the 9th, the Final Act;<sup>65</sup> and on the 11th closed the most important diplomatic body that had met since the Peace of Westphalia—a body which relaid the foundations of public law and restored to Europe a peace that was not seriously disturbed for forty years.

§ 86. Result of efforts to restore prior conditions.—France although vanquished secured equal consideration through the consummate art of her ambassador, Talleyrand, who admonished the Congress in his note of December 12, 1814, that when the treaty of May 30 stipulated that “the labors of the Congress should form a real and permanent balance of power, it did not intend to throw into a common mass all territories and all nations, to be afterwards divided in certain proportions. It intended that every legitimate dynasty should be preserved or restored, that every legitimate right should be respected, and that the vacant territories, that is to say, those destitute of sovereigns, should be distributed according to the principles of the political balance, or, what is the same thing, according to the conservative principles of the rights of each hard one for Napoleon, who declared that “America is a fortunate country; she grows by the follies of European nations.”

<sup>64</sup> Martens, (N. R.), ii, 1-18. For the secret treaty entered into at the same time between certain of the allied powers for the disposal

of the territories surrendered by France, and for the reëstablishment of the European system without reference to her, see Murhard's *Nouv. Suppl.*, i, 329.

<sup>65</sup> Klüber, *Acten des Wiener Congresses?* Martens (N. R.), ii, 379; Martens and Cussy, iii, 61.

and the repose of all.”<sup>66</sup> While it was well understood that it would be impossible to recreate exactly that older European system of which independent Poland had been a part, Talleyrand’s effort was to bring about as close an approximation to prior conditions as altered circumstances would permit. And that general result was in the end accomplished. France shrank to her normal dimensions; Austria regained what she had ceded to her; to Prussia was restored in a general way what she had possessed before the Peace of Tilsit; Ferdinand IV was reestablished upon the throne of Naples and recognized as the king of the Two Sicilies; a new Germanic Confederation was formed, whose constitution was incorporated in the Final Act of the Congress;<sup>67</sup> the effort failed to reconstruct Poland as a constitutional Kingdom subject to the Tzar, and the fragments as distributed at Vienna were finally vested in Russia, Austria and Prussia; Genoa was united to Sardinia; Venice to Austria; Norway to Sweden; Belgium and the grand duchy of Luxembourg to Holland under the king of Netherlands; a part of Saxony to Prussia; the Swiss Confederation was reorganized and neutralized; the navigation of all the great rivers of Europe, except the Danube,<sup>68</sup> was regulated; and, in order to remove conflicts that had long existed as to precedence, a clear definition was given of the relative rank of ambassadors and ministers. Thus the Final Act of this Congress,<sup>69</sup> to which were annexed many of the special compacts necessarily executed in advance of it, became the most

<sup>66</sup> Klüber, *Acten des Wiener Congresses*, vii, B’d., § 48. Talleyrand’s bold and artful protest thus made against the designs of the allies who had entered into the secret treaty of May 30th, 1814 (see above, p. 114, note 64), really frustrated their plans, and secured for France, in the midst of their divided counsels, a very substantial influence.

<sup>67</sup> The powers then conferred upon the Diet were more clearly defined by an additional act signed at Vienna, in May, 1820, and ratified by the Diet at Frankfort in June of that year. For the Federal Act of 1815, see Martens (N. R.), ii, p. 353; for the Schluss Act of 1820, *Ibid.*, v, p. 466.

<sup>68</sup> The regulations made at Vienna were extended to the Danube by the Treaty of Paris, 1856, with the additional provision that the duty of keeping it open to navigation should be conferred upon a permanent board of seven commissioners. Five articles of the Treaty (15-19) were devoted to the subject. It was provided by the treaty of Bucharest (1812) and by that of Adrianople (1829) that the use of the Danube for commercial purposes was to be enjoyed in common by the subjects of Russia and Turkey.

<sup>69</sup> Nine days thereafter began the battle of Waterloo. Not until November 20, 1815, was concluded the second Treaty of Paris, con-

important international document of modern times, because never before had the territorial possessions and frontiers of the continental states been defined in a single instrument to which all had an equal right to appeal, and upon the performance of whose conditions each had an equal right to insist.

§ 87. **Holy Alliance, 1815—its purposes defined.**—The successful intervention of the allied powers in the affairs of France, involving as it did unusually intimate relations between a few of the greater ones, seems to have suggested to the Emperor of Russia the idea of uniting Austria, Prussia and Russia in the mystic bonds of the Holy Alliance<sup>70</sup> formed at Paris in September, 1815, in which it was provided that as their interests were one and indivisible they should act together as a unit, lending “one another, on every occasion, and in every place, assistance, aid, and support.” To this new combination France gave her adhesion in the Congress of Aix-la-Chapelle in 1818;<sup>71</sup> in that which met at Troppau in 1820, the growing designs of the confederates widened into a declaration that in order to prevent the “crime” of revolt they “had an undoubted right to take a hostile attitude in regard to those states in which the overthrow of the government might operate as an example;” and in a circular issued from Laybach, to which place the Congress of Troppau was removed, they branded “as equally null, and disallowed by the public law of Europe, any pretended reform effected by revolt and open violence.” Meeting again at Verona in October, 1822, in the hope of checking the growing spirit of freedom and independence then manifesting itself throughout Europe, and especially for the purpose of crushing the revolutionary government of Spain, the allies expressed the results of their deliberations in a circular declaring their intention “to repel the maxim of rebellion, in whatever place and under whatever form it might show itself;”

sisting of four separate documents of the same tenor between France and each of the four great powers, rounding out and completing what had been agreed upon more than a year before. Martens, ii, 632 seq.

<sup>70</sup> It was signed in triplicate by the three sovereigns personally, without ministerial countersignatures, with the words *Au nom de la très Sainte et indivisible Trin-*

*ité* prefixed. It was published at St. Petersburg on Christmas Day, 1815, with a manifesto announcing that the object of the alliance was to establish a Christian fraternity among the European nations. For an English version of the compact see Manning, pp. 82-84, 1st ed.

<sup>71</sup> Martens, (N. R.), iv, 549-566.

and by a secret treaty their ultimate object was embodied in a mutual agreement not only "to put an end to the system of representative governments" in Europe, but also to destroy "the liberty of the press."<sup>72</sup> Such was the nature of the league, really formed for the protection of the principle of legitimacy against the then rising tide of popular freedom, which authorized Austria to check constitutional progress in Italy by suppressing the Neapolitan revolution of 1820, and commissioned France to invade Spain in 1823 in order to overthrow the Spanish constitution of the cortes and restore absolutism in the person of Ferdinand VII. Encouraged by such successes, the allies notified Great Britain during the summer of 1823 that so soon as the army of France should complete the suppression of the revolutionary government of Spain, a Congress would be called for the purpose of terminating the revolutionary governments in Spanish America, already recognized by the United States, but not by Great Britain, who had, however, clearly indicated to the allies at the Congress of Verona, through her representative, the duke of Wellington, that she preferred isolation to their extreme and dangerous policy of intervention.<sup>73</sup> When the Holy Alliance attempted to extend that policy to the New World the resistance opposed to it by the United States was embodied in what is generally known as The Monroe Doctrine, of which more will be said hereafter.<sup>74</sup>

§ 88. Intervention in affairs of Portugal.—Hostile as Great Britain was to general and indiscriminate intervention, she felt compelled to interfere in the affairs of Portugal upon the death in 1826 of John VI, whose heir was his son Dom Pedro IV, the ruler of Brazil. As the constitution of that country provided that its crown should never be united on the same head with that of Portugal, Pedro resigned the latter to his infant daughter Donna Maria, appointing a regency to govern during her minority under a moderate system of parliamentary government embodied in a constitutional charter. When Spain attempted to overthrow that settlement by giving aid and comfort to the absolutist pretender Dom Miguel, Great Britain gave to the regency armed assistance, and thereupon followed the civil war and the armed interference of Spain,—

<sup>72</sup> See the excellent monograph of Prof. John Bassett Moore of Columbia University, entitled *The Monroe Doctrine*, pp. 5-6.

<sup>73</sup> Cf. Alison, *Hist. of Europe from the Fall of Napoleon*, ii, p. 629 *seq.*

<sup>74</sup> See below, pp. 140-152.

a situation composed at last by the quadruple alliance entered into April 22, 1834, between France, Great Britain, Spain and Portugal.

§ 89. *Intervention in affairs of Greece.*—The year 1827 witnessed the intervention of Great Britain, Russia and France in the affairs of Greece in order to deliver that country from the dominion of the Ottoman Porte. On the 6th of July a treaty<sup>75</sup> was entered into between the mediating powers setting forth the grounds of intervention; on the 20th of October the Turkish fleet was annihilated in the Bay of Navarino by the combined fleets of the allies; and in a short time thereafter Greece was practically independent. After a period of anarchy Otto of Bavaria was made king, and on May 7, 1832, the protecting powers signed a convention<sup>76</sup> in which it was agreed that the limits of the new kingdom should be fixed in a treaty with Turkey according to the protocol made in the preceding September. The Bavarian family having been expelled by a revolution in 1862, a new sovereign was found in the person of the son of the king of Denmark, who ascended the throne as George I, under the protection of a treaty made July 13, 1863,<sup>77</sup> between Denmark on the one hand and Great Britain, France and Russia on the other. In this it was stipulated among other things that the Ionian Islands should become a part of Greece whenever the consent of the Ionian parliament should be sanctioned by the courts of France, Russia, Austria and Prussia,—an arrangement finally consummated by the treaty of March 29, 1864, between Great Britain, France and Russia on the one hand and Greece on the other, Austria and Prussia assenting. In the treaty last named the islands of Corfu and Paxo with their dependencies were endowed with perpetual neutrality.<sup>78</sup>

§ 90. *Intervention in affairs of Belgium.*—The year 1830 witnessed the intervention of the five great powers for the purpose of composing the Belgic revolution, whose object was to dissolve the union of Belgium with Holland brought about at the Congress of Vienna in 1815. The king of the Netherlands having requested their mediation, the representatives of Great Britain, France, Russia, Austria, and Prussia met in conference at London in November, 1830, and after assigning

<sup>75</sup> Martens (N. R.), vii, 282, 463.

<sup>76</sup> Ibid. (N. R.), x, 550.

<sup>77</sup> Martens (N. R. G.), xvii, 2, 79.

<sup>78</sup> *Annuaire des Deux Mondes*, xii., 1000-1004.

to Holland all territory belonging to her prior to 1790, and to Belgium what remained of the Kingdom of the Netherlands except the grand duchy of Luxembourg, entered finally into the international compact of November 15, 1831,<sup>79</sup> which provided for the definitive separation of Belgium from Holland, and for the existence of the latter as a perpetually neutral state. When the king of the Netherlands attempted to resist the settlement, Great Britain and France coerced him by embargo blockade, and the taking of the citadel of Antwerp in 1832. At length the king of the Netherlands agreed to accept the treaty of 1831, and a fresh negotiation followed resulting in the convention between Belgium and Holland of the 18th of April, 1839, confirmed by the five powers, whose 7th article repeated the declaration that Belgium should remain an independent and perpetually neutral state, and bound to observe such neutrality towards all other states.<sup>80</sup> When in 1870 that neutrality was threatened during the Franco-Prussian war, Great Britain was quick to defend it, and the result was two fresh treaties,—one between herself, France and Belgium, the other between herself, Prussia and Belgium,—in the first of which she stipulated that in the event Prussia should violate the neutrality she would join with France and Belgium in protecting it; in the second, that in the event France should violate it, she would join with Prussia and Belgium in protecting it.<sup>81</sup>

§ 91. Crimean war and treaty of Paris, 1856.—The Crimean War,—undertaken by Great Britain and France primarily to preserve the balance of power in eastern Europe, and incidentally to vest in the European Concert the protection of the Christian peoples subject to Turkey, assumed prior to that time by Russia alone,—was terminated in the Congress that met at Paris in 1856, the first in which ambassadors of the Sultan ever appeared. The more important articles of the treaty of peace signed, March 30,<sup>82</sup> between Great Britain, France, Russia, Austria, Sardinia and the Ottoman Porte, Prussia being also invited to participate, provided (1) that the independence and territorial integrity of the Ottoman Empire should be preserved, each of the six powers guaranteeing a strict observance of the engagement; (2) that the places cap-

<sup>79</sup> Martens, (N. R.), xi, 390.

<sup>81</sup> Hertslet, Map of Europe by

<sup>80</sup> Wheaton, History, Pt. iv, § 26; Treaty, iii, 1886-1891.

Hertslet, Map of Europe by Treaty, <sup>82</sup> Martens (N. R. G.), xv, 770, ii, 859-884, 996-998.

tured from Russia during the war should be restored, a tract being taken from Russian Bessarabia and added to Moldavia in such a way as to deprive Russia of the command of the mouths of the Danube; (3) that Moldavia and Wallachia, as states under the suzerainty of the Porte, should be confirmed in their privileges, it being further provided that the same guarantee should be extended to Servia, with its privileges and burdens,<sup>83</sup> and that there should be a reorganization of such principalities, for the carrying out of which another convention was signed at Paris, August 19, 1858;<sup>84</sup> (4) that the Black Sea should be neutralized and opened to the commerce of all nations; all war vessels to be excluded, excepting certain armed vessels for police purposes under a separate convention made between Russia and the Porte, who agreed to maintain no naval arsenals on its coasts,—it being further stipulated, according to “the ancient rule<sup>85</sup> of the Ottoman Empire,” that the straits of the Bosphorus and the passage of the Dardanelles should be closed to foreign ships of war while the Porte is at peace with other nations, excepting only the light draught vessels in the service of the legations of friendly powers, and certain vessels of like character of the powers having the right under the treaty to station them at the mouths of the Danube; (5) that that river, which had not been included in the regulations made in 1815 at Vienna for the navigation of the great rivers of Europe, should be thrown open to commerce; (6) that Turkey should be admitted into the family of nations.

#### Declaration as to maritime rights of belligerents and neutrals.

—After the peace negotiations were thus concluded the question of the maritime rights of belligerents and neutrals was formally presented to the Congress as a body representing all the great powers of Europe, and the outcome was the famous

<sup>83</sup> The Sultan's right to maintain garrisons there was not taken away.

<sup>84</sup> Martens, (N. R. G.), xvi, 2, 50.

<sup>85</sup> In 1774 Russia compelled Turkey to open the Black Sea and the straits leading to it from the Mediterranean to merchant vessels, it having been the custom of the Porte prior to that time, regardless of the public law of Europe, to forbid the passage of the Dar-

danelles and Bosphorus to all ships of other powers. After 1774 Turkey continued the exclusion as to ships of war, and in 1809 Great Britain recognized the practice as “the ancient rule of the Ottoman Empire,” and in 1840 a like recognition was made by Russia, Austria and Prussia, who signed with her the Quadruple Treaty of London made in that year with the Porte for the pacifi-



*Declaration of Paris*,<sup>86</sup> a protocol signed April 16 by all of the parties represented, and subsequently accepted as a part of the public law of the world by all powers except the United States,<sup>87</sup> Spain, and Mexico. The four propositions agreed upon by the plenipotentiaries were expressed in the following terms:

1. Privateering is and remains abolished.
2. The neutral flag covers enemy's goods, with the exception of contraband of war.
3. Neutral goods, with the exception of contraband of war, are not liable to capture under an enemy's flag.
4. Blockades, in order to be binding, must be effective,—that is to say, maintained by force sufficient to prevent access to the coast of the enemy.

§ 92. Rise of Prussia. Schleswig-Holstein question.—The time had now come for the balance of power in Europe to be seriously disturbed by the assertion of the military strength of Prussia, whose designs resulted in the overthrow of the Germanic Confederation and the expulsion of Austria from that body. By the death of Frederick VII of Denmark in November, 1863, was precipitated the conclusion of the long delayed struggle between the Danes and the Germans as to their respective rights over the duchies of Holstein and Schleswig. Holstein, always a part of Germany, and Schleswig, by law indissolubly united to Holstein, had been incorporated with Denmark under her constitution of 1855. After protesting against that act as a violation of its rights, the Federal Diet finally decreed federal execution against Denmark in October, 1863. Such was the condition of things when Christian IX succeeded, a few weeks later, to the Danish throne under the arrangements his father had been authorized to make by the Treaty of London, May 8, 1852.<sup>88</sup> When the new king, with a disputed title, formally accepted the constitution incorporating the duchies with Denmark, he found himself confronted by prince Frederick of Augustenburg who claimed both

cation of the Levant. Cf. Holland, and independence of the Ottoman The European Concert in the Empire, a breach of which was Eastern Question, pp. 92, 95, 99, made a *casus belli*, see *Ibid.*, 790. 246.

<sup>86</sup> Martens (N. R. G.), xv, 791. For the special guarantee entered into between Great Britain, France and Austria to insure the integrity

<sup>87</sup> For the reasons that prompted the United States to withhold its assent, see above, p. 95, note 7.

<sup>88</sup> Martens (N. R. G.), xvii, 2, 313 *seq.* Cf. also Prof. F. Thu-

Schleswig and Holstein, backed not only by strong followings in both duchies but by the approving sentiment of the Germans, who saw in his aspirations a chance of rescuing the duchies from the Danes. Under the pressure of that sentiment the Federal Diet in December, 1863, sent a body of troops to occupy Holstein. At that point Prussia intervened, and, after securing the coöperation of Austria, their united armies, early in 1864, crushed Denmark, who was thus forced to execute, October 30, 1864, the Peace of Vienna,<sup>89</sup> wherein she ceded Schleswig, Holstein, and Lauenburg to the emperor of Austria and the king of Prussia, with a promise to consent to such arrangements as they might make. The quarrel that ensued between Austria and Prussia as to the final disposition of their joint acquisition was composed for a moment by the Convention of Gastein, August 14, 1865,<sup>90</sup> wherein it was agreed that Schleswig should be controlled provisionally by Prussia, and Holstein by Austria,—the latter agreeing to sell her rights over Lauenburg to Prussia for 2,500,000 rix dollars.

§ 93. Peace of Prague, 1866—withdrawal of Austria from Confederation.—That hollow truce only gave time to the combatants to provide allies and to arm for the final struggle precipitated by Austria's motion in the last sittings of the Diet of the 11th and 14th of June, 1866, to mobilize the federal forces for the purpose of enforcing execution against Prussia. After the fact was disclosed that Austria was supported by Saxony, Bavaria, Württemberg, Hanover, Hessen-Cassel, Hessen-Darmstadt, and several of the minor states, Prussia withdrew from the Confederation, and before the end of the month declared war upon Hanover, Saxony and Austria.<sup>91</sup> Prussia's military superiority, backed by her allegiance with Italy, made the struggle so short that the preliminaries of peace, embodied in the Convention of Nikolsburg, July 26, 1866, were made final in the Peace of Prague on the 23d of August.<sup>92</sup> The great outcome was the withdrawal of Austria from the Confederation, thus leaving Prussia free to form a new one in which she could be supreme. Under the constitution<sup>93</sup> of the new league, known as the North German Con-

*Verfassungsgesch. Schleswig-Holsteins von 1806-1852*, Tübing, 1871.

<sup>89</sup> Martens (N. R. G.), xvii, 2, 474-486.

<sup>90</sup> *Annuaire des Deux Mondes*, vol. xiii, 971 (1864-1865).

<sup>91</sup> For a more complete statement see Bryce, *Holy Roman Empire*, pp. 407-416.

<sup>92</sup> *Annuaire*, xiv, 363, 367, (for 1866, 1867).

<sup>93</sup> Adopted April 17, 1867.

federation, at whose head Prussia placed herself, the military forces of all the federal states were fused and placed under the command of the king of Prussia, who, as permanent president of the Confederation, was authorized to control its foreign policy, although a nominal independence was left to the minor princes, who were permitted to send and receive diplomatic agents, to summon their local legislative bodies, and to levy local taxes. By conquest and by treaty Prussia about that time increased and consolidated her dominions by incorporating Hanover, Hessen-Cassel, Nassau, Frankfort, Schleswig-Holstein and Lauenburg.<sup>94</sup>

§ 94. Treaty between Prussia and France, 1871.—In the Peace of Prague it was stipulated that the South German States should maintain an independent national existence in a league of their own, with the clear right to enter into treaty relations with the Northern league, which embraced only the states north of the river Main. When the fact was revealed that within a few months after the conclusion of the war of 1866 some of the Southern states<sup>95</sup> had actually entered into secret military conventions with the North German Confederation, a critical condition of things arose between France and Prussia, which was greatly aggravated by the triumph in 1867 of the latter over the former in the diplomatic struggle for the possession of the grand-duchy of Luxemburg. At the outbreak of the inevitable conflict, precipitated by the rash action of France in July, 1870,<sup>96</sup> Prussia was able to marshal under her leadership the combined forces of Germany inspired by an enthusiasm so intense and universal as to make them irresistible. At Versailles, on January 18th, 1871, after the necessary legislation in the various states, the king of Prussia assumed the title of German Emperor, thus welding Germany together as a single state under a new constitution<sup>97</sup> sixty-five years after the final dissolution of the ancient body

<sup>94</sup> The Convention of Gastein secured Lauenburg, the Peace of Prague, Schleswig-Holstein.

<sup>95</sup> Bavaria, Würtemberg and Baden.

<sup>96</sup> On July 15, 1870, Olivier, French minister of foreign affairs, in asking a credit of the *Corps Legislatif*, declared that a refusal to give audience was a *casus belli*. For another view see Benedetti's

*Mission en Prusse* and Studies in Diplomacy.

<sup>97</sup> "The constitution of the new Empire is in its main features that of the North German Confederation, modified by the treaties whereby Baden, Würtemberg and Bavaria, respectively, entered the pre-existing body." Bryce, pp. 417-418.

known as the Holy Roman Empire. On the 28th Paris capitulated, and the preliminary peace of February 26th was confirmed by the definitive treaty concluded at Frankfort on May 10th, under which Germany gained from France Alsace and Lorraine, together with a great indemnity to cover the cost of the war.<sup>98</sup>

§ 95. Prussia and Turkey. Conference of London, 1871.—While Prussia was thus building up her hegemony in central Europe, the steady growth of Russia in the east was drawing her nearer to the realization of her plans for the dismemberment of Turkey and the capture of Constantinople, checked for a time by the results of the Crimean War and the treaty of 1856, in which those results were embodied. The two great humiliations to which Russia was then subjected consisted of the forced surrender of her protectorate over the Eastern Christians, and of the abrogation of her rights to keep war vessels in the Black Sea and to maintain naval arsenals on its coasts. So keenly did Russia feel the restraints placed upon her sovereignty by the stipulations last named, that the moment the ally who had aided England in imposing them upon her was stricken down, she notified the other signatory powers, in a circular issued in October, 1870, shortly after the fall of the second empire, that it was impossible for her to be longer bound either by the objectionable articles of the treaty of 1856 or by the Convention of the Straits really a part of it. To save appearances England deemed it best to call a Conference in which the demands of Russia could be duly ratified. The representatives of the powers who met in London in January, 1871, after declaring that no state can break or modify a treaty without the voluntary assent of the other contracting parties,<sup>99</sup> finally annulled on March 13th articles XI, XIII and XIV of the Treaty of Paris, while Russia and Turkey by a separate agreement abrogated the special convention made between them at that time as to the size and number of armed vessels the two riparian proprietors might maintain for police purposes. In lieu of the articles annulled the following was submitted: "The principle of the closure of the Straits of the Dardanelles and the Bosphorus estab-

<sup>98</sup> Martens (N. R. G.), xix, 653, 688.

<sup>99</sup> The exact language employed was this: "It is 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 powers by means of an amica-

lished by the special convention of March 30, 1856, is maintained, with the right, on the part of His Imperial Majesty the Sultan, of opening said Straits in time of peace to ships of war of friendly and allied powers, in case the Sublime Porte should find it necessary in order to secure the Treaty of Paris of March 30th, 1856.<sup>1</sup> In that way Russia regained her full sovereignty over the Black Sea and its coasts, subject to the right of the Sultan to invite into the Straits at any moment such powers as may be willing to join with him in order to check any naval aggression Russia may make.

**Treaty of San Stefano, and Congress of Berlin, 1878.**—The fresh complications in which the Slavonic Christians became involved with the Porte in 1877 gave to Russia another opportunity for a war, which she concluded in a separate treaty with the Ottoman Porte at San Stefano, March 17th, 1878, after having advanced to the very suburbs of Constantinople. That treaty Great Britain, with her fleet at the Dardanelles and with her Indian troops at Malta, sternly refused to recognize because the separate peace itself, apart from its special stipulations, was in open violation of the terms of the treaties of 1856 and 1871.<sup>2</sup> Under such conditions Russia, who could no longer count upon the neutrality of Austria, consented to submit her treaty with Turkey to a European Congress that sat at Berlin from June 13 to July 13, 1878. In the definitive treaty signed on the day last named and ratified August 3, the settlement made at San Stefano was modified in several particulars, the chief being a reduction of the territory of Bulgaria, and the division of that state into two parts. That part north of the Balkans was to constitute an autonomous principality under the suzerainty of the Sultan, with a Christian government and national militia, while that south of the Balkans was to be made into the province of East Roumelia subject to the direct authority of the Sultan, but with administrative autonomy and a Christian governor-general. To Austria-Hungary passed in the final settlement Bosnia and Herzegovina, while the concessions of territory made to Servia and Monte-

ble arrangement." British State Papers, Protocols of London Conference, 1871, p. 7; Hertslet's Map of Europe by Treaty, 1256-7, 1892-8, 1904.

Holland, The European Concert, pp. 272-276.

<sup>2</sup> Martens (N. R. G.), 2nd Ser., iii, 246 and 259; Holland, pp. 335-348.

<sup>1</sup> For the text of the treaties, see

negro, and to Russia in Asia, by the treaty of San Stefano were slightly diminished. Montenegro and Roumania were recognized as fully independent,—Servia also under certain conditions.<sup>3</sup> The Sultan, under the pressure of advice, made some concessions to Greece which subsequently so extended her frontiers as to give her Janina as well as Thessaly, while to Great Britain he assigned the island of Cyprus to be occupied and administered by her.<sup>4</sup>

**Readjustment of forces.**—When the immense changes that have taken place since 1815 in Poland, in Belgium, in Italy, in Germany, in Denmark, in France, and in Turkey are taken into account, it can hardly be maintained that any substantial part of the work of the great Congress of Vienna still survives. The system of balance then established was finally shattered by the rise of Prussia and the reorganization of Germany in such a way as to make its military power more than a match for any single European state. The readjustment of forces thus brought about has taken the form of the triple alliance between Germany, Austria and Italy on the one hand, and the dual alliance of Russia and France on the other, with Great Britain guarding against isolation through closer relations with the United States.

<sup>3</sup> With the consent of the powers Servia was declared a Kingdom in 1882.

<sup>4</sup> Great Britain went into possession in 1881.

## CHAPTER V.

### EXTENSION OF INTERNATIONAL SYSTEM TO NEW WORLD.

§ 96. Early conflicts as to boundaries—prior discovery as a basis of title.—An account must now be given of the process through which the system of international law, founded and nurtured by the European nations,<sup>1</sup> was extended to the New World. The struggle for the possession of vast and undefined territories in the East and West inaugurated by the discoveries of the Spanish and Portuguese navigators, who took the lead during the 15th and 16th centuries, presented questions beyond the resources of the medieval international code, for the reason that the new conditions involved were without a parallel in medieval European experience. The only authorities that could be invoked were the Holy Roman Empire and the principles of Roman law which formed the basis of its judicature. On the very threshold of the struggle Christendom was called upon to pass on the rights of the native though infidel inhabitants of the territories of which the European discoverers wished to possess themselves. Despite Ayala's bold declarations that war against infidels simply because they were such could not be justly authorized by either Pope or Emperor, that infidelity did not of itself forfeit their right to sovereignty under the law of nations, for the reason that dominion over the earth was originally given not to the faithful alone but to all rational creatures,<sup>2</sup>—the conclusion was generally and firmly established that the rights of the native infidel occupants were entirely subordinate to the paramount claims of the first Christian discoverers. With that question thus disposed of, the Pope, as the bestower of kingdoms and the final judge between Christian nations, was soon called upon by Spain and Portugal to adjust the grave conflict which had arisen between them in the New World as to the

<sup>1</sup> "It is scarcely necessary to point out that as international law is a product of the special civilization of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognized by

countries differently civilized, such states only can be presumed to be subject to it as are inheritors of that civilization." Hall, *Int. Law*, p. 42.

<sup>2</sup> See above, p. 56.

relative extent of their freshly discovered possessions. As a settlement of that controversy Alexander VI published in 1493 his famous bull granting to Ferdinand and Isabella, and to their successors to the united crown of Castile and Aragon, with certain reservations, all lands discovered and to be discovered to the west of an imaginary line to be drawn from pole to pole an hundred leagues west from the Azores and Cape De Verde Islands.<sup>3</sup> So unjust did that division prove to Portugal that on June 4th, 1494, a convention was made with Spain at Tordesillas moving the meridian line to a point three hundred and seventy leagues west of the Cape Verde Islands, a change which gave to Portugal Brazil, the Moluccas, the Philippines and half of New Guinea.<sup>4</sup> Finally, to compose the bloody conflicts that arose when Great Britain, France and Holland entirely ignored the extravagant claims set up under the papal grant by Spain and Portugal not only to the lands but to the seas of the New World, another basis of division was adopted whose fundamental principle was prior discovery. All agreed to subordinate the rights of the native Indians to those of the first Christian discoverers, whose conflicting claims could only be settled through an appeal to the meager and inadequate rules provided by the Roman lawyers for the acquisition of *res nullius* through *occupatio*.

§ 97. Law of occupation as drawn from Roman sources.— Under the Roman law anything without an owner, *res nullius*, might be taken possession of by anyone who desired to keep it, and such “taking possession,” as a mode of acquisition, was known as *occupatio*.<sup>5</sup> If the thing thus acquired had once had an owner it was necessary to show that he had voluntarily abandoned it, while the new possessor was also required to manifest his purpose to retain it,—“apprehension must be accompanied by an *animus possidendi*, or *rem sibi habendi*.”<sup>6</sup> As *res nullius* the Romans counted a new island formed in the middle of a river, divisible between the riparian owners by a line drawn midway between the banks; or what is more to the point a new island rising in the sea<sup>7</sup> through volcanic action

<sup>3</sup> For the text of the bull, see 1, 86; Nar. and Crit. Hist., 11, pp. Calvo's *Recueil*, i, pp. 1-15. Cf. 14-15.

also Torquemada, *Mon. ind.*, lib. 18, c. 3; Robertson, i, pp. 148-150; Cauchy, I, pp. 378-381.

<sup>4</sup> Jurien de la Gravière, *Les Mairines du XVe et du XVIIe siècle*,

<sup>5</sup> Hadley, Introduction to Roman Law, p. 164.

<sup>6</sup> Mackeldey's *Modern Civil Law* (Kaufmann's ed.), vol. i, p. 249.

<sup>7</sup> *Insula quae in mari est (quod*



to which Italy was no stranger. Such was the source to which Grotius turned for the rules that were to regulate, to some extent at least, the process of discovery and settlement applied by the European nations to the partition of the New World.<sup>8</sup> By discovery, each nation was supposed to take possession of what it desired as *res nullius*; by settlement, to manifest its intention to keep it as its own. The claim of the English crown to the territories upon which the English settlements in America were made rested upon the voyages of the Cabots (1497-98), to whom was issued a patent—the oldest surviving document connecting the old land with the new<sup>9</sup>—authorizing them “to seek out and discover all islands, regions, and provinces whatsoever that may belong to the heathens and infidels,” and to set up the royal banner therein. The inchoate right thus acquired by discovery at the close of the fifteenth century did not ripen into a perfect title until early in the seventeenth when the permanent English settlements in America were made. In order to regulate the competition for the possession of the New World, to avoid conflicting settlements, and consequent war with each other, the European nations agreed, as Chief Justice Marshall has expressed it, “to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated between themselves. This principle was that discovery gave title to the government by whose subject, or by whose authority, it was made against all other European governments, which title might be consummated by possession. \* \* While the different nations of Europe respected the rights of the natives as occupants, they asserted the ultimate dominion to be in themselves.”<sup>10</sup>

§ 98. Title to newly-discovered lands under English Constitution.—According to the theory of the English constitution the title to all newly discovered lands accrued to the king in his public and royal character, and the exclusive right to grant them resided in him as a part of the royal prerogative. “Upon these principles rest the various charters and grants of terri-

raro accidit) occupantis fit: nullius enim esse creditur. *Institutes*, II, i, § 22.

<sup>8</sup> Cf. *De Jure Belli ac Pacis*, II, c. iii, entitled *De acquisitione originaria rerum, ubi de mari et fluminibus*.

<sup>9</sup> Dated March 5, 1495 (1496, new style), and printed in the Hakluyt Society's edition of the *Divers Voyages*, and in Rymer's *Foedera*.

<sup>10</sup> *Johnson vs. McIntosh*, 8 Wheat., 573.

tory made on this continent."<sup>11</sup> The great title deed under which the English settlers in America took actual and permanent possession was James I's charter of April 10th, 1606, creating the London and Plymouth companies as distinct corporations. After their dissolution, out of the vast territories originally granted to them were carved the domains finally distributed between the five southern colonies of Virginia, Maryland, North Carolina, South Carolina and Georgia, and the four northern colonies of Massachusetts, Connecticut, Rhode Island and New Hampshire,—the border lands between the two being assigned to New York, New Jersey and Pennsylvania, from the last of which was clipped the state of Delaware.<sup>12</sup> Many of these colonial charters attempted to convey rights from ocean to ocean despite the fact that the English settlers had entered only into possession of the narrow slip of country between the Alleghanies and the Atlantic. Upon the ground that a state cannot acquire a whole continent by making settlements on one of its coasts, the British negotiators contended, at the conference held in London in 1826-27 as to the Oregon boundary dispute, that such colonial charters have no international validity; that the grantees under them only received exclusive rights as against their fellow-subjects.<sup>13</sup> By that contention was exposed the fatal defect inherent in the old doctrine of discovery and settlement, a doctrine that furnished no adequate or practical rule by which the extent of territory *constructively* incident to actual settlements can be precisely determined.

§ 99. **General rules as to area appropriated by an act of occupation.**—As to the area appropriated by an act of occupation nothing more definite has ever been formulated than the general rule, that when a settlement is made by duly authorized persons the state to whose benefit it accrues is entitled, not only to all lands occupied and controlled by it, but also to such unoccupied regions beyond as are necessary to its safety and legitimate development. As first settlements are usually made upon coasts, questions have often arisen as to their extension inland. As the English colonial charters show it was the custom of that country to claim in North America, as Mr. Calhoun has expressed it, "specific limits along the

<sup>11</sup> Taney, C. J., in *Martin et al. vs. The Lessee of Waddell*, 16 Peters, 409.

<sup>12</sup> Cf. *The Origin and Growth of the Eng. Const.*, vol. i, pp. 17-19.

<sup>13</sup> Twiss, *Law of Nations*, vol. i, §§ 117, 118.

coast, and generally a region of corresponding width extending across the entire continent to the Pacific Ocean."<sup>14</sup> Against that extravagant claim prevailed, however, the more reasonable rule that the rights of a coast settlement do not extend inland further than the watershed.<sup>15</sup> While the rules for the division of continents are equally applicable to great islands like Australia, it is admitted that an island of moderate size, or even a group of small islands, may be acquired by one formal act of annexation and one settlement. In that way Great Britain and Germany took possession, respectively, in 1885, of the Louisiade Archipelago and the Marshall Islands, groups situated off the eastern end of New Guinea.<sup>16</sup> As to lateral boundaries the general rule is that when two states have established settlements upon a coast, and the extent of their respective territories is uncertain, a line should be drawn midway between the last posts on either side without regard to the natural features of the intervening country.<sup>17</sup> It has been claimed that the entire basin of a great river and its tributaries is so appurtenant to the land at its mouth that the whole may be acquired through the possession there of a fort or settlement extending no considerable distance on either side.<sup>18</sup> The sounder view is that such a claim must be limited (1) by the reservation that the extent of coast occupied must bear some reasonable relation to the extent of the river basin claimed to be appurtenant to it; (2) by the fact that the occupation of one bank of a river does not necessarily confer a right to the opposite bank, still less to extensive territories beyond it.<sup>19</sup> In order that the original occupation may be

<sup>14</sup> Mr. Calhoun, Sec. of State, to Pakenham, Sept. 3, 1844. Ms. Notes, Great Britain; Calhoun's Works, vol. v, p. 432.

<sup>15</sup> Such was the rule laid down by the American commissioners at Madrid in the controversy of 1803-5 as to the boundaries of Louisiana. See below, p. 133.

<sup>16</sup> Annual Register for 1884, pp. 433-434. For Vattel's rule as to the acquisition of sovereignty over "islands or other lands in a desert state," see I., c. xviii, §§ 206, 207.

<sup>17</sup> Phillimore, i, § ccxxxii-viii; Twiss, i, § 115-9, 124; The Ore-

gon Question, 249; Bluntschli, §§ 278, 279; Hall, § 32. In that way was fixed the boundary line between Spain and the United States on the Gulf of Mexico. Treaties of the U. S., p. 1017.

<sup>18</sup> Such was the contention of Mr. Rush in 1824, and of Mr. Gallatin in the Conference held at London in 1827 between the Commissioners of Great Britain and the United States. Cf. British and Foreign State Papers, 1825-26, p. 506.

<sup>19</sup> Twiss, i, §§ 118, 119, 143; Hall, § 32.

legally effective it is necessary that the person or persons making the settlement shall possess either specific or general authority to appropriate unoccupied lands from the state in whose name they act. When a duly commissioned officer takes possession of territory in the name of his state his act is its act, indicating for the moment at least a union of fact and intention. If, however, a navigator without authority takes possession in the name of his state and then sails away without actually founding a settlement, the fact of possession ceases, and with it the basis for subsequent ratification. When unauthorized persons enter unappropriated country, and actually make a settlement there in the name of the state to which they belong, a simple adoption or ratification of their act by such state will cure the original want of authority, without prejudice to the rights of any other state.<sup>20</sup>

§ 100. **Conflict between U. S. and Spain as to Western boundary of La.**—Such were the leading general rules into which the meager materials to be drawn from Roman law were expanded when the time came for the European nations to perform a task that stood without a precedent in history. So inadequate did such rules prove to be when actually applied to the partition of the New World that wars were only prevented in the settlement of the greater boundary controversies through compromises and special agreements in each particular case. That course was pursued in the three notable disputes, composed since the beginning of the present century, as to the territorial limits of the United States. After the purchase of Louisiana from France in 1803, a conflict arose between the United States and Spain as to the western boundary of the ceded territory, the former claiming that it should be the Rio Grande, the latter, that it should be a line drawn between the Red River and the Sabine. As assignees of the French title the United States rested upon the acts of La Salle in 1681-85 at the mouth of the Mississippi and in the Bay of Espiritu Santo. The Spaniards relied upon the prior explorations made by Spanish officers on the northern shores of the Gulf of Mexico in 1518 and 1561, and upon long and uninterrupted subsequent possession of the whole country. Upon that basis Spain demanded that the frontier should be fixed midway between the posts which had been permanently occupied by themselves and the French respectively. The American com-

<sup>20</sup> Martens, *Précis*, § 37; Philli- §§ 111, 114, 120; Bluntschli, *more*, i, § cc. xxvi-viii; Twiss, i, §§ 273-9; Hall, § 32.

missioners contended in the conference held upon the subject with the commissioners of Spain that it was "evident that by discovery and possession of the River Mississippi in its whole length, and the coast adjoining it, the United States are entitled to the whole country dependent on that river, the waters which empty into it, and their several branches, within the limits on that coast;" and in support of their claim they relied upon a few principles which they said were "simple, intelligible, and at the same time founded in strict justice. The first of these is that, when any European nation takes possession of any extent of seacoast, that possession is understood as extending into the interior country, to the sources of the rivers emptying within that coast, to all their branches, and the country they cover, and to give it a right in exclusion of all other nations to the same."<sup>21</sup> In other words the contention was that the discovery and occupation of a line of seacoast by a state entitles it to the interior country as far back as the crest of the watershed, a claim in perfect accord with the general principles of the law of nations.<sup>22</sup> The matter was finally compromised and settled in the treaty of 1819 by fixing the frontier not very far from the line for which Spain had contended at the outset.<sup>23</sup>

§ 101. Conflict with Great Britain as to northeastern boundary.—The treaty signed at Washington, August 9, 1842, by Lord Ashburton and Mr. Webster closed the ancient strife as to the northeast boundary between Canada and the state of Maine growing out of loose and inadequate definitions contained in the treaty of 1783. In the course of the long discussion which really began in 1827<sup>24</sup> it was maintained upon the part of the United States that a treaty of partition between a mother state and a new one born of it should not be considered as a treaty of cession from the former to the latter, but as an acknowledgment that certain territory was under a pre-existing title, in the possession of the state which established its independence.<sup>25</sup> As the disputed region was nearly if not

<sup>21</sup> *Mémoire de l'Amérique*, p. 116.

<sup>22</sup> Twiss, i, § 117; Lawrence, § 94.

<sup>23</sup> Cf. British and Foreign State Papers, 1817-18.

<sup>24</sup> In 1833 the matter was submitted to the arbitration of the King of Holland, whose award was rejected by the United States

"because he was so notoriously under our (British) influence, and because he had lost his independence with the loss of Belgium." Lord Aberdeen to Mr. Croker, Feb. 25th, 1843. Croker Papers, ii, p. 398.

<sup>25</sup> British and Foreign State Papers, 1827-28, 490-585.

entirely unoccupied in 1783, and only partially settled after 1790, the difficulty was to determine who was in possession at any given time. As to the exercise of proprietary or sovereign rights over such region pending a definite settlement of the real controversy, Lord Aberdeen claimed that it was "an acknowledged rule of law that when a doubt (as to the right of sovereignty) exists, the party who has once clearly had a right, and who has retained actual possession, shall continue to hold it until the question at issue may be decided."<sup>26</sup> As the United States admitted that Great Britain had a right to a "*de facto* jurisdiction" over all territory, if any, inhabited before 1783, the problem was limited to the proper mode of dealing with the portions settled after 1790. The solution of the problem embodied in the compromise treaty of August, 1842, although denounced by Lord Palmerston as "a capitulation," was generally accepted and applauded by both nations.<sup>27</sup>

§ 102. Conflict with Great Britain as to northwestern boundary.— In the making of the Ashburton Treaty the long standing dispute between Great Britain and the United States as to the claim of the latter to the territory between the Rocky Mountains and the Pacific Ocean, and between the 42d degree and 54th degree and 40 minutes of north latitude, was left out of consideration altogether. No claim could have possibly presented in a more perplexing form two sets of acts of discovery and settlement in direct conflict with each other. The main questions at issue involved disputed facts both as to the priority of the alleged discoveries, and as to the subsequent acts of occupation, scattered over long intervals of time, confirming them. At the outset the United States, claiming only the basin of the Columbia River by right of discovery and settlement, rested its case (1) upon the fact that Capt. Gray of Boston, an uncommissioned navigator, had in 1792 discovered the mouth of the river, sailing up some fifteen miles until the channel he was in ceased to be navigable; (2) upon the fact

<sup>26</sup> Cf. Hall, Int. Law, pp. 102-104.

<sup>27</sup> Greville's Memoirs, Sept. 17, 1842, vol. i, 2nd ser. From the fact that the government of the United States saw fit to obtain the consent of Massachusetts and Maine to the treaty before it was concluded, it can not be conclusively inferred

that the former did not possess perfect power to deal with the subject without such consent. Opinions of Attorneys-General, vi, 756; Kent. Comm., i, 166, 167; Webster's Works, vi, 272, 289; Halleck's Int. Law, p. 848; The schooner Peggy, 1 Cranch, 103.

that Captains Lewis and Clark, who were the first to discover the sources of the river, had explored its course to the sea; and (3) upon the further fact that the first posts and settlements in the disputed territory had been founded by citizens of the United States. The general contention, it was claimed, had been greatly strengthened by Great Britain's restitution in the treaty of Ghent, 1814, without reservation or exception, of the settlement of Astoria or Ft. George, founded at the mouth of the Columbia river by Americans in 1811, and captured by the British during the late war. The counter case of Great Britain rested, (1) upon an alleged discovery of the river, four years before Capt. Gray entered it, by Lieut. Meares, of the royal navy; (2) upon the acts of Capt. Vancouver, a surveyor of the coast, who entered shortly after Gray, and finding the true channel explored the river for a hundred miles or more and took formal possession of the country in the name of the King. The claim of the discovery of the sources of the river by Americans was offset by the statement that prior to or contemporaneously with their acts the agents of the British Northwest Company had made like explorations, establishing posts on the head waters or main branches of the river. The contention of the United States was then so widened as to embrace the whole territory originally described by virtue of the boundary treaty made with Spain in 1819, which conveyed to the former whatever rights were vested in the latter north of the 42d parallel by reason of acts of certain Spanish navigators who were supposed to have discovered the coasts of the region in question prior to the coming of either British or Americans. Great Britain at once rejoined that the original discoverers of the coast were really Sir Francis Drake in 1579 and Capt. Cook in 1778; and that so far as the treaty with Spain was concerned, it could not convey in any event more than the joint right of occupancy secured to her equally with Spain by the convention of the Escorial, 1790, usually known as the Nootka Sound Convention. In reply to the claim set up by the United States under the colonial charters running from ocean to ocean, Great Britain denied that they possessed any international validity, or that the grantees under them held exclusive rights against any one, except fellow subjects. As a final and saving clause the United States contended that she had the best right to the region in question by reason of contiguity of settlement,—a right which Mr. Gallatin said “must depend, in a considerable degree, on the magnitude and

population of that settlement."<sup>28</sup> As anything like a scientific solution of such a perplexing controversy was out of the question, an appeal was wisely made, after the two countries had drifted to the verge of war, to compromise, the result of which was the treaty of 1846,<sup>29</sup> in whose first article it was stipulated that from the point on the 49th parallel of north latitude where the boundary laid down in the then existing treaties terminated, the frontier should be continued westward along said 49th parallel to the middle of the channel separating the continent from Vancouver's Island, and thence southerly through the middle of said channel, and of Fucas Straits, to the Pacific Ocean, the navigation of the whole of such channel and straits, south of the 49th parallel, remaining free and open to both parties.

§ 103. **Acceptance of the law of nations by the U. S.**—Before the close of the American revolution the Congress of the United States,—which under the Articles of Confederation possessed jurisdiction over all questions arising under the law of nations,—in its Ordinance of December 4th, 1781, concerning marine captures, professed obedience to that law "according to the general usages of Europe;"<sup>30</sup> and by the terms of the second federal constitution treaties were made the supreme law of the land, binding the nation as a whole and all subordinate authorities and judges of every state.<sup>31</sup> After ratification a treaty becomes the equivalent of an act of Congress whenever it is self-executing; and whenever a treaty conflicts with such an act the latest in date must control.<sup>32</sup> By the judgments of the Supreme Court of the United States the common law of nations has been placed upon as high a plane as the conventional. It has been there declared that the federal courts must respect the law of nations as a part of the law of

<sup>28</sup> For the English and American views, and for the facts of the case in its later form, see De Garden, *Histoire des Traités de Paix*, v., 95; Parl. Papers, lii, 1846; Oregon Corresp., 34 and 39; Twiss, Oregon Question, 379; Dana's Wheaton, pp. 250-255; Hall, § 33.

<sup>29</sup> U. S. Laws and Treaties, ix, 109, 869.

<sup>30</sup> Journals of Congress, vol. vii,

185; Kent's Commentaries, vol. i, p. 1.

<sup>31</sup> Ware vs. Hylton, 2 Dall., 199; Marbury vs. Madison, 1 Cranch, 176; Worcester vs. George, 6 Peters, 575.

<sup>32</sup> Foster vs. Neilson, 2 Peters, 314; U. S. vs. Arredondo, 6 Peters, 691; U. S. vs. Percheman, 7 Peters, 51.



the land;<sup>33</sup> that such law, unlike foreign municipal laws, need not be proved as a fact; <sup>34</sup> that even as to municipal matters the *lex fori* should be so construed as to conform to such law unless the contrary be expressly prescribed;<sup>35</sup> that as the conduct of the foreign relations of the United States is placed in the hands of the federal government, its decisions upon all such subjects are binding on every citizen of the Union.<sup>36</sup> American statesmen have been no less pronounced than the jurists as to the binding force of international law. Mr. Jefferson, when Secretary of State, wrote to M. Genet that "the law of nations makes an integral part \* \* of the laws of the land,"<sup>37</sup> and Mr. Webster, when in the same office, wrote to Mr. Thompson that "every nation, on being received, at her own request, into the circle of civilized governments, must understand that she not only attains rights of sovereignty and the dignity of a national character, but that she binds herself also to the strict and faithful observance of all those principles, laws and usages which have obtained currency among civilized states."<sup>38</sup> It has been held, however, that maritime law, not a part of international law, is only so far operative in any country as it is adopted by the laws and usages of that country.<sup>39</sup>

§ 104. Jurisdiction over three mile zone.—At the very outset the government of the United States adopted provisionally that rule of international law which extends the jurisdiction of a nation over the littoral seas surrounding it to the extent

<sup>33</sup> The *Nereide*, 9 Cranch, 388. "In England, the position that the law of nations is a part of the municipal law was first, so far as is disclosed by the reports of decided cases, asserted from the bench by Lord Talbot, in 1736. (*Triquet v. Bath*, 3 Burrow's Reports, 1480.) He found no warrant for it in the earlier institutional writers of his country, although many of them were civilians. \* \* The principle thus declared was received without question in America, and remained unshaken by the Revolution." Inaugural Address delivered by Judge Simeon E. Baldwin, as President of the International Law Association, at Rouen, Aug. 21,

1900. See also Holland's *Studies of Int. Law*, p. 193; *Republica v. De Longchamps*, 1 Dallas Reports, 111, 114; *United States v. Arona*, 120 U. S. Reports, 488.

<sup>34</sup> The *Scotia*, 14 Wallace, 170.

<sup>35</sup> The *Amelia*, 1 Cranch, 1; 4 Dall., 34; *Murray vs. The Charming Betsy*, 2 Cranch, 64, 118; *Little et al. vs. Barreme*, 2 Cranch, 170.

<sup>36</sup> *Kennett vs. Chambers*, 14 Howard, 38.

<sup>37</sup> June 5, 1793, 1 Am. St. Pap. F. R., 150.

<sup>38</sup> April 15, 1842, Webster's Works, vi, 437.

<sup>39</sup> *Norwich Co. vs. Wright*, 13 Wall., 104; *The Lottawana*, *Ibid.*, 558; *The Scotland*, 105 U. S., 24.

of three miles from low water mark;<sup>40</sup> and at a little later day it was declared that "our jurisdiction has been fixed (at least for the purpose of regulating the conduct of the Government in regard to any events arising out of the present European war) to extend three geographical miles (or nearly three and a half English miles) from our shores, with the exception of any waters or bays which are so land-locked as to be unquestionably within the jurisdiction of the United States, be their extent what they may."<sup>41</sup> And in order to remove all ambiguity it was finally declared that it may be regarded "as settled, that so far as concerns the eastern coast of North America, the position of this department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from low water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a distance of three miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign."<sup>42</sup> While, within such limits, the sovereign of the shore may arrest, by due process of law, persons charged with crime on board foreign merchant ships, and may require that nothing be done by ships of friendly powers by which the peace of the shore may be disturbed, the claim to territorial jurisdiction within the three mile zone cannot be extended to ships using the ocean as a highway, and not bound for a port within such jurisdiction.<sup>43</sup> It is asserted by a few publicists that with the increasing range of great guns states should have the right of their own motion to extend the limits of their jurisdiction over littoral seas.

<sup>40</sup> Mr. Jefferson, Sec. of State, to the Minister of Great Britain, Nov. 8, 1793. Wharton, *Int. Law Dig.*, vol. i, § 32.

<sup>41</sup> Mr. Pickering, Sec. of State, to Governor of Virginia, Sept. 2, 1796.

<sup>42</sup> Mr. Bayard, Sec. of State, to Mr. Manning, Sec. of the Treasury, May 28, 1886: "The exclusive jurisdiction of a nation extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the

sea *inclosed by headlands*, and, also, to the distance of a marine league, or as far as a cannon-shot will reach from the shore along its coasts." Mr. Buchanan, Sec. of State, to Mr. Jordan, Jan. 23, 1849. Wharton, *Int. Law Dig.*, vol. i, § 32, pp. 101, 107, 108.

<sup>43</sup> Henry on *Adm. Jur.* (1885), § 89; Martens, *Précis*, i, p. 144; Bluntschli, § 302; Heffter, § 75; Klüber, § 130; Ortolan, i, p. 133.

As Hall has expressed it: "It is probably safe to say that a state has the right to extend its territorial waters from time to time at its will, with the now increasing range of its guns, though it would undoubtedly be more satisfactory than an arrangement upon the subject should be arrived at by common consent."<sup>44</sup> It is very difficult to conceive upon what theory or by what authority any state acting alone could do any such thing, as the existing jurisdiction rests solely upon common consent as manifested by usage. In the *Franconia* case it was expressly held that Great Britain could only acquire jurisdiction over the three mile zone encircling her coasts through the adoption of the general rule of international law by which it is conferred.<sup>45</sup>

<sup>44</sup> Int. Law, p. 127, ed. 1880. See made in Hall's text. See p. 160, 32 Alb. Law Jour., p. 101. A slight 4th ed. modification was subsequently

<sup>45</sup> See above, p. 88 *seq.*

## CHAPTER VI.

### MONROE DOCTRINE AND OTHER SOURCES.

§ 105. **History of Holy Alliance reviewed.**—In the account heretofore given of the growth of the European treaty system from the Peace of Westphalia to the Treaty of Berlin, an effort was made to draw out the process through which a primacy or overlordship was vested, by a set of tacit understandings, outside of and above the ordinary rules of international law, in that combination of the great powers, now six in number, usually known as the Concert of Europe. An account was also given of the circumstances under which an inner circle of that Concert, known as the Holy Alliance, undertook to intervene in the internal affairs of certain European states in order to protect the principle of legitimacy against the then rising tide of popular freedom, as a result of which Austria, at the command of the Alliance, crushed the Neapolitan revolution of 1820, and France, by the same authority, invaded Spain in 1823 for the purpose of overthrowing the constitution of the Cortes and of restoring absolutism in the person of Ferdinand VII. In the summer of that year it was that the Alliance notified Great Britain that, so soon as France should complete the overthrow of the revolutionary government of Spain, a congress would be called for the purpose of terminating the revolutionary governments in South America, which had then been recognized by the United States but not by Great Britain.<sup>1</sup> The attempt thus made by those who claimed the right to exercise a primacy or overlordship in the affairs, external and internal, of European states to extend that system of interference to American Republics forced the government of the United States, as the dominant political power in this hemisphere, to assert that in itself alone resides a primacy or overlordship, which has gradually become as well defined in the New World as that of the Concert of Europe in the Old. Like every other institution that has been the result of growth

<sup>1</sup> See above, p. 116 *seq.* When in 1825 Canning formally recognized the independence of such governments his intention is said to have been to seek compensation for the preponderance of France in the Peninsula by "calling the New World into existence to redress the balance of the Old." Alison, *Hist. of Europe from the Fall of Napoleon*, ii, p. 715 *seq.*

it did not attain its full stature in a night; it did not spring into life fully armed. Therefore, in order clearly to explain the nature and extent of the hegemony of the United States in this hemisphere, it will be necessary to trace, step by step, the process through which the doctrine as originally announced has reached its present state of maturity. Castlereagh, who was regarded as too much in sympathy with the Holy Alliance, yielded the direction of England's foreign affairs to Canning, who came forward as an advocate of the universal right of self-government, and as an opponent to France's invasion of Spain, just in time to deal with the momentous question presented by the threat of the Alliance to extend its interference to Spain's relations with her colonies in South America. In order to defeat that design, full of menace to the interests of English merchants who had built up a large trade with South American countries, Canning, in the summer of 1823, began to correspond with Mr. Rush, the American Minister at London, as to the advantages of a joint declaration by Great Britain and the United States against the proposed European intervention.

§ 106. Jefferson's famous letter to Monroe, Oct. 24th, 1823.—As soon as President Monroe received that correspondence he submitted it to Mr. Jefferson, then in retirement, with the request that he would advise him in the matter. On the 24th of October Jefferson in his letter from Monticello said, among other things, that "the question presented by the letters you have sent me is the most momentous which has been offered to my contemplation since that of Independence. That made us a nation; this sets our compass and points the course which we are to steer through the ocean of time opening on us. And never could we embark upon it under circumstances more auspicious. Our first and fundamental maxim should be never to entangle ourselves in the broils of Europe; our second, never to suffer Europe to intermeddle with cis-Atlantic affairs. America, North and South, has a set of interests distinct from those of Europe, and peculiarly her own. She should, therefore, have a system of her own, separate and apart from that of Europe. \* \* \* One nation, most of all, could disturb us in this pursuit; she now offers to lead, aid, and accompany us in it. By acceding to her proposition we detach her from the bands, bring her mighty weight into the scale of free government, and emancipate a continent at one stroke, which might otherwise linger in doubt and difficulty.

Great Britain is the nation which can do us the most harm of any one or all on earth, and with her on our side we need not fear the whole world. With her, then, we should most sedulously cherish a cordial friendship, and nothing would tend more to knit our affections than to be fighting once more side by side in the same cause. \* \* But we have first to ask ourselves a question. Do we wish to acquire to our own confederacy any one or more of the Spanish provinces? I candidly confess that I have ever looked on Cuba as the most interesting addition which could ever be made to our system of States. The control which, with Florida Point, this island would give us over the Gulf of Mexico and the countries and isthmus bordering on it, as well as all those whose waters flow into it, would fill up the measure of our political well-being. Yet, as I am sensible that this can never be obtained, even with her own consent, but by war, and its independence, which is our second interest (and especially its independence of England), can be secured without it, I have no hesitation in abandoning my first wish to future chances, and accepting its independence, with peace and the friendship of England, rather than its association at the expense of war and her enmity.”<sup>2</sup> Madison, who was consulted at the same time through Jefferson, gave his cordial approval to Canning’s suggestion,<sup>3</sup> and Calhoun, who was Secretary of War at the time, declared that he believed that the Alliance “had an ultimate eye to us; that they would, if not resisted, subdue South America. \* \* Violent parties would arise in this country, one for and one against them, and we should have to fight upon our own shores for our institutions.”

§ 107. **President Monroe’s message of Dec. 2nd, 1823—European system not to be extended in this hemisphere.**—Thus advised President Monroe, in his seventh annual message, delivered December 2d, 1823, said to Congress that “in the wars of the European powers, in matters relating to themselves, we have never taken any part, nor does it comport with our policy to do so. It is only when our rights are invaded or seriously menaced that we resent injuries or make preparation for our defense. With the movements in this hemisphere we are of necessity more immediately connected, and by causes which must be obvious to all enlightened and impartial observers. The political system of the allied powers is essentially dif-

<sup>2</sup> Jefferson’s Works, vii, p. 315.

<sup>3</sup> Madison’s Writings, iii, p. 339.

ferent in this respect from that of America. This difference proceeds from that which exists in their respective governments. And to the defense of our own, which has been achieved by the loss of so much blood and treasure, and matured by the wisdom of their most enlightened citizens, and under which we have enjoyed unexampled felicity, this whole nation is devoted. We owe it, therefore, to candor and to the amicable relations existing between the United States and those powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered, and shall not interfere. But with the governments who have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition toward the United States. \* \* Our policy in regard to Europe, which was adopted at an early stage of the wars which have so long agitated that quarter of the globe, nevertheless remains the same, which is not to interfere in the internal concerns of any of its powers; to consider the government *de facto* as the legitimate government for us; to cultivate friendly relations with it, and to preserve those relations by a frank, firm, and manly policy; meeting, in all instances, the just claims of every power, submitting to injuries from none. But in regard to these continents, circumstances are eminently and conspicuously different. It is impossible that the allied powers should extend their political system to any portion of either continent without endangering our peace and happiness; nor can any one believe that our southern brethren, if left to themselves, would adopt it of their own accord. It is equally impossible, therefore, that we should behold such interposition, in any form, with indifference. If we look to the comparative strength and resources of Spain and those new governments, and their distance from each other, it must be obvious that she can never subdue them."

§ 108. -Part of same message relating to unsettled boundaries in northwest.— At an earlier stage of his message, in a paragraph (7) far removed from the two (48 and 49) from which

the foregoing extracts have been taken, President Monroe had expressed himself in the same general way in reference to a subject having no connection whatever with the intervention of the Holy Alliance in the affairs of South America. The first declaration,—relating to fresh acquisitions of territory by European powers in any portion of the American continents by occupation or colonization,—was prompted by a controversy as to unsettled boundaries in the Northwest that grew out of a ukase issued by the Czar of Russia in September, 1821, in which he had asserted exclusive territorial rights from the extreme northern limit of the continent to the 51st parallel of north latitude, by attempting to exclude foreigners from fishing and navigation for the purposes of commerce within an hundred Italian miles of the coast down to that parallel. Against that ukase both Great Britain and the United States protested because an unsettled controversy was then pending between them as to the very territory to which the Czar thus laid claim. When Russia proposed an amicable settlement of the matter Mr. John Quincy Adams, then Secretary of State, said to the Russian minister at a conference held on July 17th, 1823, “that we should contest the right of Russia to *any* territorial establishment on this continent, and that we should assume distinctly the principle that the American continents are no longer subjects for any *new* colonial establishments.”<sup>4</sup> On July 2nd Mr. Adams had written to Mr. Rush, our minister at London, enclosing copies of his instructions to Mr. Middleton, our minister at St. Petersburg, and directing him to confer freely with the British government on the subject. In his letter to Mr. Rush Mr. Adams said, that a “necessary consequence of this state of things will be, that the American continents henceforth will no longer be subject to colonization. *Occupied by civilized nations, they will be accessible to Europeans and each other on that footing alone;* and the Pacific Ocean, in every part of it, will remain open to the navigation of all nations in like manner with the Atlantic. Incidental to the condition to national independence and sovereignty, the rights of interior navigation of their rivers will belong to each of the American nations within its own territories.”<sup>5</sup> Just five months thereafter President Monroe, in para-

<sup>4</sup> J. Q. Adams's Memoirs, VI, 163. ly denied the correctness of the position, and that 'Great Britain

<sup>5</sup> “When Mr. Rush made known Mr. Adams's letter to the British Cabinet, he asserts that they total-ly considered the whole of the *un-occupied* parts of America as being open to her future settlements *in*



graph seven of his message of December 2nd mentioned above, informed Congress that "at the proposal of the Russian Imperial Government, made through the minister of the Emperor residing here, a full power and instructions have been transmitted to the minister of the United States at St. Petersburg to arrange, by amicable negotiation, the respective rights and interests of the two nations on the northwest coast of this continent. A similar proposal had been made by his Imperial Majesty to the Government of Great Britain, which has likewise been acceded to. \* \* In the discussions to which this interest has given rise and in the arrangements by which they may terminate, the occasion has been judged proper for asserting, as a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for *future colonization* by any European powers."

§ 109. **Meaning of Monroe's phrase, "future colonization."**—When serious discussion afterwards arose as to the meaning of President Monroe's phrase "future colonization," reference was made to the letter of Mr. Adams, who is credited with laying the foundations of this part of the Monroe Doctrine when he said that these continents are "occupied by civilized nations," and are "accessible to Europeans and each other on that footing alone." After Mr. Adams became president he threw further light on the subject in his special message to the Senate of December 26th, 1825, when, speaking of measures which might be adopted by the Panama Congress, he suggested that "an agreement between all the parties represented at the meeting, that each will guard by its own means against the establishment of any future European colony *within its borders*, may be found advisable. This was more than two years since announced by my predecessor, as a principle resulting from the emancipation of both the American continents." In the light of that declaration it seems to be clear that Mr. Monroe only intended to say that no future colonization by European nations could be permitted within the limits already claimed by civilized powers; and that he did not have in mind the vast unoccupied regions still unsettled by such powers.<sup>6</sup>

like manner as heretofore; that is, 'by priority of discovery and occupation.' Dana's notes to Wheaton's Elements, p. 99.

<sup>6</sup> "It was by no means generally admitted that the American continents were then wholly occupied by civilized nations. There were

His declaration that, "with the existing colonies or dependencies of any European power we have not interfered, and shall not interfere," relieved that part of the subject from all ambiguity. Such are the two foundations, relating to two entirely distinct subject matters, of what is generally known as the Monroe Doctrine, a doctrine which has gradually reached its present dimensions through seventy-five years of persistent development.

§ 110. **Its meaning widened by President Polk.**—Pending the controversy with Great Britain as to the Oregon territory, and in the face of possible intervention by the European powers on account of the annexation of Texas, President Polk, in his message of December 2nd, 1845, greatly widened the protest of President Monroe against "future colonization by any European powers" when he said that "it should be distinctly announced to the world as our settled policy, that no future European colony or dominion shall, with our consent, be planted or established on any part of the North American continent."<sup>7</sup> That enlarged declaration, unfettered by any implication that European settlements might be made in North America outside the boundaries of civilized nations, was evidently intended by the use of the word "dominion" to forbid the acquisition by conquest or purchase of any territory already occupied.<sup>8</sup> In obedience to that principle Great Britain and France were more than once notified that the United States could not witness with indifference the transfer of Cuba by Spain to any other European power;<sup>9</sup> while in the Clayton-Bulwer Treaty of 1850 Great Britain expressly bound herself not to exercise dominion over "any part of Central America,"

vast regions of territory not actually settled by the subjects of civilized powers. Neither Russia nor Great Britain admitted the claim put forth by Mr. Adams." Prof. John B. Moore's Monograph, *The Monroe Doctrine*, p. 4.

<sup>7</sup> In his special message to congress of April 29, 1848, concerning Yucatan, Mr. Polk went still farther when,—after stating that the authorities of that country, in the face of an Indian insurrection, had offered to transfer "the dominion and sovereignty of the peninsula" to the United States,

Great Britain or Spain,—he declared that "we could not consent to a transfer of this 'dominion and sovereignty' to either Spain, Great Britain, or any other European power."

<sup>8</sup> "This doctrine of Mr. Polk would require our consent to any acquisition of dominion by a European power, whether by voluntary cession or transfer, or by conquest." Dana's notes to Wheaton's *Elements*, p. 102.

<sup>9</sup> "You will now add that we could not consent to the occupation of those islands (Cuba and

a provision under which she was finally induced to give up the protectorate, acquired long before the treaty was made, over the Indians of the Mosquito Coast.<sup>10</sup>

§ 111. Clayton-Bulwer treaty, 1850—an exception to Monroe Doctrine.—The Clayton-Bulwer treaty<sup>11</sup> is specially notable as the only exception to the rule that the government of the United States will decline to enter into any alliances or combinations with European powers for the settlement of questions connected with its interests in this hemisphere. In defiance of that fundamental principle as embodied in the Monroe Doctrine, the treaty in question,—after declaring in the preamble that the United States and Her Britannic Majesty are “desirous of consolidating the relations of amity which so happily subsist between them by setting forth and fixing in a convention their views and intentions with reference to any means of communication by ship-canal which may be constructed between the Atlantic and Pacific Oceans by way of the river San Juan de Nicaragua, and either or both of the lakes of Nicaragua or Managua to any port or place on the Pacific Ocean,”—provides (art. I) that “the governments of the United States and of Great Britain hereby declare that neither the one nor the other will ever obtain or maintain for itself any exclusive control over the said ship-canal; agreeing that neither will ever erect or maintain any fortifications commanding the same, or in the vicinity thereof, or occupy or fortify, or colonize, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America; nor will either make use of any protection which either affords, or may afford, or any alliance which either has or may have to or with any state or people, for the purpose of erecting or maintaining any such fortifications, or of occupying, fortifying, or colonizing Nicaragua, Costa Rica, the Mosquito Coast,

Porto Rico) by any other European power than Spain under any contingency whatever.” Mr. Clay, Sec. of State, to Mr. Brown, Oct. 25, 1825. Mss. Inst. to Ministers.

<sup>10</sup> Cf. Martens (N. R. G.), ii, 210-6. The United States “will not consent to the subjugation of any of the independent states of this continent to European powers, nor to the exercise of a protectorate over them, nor to any other direct

political influences to control their policy or institutions.” Mr. Cass, Sec. of State, to Mr. Dodge, Oct. 21, 1858. By a treaty concluded with Honduras, Nov. 28, 1859, and with Nicaragua, Aug. 28, 1860, Great Britain finally relinquished the Mosquito Protectorate. See President Buchanan’s Fourth Annual message, 1860.

<sup>11</sup> Treaties of the United States, p. 441.

or any part of Central America, or of assuming or exercising dominion over the same. \* \* \* Article II. Vessels of the United States or Great Britain traversing the said canal shall in case of war between the contracting parties, be exempt from blockage, detention, or capture by either of the belligerents." The treaty as a whole rested upon two clearly defined conditions: first, that the canal should be built at once by private persons or companies,—“it being desirable that no time should be unnecessarily lost in commencing and constructing the said canal, the governments of the United States and Great Britain determine to give their support and encouragement to such persons or company as may first offer to commence the same, with the necessary capital, the consent of the local authorities, and on such principles as accord with the spirit and intention of this convention;” second, that the compact should not be a dual but an international one,—“the contracting parties in this convention engage to invite every state with which both or either have friendly intercourse to enter into stipulations with them similar to those which they have entered into with each other, to the end that all other states may share in the honor and advantage of having contributed to a work of such general interest and importance as the canal herein contemplated.” Now that a half century has passed by without any effort whatever upon the part of the private persons who were to construct the canal promptly, and after the failure during that time of any other power to become a party to the arrangement, it is hard to understand how any publicist can contend that the treaty is not “voidable” under the well settled principle that neither party to an international compact “can make its binding effect dependent at his will upon conditions other than those contemplated at the moment when the contract was entered into, and on the other hand a contract ceases to be binding so soon as anything which formed an implied condition of its obligatory force at the time of its conclusion is essentially altered.”<sup>12</sup>

Whether it will be wise for the government of the United States to avail itself unconditionally of the legal right thus vested in it to annul the treaty in question; whether it will be to its ultimate interest to assume alone the defense of the pro-

<sup>12</sup> Hall, § 116. For a more extended consideration of that doctrine, see below, Sec. 394. A summary of the conflicting views of English and American statesmen as to its application to the Clayton-Bulwer treaty may be found in Wharton, *Int. Law Dig.*, § 150f.

posed canal and to relinquish many advantages that would certainly flow from its neutralization,<sup>12a</sup>—are questions of American statesmanship that lie beyond the domain of international law. It is to be hoped, however, that such a wise and conservative solution of these vexed questions may be reached as will satisfy the reasonable aspirations of the two great branches of the English speaking people.

§ 112. **Termination of France's intervention in affairs of Mexico.**—The step backward taken at the making of the Clayton-Bulwer treaty was more than regained when in December, 1865, it became necessary for the government of the United States to terminate the intervention of France in the internal affairs of Mexico. Notice was then given that friendship with that country must cease, “unless France could deem it consistent with her interest and honor to desist from the prosecution of armed intervention in Mexico to overthrow the domestic republican government existing there, and to establish upon its ruins the foreign monarchy which has been attempted to be inaugurated in the capital of that country.”<sup>13</sup> Five years later a full and final expression was given to the aspirations of the United States upon that subject by Mr. Fish,—in his Report of July 14th, 1870, to President Grant, accompanying the President's message of the same date,—when he said: “This policy is not a policy of aggression; but it opposes the creation of European dominion on American soil, or its transfer to other European powers, and it looks hopefully to the time, when, by the voluntary departure of European governments from this continent and the adjacent islands, America shall be wholly American.” And then that very able Secretary of State placed, perhaps for the first time, the rapidly developing primacy upon a broad philosophic and historic basis when he said that, “the United States, by the priority of their independence, by the stability of their institutions, by the regard of their people for the forms of law, by their resources as a government, by their naval power, by their commercial enterprise, by the attractions which they offer to European immigration, by the prodigious internal development of their resources and wealth, and by the intellectual life of their population, occupy of necessity a prominent position on this continent, which they neither can nor should abdicate, which entitles them to a leading voice, and which imposes on

<sup>12a</sup> David Dudley Field favored the plan of neutralization. Int. Code, p. 373, second ed. <sup>13</sup> Mr. Seward, Sec. of State, to Mr. Bigelow, Dec. 16, 1865; Mss. Inst., France.

them duties of right and of honor regarding American questions, whether those questions affect emancipated colonies, or colonists still subject to European dominion."

§ 113. Definition of Monroe doctrine completed by President Cleveland.—Not, however, until a resolute and far-sighted statesman, who clearly understood that our marvelous national development entitled us to rank as a world-power, was given the opportunity by the boundary controversy between Great Britain and the Republic of Venezuela, was the inevitable declaration finally made that the same reasons that impel the Concert of Europe to guard the balance of power in the Old World prompt the government of the United States to maintain alone its primacy in the New. In his special message<sup>14</sup> to Congress of December 17th, 1895, President Cleveland, after referring to the contention of the British Prime Minister that the Monroe Doctrine had been given "a new and strange extension and development," said that "without attempting extended argument in reply to these positions, it may not be amiss to suggest that the doctrine upon which we stand is strong and sound, because its enforcement is important to our peace and safety as a nation and is essential to the integrity of our free institutions and the tranquil maintenance of our distinctive form of government. It was intended to apply to every stage of our national life and cannot become obsolete while our Republic endures. *If the balance of power is justly a cause for jealous anxiety among the governments of the Old World and a subject for our absolute non-interference, none the less is an observance of the Monroe Doctrine of vital concern to our people and their government.* \* \* The Monroe Doctrine finds its recognition in those principles of international law which are based upon the theory that every nation shall have its rights protected and its just claims enforced." When the government of Great Britain justly and wisely conceded the right of arbitration thus asserted by the United States, solely by virtue of its<sup>15</sup> primacy or overlordship

<sup>14</sup> Messages and Papers of the Presidents, ix, 655.

<sup>15</sup> That the statesmen of Great Britain perfectly understood at the time the nature of the concession clearly appears from the following: "From the point of view of the United States the arrangement is a concession by Great Britain of

the most far-reaching kind. It admits a principle that in respect of South American republics the United States may not only intervene in disputes, but may entirely supersede the original disputant and assume exclusive control of the negotiations. Great Britain can not, of course, bind any other

in the New World, enduring foundations were laid for that close moral alliance since developed between the two broad divisions of English-speaking peoples. In the light of an examination of that primacy as it exists to-day it is folly to contend that it is just what it was when originally formulated by President Monroe. As "it was intended to apply to every stage of our national life and cannot become obsolete while our Republic endures," it has grown with our growth, and now stands ready to adapt itself to all future developments. The change that has taken place has, however, been less in its outward form than in its inner spirit. To use the words of Bagehot, it "is like an old man who still wears with attached fondness clothes in the fashion of his youth; what you see of him is still the same; what you do not see is wholly altered."<sup>16</sup> The marvel to students of the American constitution is that the upbuilding of the primacy of the United States in the New World has been worked out by the pens of Presidents and Secretaries of State,—it is purely a creation of the executive power.

§ 114. Instructions given by states for guidance of their own courts and officers.—The Monroe Doctrine must, therefore, be classed with those sources of international law which rest upon instructions given by states for the guidance of their own courts and officers. All such national acts are in their inception nothing more than expressions of opinion by particular states that certain rules are so just and equitable that they are willing to bow to their authority. Not until a new rule thus announced has, through its own merits, won general acceptance can it become a part of the general body of international law. In that event the first announcement should be considered as the source from which the general rule was drawn. A familiar illustration of this principle is to be found in the famous marine ordinance of Louis XIV, which was nothing more than a set of instructions issued to the prize courts and naval commanders of France directing them how to proceed in prize cases, the conduct of which was greatly embarrassed by the fact that the usage of nations on that subject had not then been clearly established. That beautiful model of legislation, through its intrinsic merit, aided by the excellent commentary of Valin nearly a century later,

nation by her action, but she has against herself." London Times, set up a precedent which may in Nov. 14, 1896. future be quoted with great effect

<sup>16</sup> The Eng. Const., p. 2.

finally became the general basis of law upon that subject.<sup>17</sup> As Sir William Grant expressed it, "When Louis XIV published his famous ordinance of 1681, nobody thought that he was undertaking to legislate for Europe, merely because he collected together and reduced into the shape of an ordinance, the principles of marine law as then understood and received in France."<sup>18</sup> In the same way the Instructions for the Guidance of the Army of the United States in the Field<sup>19</sup>—an anticipation of the attempt made at the Brussels Conference of 1874 to form a code for the regulation of land war—give promise of winning general acceptance, as like manuals have been adopted by several states, and as they have already been commended in the works of two eminent publicists.<sup>20</sup> The fact has just been emphasized that what is generally known as the Monroe Doctrine—that new page which is being rapidly incorporated into the general body of the law of nations—rests only upon a series of purely national documents formulated from time to time by the Presidents of the United States or by Secretaries of State. As soon as the entire family of nations, or all of its members directly interested in the subject, acquiesce in that doctrine as Great Britain and France have done, the new rule establishing the hegemony of the United States in these continents will become a part of the public law of the world, if it is not so already.

§ 115. History of diplomatic intercourse as a source of international law.—The fifth and final source of International law is to be found in the general history of diplomatic intercourse embodied in the mass of materials contained in the archives of the departments of foreign affairs of the several countries, including the histories of the negotiations through which wars have been begun and ended and treaties made and unmade, the official opinions of jurists given publicly or confidentially to their governments expounding the law in particular cases,

<sup>17</sup> See above, p. 41.

<sup>18</sup> Cf. Marshall on Insurance, i, p. 425.

<sup>19</sup> A Code of War for the Government of the Armies of the United States in the Field was prepared during the great civil war (1861-65) upon the requisition of the President by the eminent publicist Francis Lieber. It was adopted

and promulgated by the War Department in General Orders, No. 100. It is evident that that was the model which suggested to Bluntschli his codification of the Law of War. See the preface to his *Droit International Codifié*.

<sup>20</sup> Maine, *Int. Law*, p. 24; Lawrence, *Principles of Int. Law*, p. 105.



as well as the records of the numberless miscellaneous transactions embraced in what are generally known as state papers. Reference has been made already to the works of great publicists who have created sources of international law through their individual effort in a purely private capacity.<sup>21</sup> When experts of that class become the representatives of states charged with the conduct of their foreign affairs, their official utterances in state papers often become of exceptional importance. In that category may be placed the utterances of the early publicists of the United States who gave such an impetus to the more perfect development of the laws of neutrality,<sup>22</sup> and also such official opinions of the Attorneys General as relate to the law of nations. While new rules thus laid down may sometimes become sources through general acceptance, ordinarily precedents contained in state papers, if precedents they may be called, are looked to rather as evidences of what the practice or usage of nations really is than as sources of it.

#### § 116. International private law, or conflict of laws.—

In what has so far been said as to the sources and foundations of international public law no reference has been made to that kindred branch designated by some writers as private international law, by others as conflict of laws.<sup>23</sup> While serious objections may be urged against both terms for their failure perfectly to express the idea they are intended to convey, the former seems to be gaining in general acceptance, despite the fact that both Story and Dicey have given the weight of their names to the latter. As early as 1826 Chancellor Kent, in the

<sup>21</sup> See above, p. 71.

<sup>22</sup> See above, p. 67.

<sup>23</sup> "In 1840 Felix began a series of articles '*du conflit des lois de différentes nations, ou du droit international*,' and republished them in 1843 as the '*Traité du droit international privé, ou du conflit des lois en matière de droit privé*.' Mr. Westlake followed in 1858, 1880 and 1891 with his '*Private International Law, or the Conflict of Laws*;' M. Fiore in 1869, with his '*Diritto internazionale privato, o principii per risolvere i conflitti tra legislazione diverse in materia*

*di diritto civile e commerciale*;' M. Haus with '*Le droit privé qui régit les étrangers en Belgique, ou du droit des gens privé considéré dans ses principes fondamentaux et dans ses rapports avec les lois civiles des Belges*,' 1874; M. Brocher with his '*Nouveau traité du droit international privé*,' 1876; and Mr. Foote with his '*Private International Jurisprudence*,' 1878. In 1874 M. Clunet established at Paris the '*Journal du droit international privé*.'" Holland, *Elements of Jurisprudence*, p. 369.

first volume of his Commentaries,<sup>24</sup> said that "a recent French writer (*M. Victor Foucher*) divides the law of nations into two branches, (1) public international law, which regulates the political relation of nation to nation; and (2) private international law, which, though based upon the first, regulates the reciprocal and personal relations of the inhabitants of different states." It may well be said that the second is based upon the first because it is impossible by fanciful refinements to overturn the fact that the laws of one state cannot be enforced within the limits of another except through "comity,"—that term being understood to mean not mere courtesy, but that reciprocal obligation which arises out of the necessity for every nation to recognize and enforce, under certain conditions, the laws of every other nation in order to prevent gross inconvenience and injustice to litigants (*ex comitate ob reciprocam utilitatem*).<sup>25</sup> Little, if any, improvement can be made upon the axioms of Huber, the third of which is that the rulers of every empire from comity admit, that the laws of every people, in force within its own limits, ought to have the same force everywhere, so far as they do not prejudice the powers or rights of other governments, or of their citizens,<sup>26</sup> because it appears that this matter is to be determined, not simply by the civil laws, but by the convenience and tacit consent of different people. If then the enforcement of the laws of one state affecting a private individual within another, depends upon "the convenience and tacit consent of different people," the conclusion is irresistible that such tacit consent is one of the rules regulating the intercourse of nations. The law of the state actually enforced within another is a national law; the rule by virtue of which it is so enforced is an international rule. There is therefore an absolute necessity for the use of the word international as an apt term to describe this system of international obligation resting upon international convenience. The only real question is as to the form in which

<sup>24</sup> Page 2, note a. David Dudley Field in his *International Code* (1876) uses the terms *Public International Law* and *Private International Law* just as Kent did in 1826.

<sup>25</sup> Cf. Dicey, *Conflict of Laws*, p. 10.

<sup>26</sup> *Rectores imperiorum id com-*

*itur agunt, ut jura cujusque populi intra terminos ejus exercita tenant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium praejudicetur. Lib. 1, tit. 3, de Conflictu Legum, § 2, p. 538. Story, Conflict of Laws, § 29.*

the word international should be so combined with other words as to express the exact idea. Prof. Holland favors such a transposition of the current term as will make it read international private law,<sup>27</sup> which is far more definite than *Anwendung der Gesetze*<sup>28</sup> (Application of Law). And yet even against a slight change for the better stands the usage of more than fifty years, during which time a majority of the best writers have employed the term private international law in contradistinction to public international law. If any change is to be made in the first of these titles the substituted term should certainly express the true state of the case. It is hard to conceive of anything more misleading than the term Conflict of Laws, when employed to describe the international rules established to remove such conflicts,—rules, as Sir Henry Maine<sup>29</sup> has expressed it, “prescribing the conditions on which one community will recognize and apply the jurisdiction of another.” If that be their real character, the body of law in question should be entitled: International Private Law, a system of rules established by the comity of nations for the prevention of conflict of laws. For like reasons that part of the subject treated in the present work has been entitled International Public Law. Within a reasonable time the author hopes to publish another to be entitled International Private Law.

<sup>27</sup> Elements of Jurisprudence, pp. 368-373. Such a change, which Prof. Holland says does not fully remedy the difficulty, finds support in the names of the following works: Schöffner's *die Entwicklung des internationalen Privatrechts*, 1841; Pfeiffer's *das Princip des internationalen Privatrechts*, 1851; von Bar's *das internationale Privat- und Strafrecht*, 1862; von Püttlingen's *Handbuch*

*des in Oesterreich-Ungarn geltenden internationalen Privatrechts*, 1878. The *Zeitschrift für internationales Privat- und Strafrecht* was founded by F. Böhm in 1890.

<sup>28</sup> For an illustration of the use of that term, see Struve's *über das positive Rechtsgesetz in seiner Beziehung auf räumliche Verhältnisse und über die Anwendung der Gesetze verschiedener Oerter*, 1834.

<sup>29</sup> Int. Law, p. 17.



## PART III.

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# RIGHTS AND DUTIES OF STATES IN TIME OF PEACE.

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### CHAPTER I.

#### NATURE AND ATTRIBUTES OF STATES, SOVEREIGN AND PART-SOVEREIGN.

§ 117. Territorial sovereignty the basis of all international relations.—By what has so far been said two conclusions have been clearly established: first, that what is now known as international law is a system of rules created by civilized nations, since the beginning of the Reformation, to regulate their intercourse with each other; second, that such system was founded in the first instance by the states that gradually arose out of the settlements made by the migratory hordes who settled down permanently upon the wreck of the Roman Empire.<sup>1</sup> The vitally important outcome of the process through which such migratory hordes were tied to the land—the “process of feudalization”—was the principle of territorial sovereignty which has become the basis of all international relations.<sup>2</sup> Upon that basis rests the modern conception of the state as a nation with fixed geographical boundaries,—a conception radically different from the ancient conception of the state as a city-commonwealth.<sup>3</sup> When, therefore, publicists attempt to describe the state as it exists to-day by means of definitions drawn from Aristotle<sup>4</sup> and Cicero<sup>5</sup> they should remember that the corporate entity now known as the state is something of which no statesman of the ancient world ever dreamed,—it is a new creation at which both Aristotle and

<sup>1</sup> See above p. 26.

<sup>2</sup> *Ibid.*, p. 27.

<sup>3</sup> *Ibid.*, p. 18.

<sup>4</sup> *Pol.*, bk. vii, c. iv, 13.

<sup>5</sup> *Respublica est cœtus multitudinis, juris consensu et utilitatis communiõne societas, De Rep. l. i.*

§ 25.

Cicero would have stared and gasped. Out of the modern conception of the state has grown the fundamental principle of territorial sovereignty, and from it flow, naturally and necessarily, the corollaries that every state is coequal with every other, and that territory and jurisdiction are coextensive.

§ 118. Why the several types of state organization must be examined.—Each sovereign state is supreme within its territorial limits; with its internal political constitution no other state has the normal right to interfere. International law deals solely with a state's external relations and not with its internal organization. Each state as a corporate body binds itself through the acts of the governmental agents established and authorized by its own constitution. No other state has the right to dictate who such agents shall be or how they shall be constituted; it can only satisfy itself as to the fact that such agents have been duly constituted and that they are acting within the limits of their authority. Thus the administrators of every state are forced for their own protection to examine the constitutions of all other states with which they deal so as to be sure that those who represent them are not acting *ultra vires*.<sup>6</sup> For that reason it will be necessary briefly to review the several typical forms of state organization existing in the world to-day.

§ 119. Sovereign states divided into five classes.—The tendency which has manifested itself in Europe during the last thirty years to build up great nationalities, through the incorporation of smaller states in more strictly organized wholes, has brought about some notable internal political changes, especially in the constitutions of Germany, Italy and Austria-Hungary. With such changes clearly in view the statement may be made, that the corporate entities known to international law, which act as independent units when dealing with other states, are (1) single or organic bodies like France and Russia; (2) such states, otherwise entirely separate and distinct, as happen to be temporarily or accidentally united in a personal union under a single sovereign, (3) aggregates arising out of real unions like that uniting Hungary with Austria; (4) incorporate unions such as that existing between England and

<sup>6</sup> "It is the business of the state itself as to the competency of those with which a contract is made to with whom it negotiates." Hall, p. take reasonable care to inform 348.

Scotland, and between Great Britain and Ireland; (5) federal unions of the kind embodied in the constitutions of Switzerland, Germany and the United States.

§ 120. **Personal unions—relation of Great Britain to Hanover.**—Of the unions into which states may enter without forming confederations, those known as personal unions are the least important because, so far as international law is concerned, states thus joined still retain complete independence. The illustration usually given of such a union, is that which accidentally bound the United Kingdom of Great Britain and Ireland to that of Hanover from the accession of George I down to the death of William IV, during the five successive reigns in which the king of England was the Elector of Hanover.<sup>7</sup> The coincidence which thus placed the two crowns on the same head by the civil law of succession in each country, did not place either in such a relation to foreign powers that war with the one necessarily involved war with the other, while in treaty engagements with such powers no attempt was made to involve the one with the other. For a long time prior to 1857<sup>8</sup> the Swiss canton of Neuchâtel was united through a personal union to the Prussian monarchy, by reason of the fact that the king of Prussia was sovereign prince of Neuchâtel, which held at the same time a recognized place in the Swiss Confederacy as the only non-republican canton.

§ 121. **Real unions—Austria-Hungary.**—When states with an independent existence are permanently united to each other under a single sovereign in such a way as to make them, for the purposes of international law, a single corporate body, the tie between them becomes a real union as distinguished from a personal one.<sup>9</sup> A typical illustration of a real union is that embodied in the dual monarchy of Austria-Hungary, the final outcome of an agglomeration of various nationalities in which each has striven to preserve its ancient constitution from destruction by the overwhelming force of the central authority. As a partial recognition of that aspiration the constitution of February 18th, 1867, reorganized the composite whole as the joint kingdom of Austria-Hungary, a “real union” of

<sup>7</sup> Cf. Phillimore, § i, lxxvi; Halleck, i, 68; Heffter, § 20; Twiss, i, 46.

<sup>8</sup> In that year the independence of Neuchâtel was recognized by Prussia when the sovereign prince

relinquished all his rights, except his title, which his successor (the German emperor) has dropped.

<sup>9</sup> *Unio civitatum, sive perpetua sit, sive temporaria, fit jure (1) vel societatis (systema civitatum*

two states, constitutionally and administratively independent, under the supreme direction of the emperor of Austria, also king of Bohemia and "Apostolic" king of Hungary, who stands at the head of the whole government in all its branches. In the direction of the common concerns of the two kingdoms the emperor-king is assisted by three ministries, the first being that of foreign affairs, to which is committed all international functions, diplomatic and commercial.<sup>10</sup>

Prussian and Danish monarchies *gesammtstaats*.—The single political community which thus deals with other states has been described by German publicists as a *gesammtstaat* or joint-state in order clearly to define its international character.<sup>11</sup> When the emperor of the Holy Roman Empire finally consented that Frederick, son of the Great Elector, might assume (January 18th, 1701) the title of king of Prussia, he was influenced by the fact that Prussia was then beyond the bounds of the Empire.<sup>12</sup> In his new capacity Frederick thus became an independent monarch, while as elector of Brandenburg he was a subject of the Empire. And so under the constitution of the Germanic Confederation, as settled by the Congress of Vienna,<sup>13</sup> the head of the house of Hohenzollern, as the chief of a Prussian monarchy composed of Germanic and non-Germanic states, possessed the right to enter into the treaty engagements in three distinct capacities: First, in behalf of the entire Prussian monarchy as a *gesammtstaat* or joint-state; second, in behalf of the Germanic portion of it; third, in behalf of the non-Germanic portion of it. At the same epoch the king of Denmark could treat in behalf of the entire Danish monarchy as a *gesammtstaat* or joint-state; or in behalf of the two Germanic duchies of Holstein and Lauenburg alone; or in behalf of the Danish provinces alone.<sup>14</sup>

fæderatarum) (2) vel imperii (sub eodem imperante). Hæc est vel *personalis* vel *realis*. Klüber, I, § 27.

<sup>10</sup> For the details of the existing constitutions and the organization of the common ministries, cf. Woodrow Wilson, *The State*, §§ 592, 593, 594, 595, 597.

<sup>11</sup> "The political unity of the states which compose the Austrian Empire forms what the German publicists call a community of

states (*gesammtstaat*); a community which reposes on historical antecedents." Dana's *Wheaton*, p. 61.

<sup>12</sup> Bryce, *The Holy Roman Empire*, p. 388. The title was taken from the name of the duchy of East Prussia, so called from its situation next to Russia—*po Russia*.

<sup>13</sup> Twiss, i, p. 48.

<sup>14</sup> As to the effect of the Final Act of 1820 in defining the war-making and treaty-making powers,



**Sweden and Norway a gesamtstaats.**—It thus appears that a *gesamtstaat* may be a greater whole in which the states composing it have lost their international existence, as in the case of Austria-Hungary, or it may be a greater whole in which such states enjoy both a separate and common international existence, as in the cases of Prussia and Denmark as once organized. There should therefore be no difficulty in classing the aggregate arising out of the union of Sweden and Norway as a *gesamtstaat* or real union,<sup>15</sup> because, however distinct the two kingdoms may be in their internal relations, the fact remains that they possess a single international system, at whose head stands the common king acting exclusively through the Swedish minister of foreign affairs, as Norway has no such functionary. While war can only be made after consultation with a joint council of the two kingdoms, the common king must himself assume the full responsibility of the decision, and war or peace thus made necessarily involves both kingdoms. And yet it is not correct to say that “Norway has not any international existence apart from Sweden,” because the common king may make a treaty binding one kingdom only. There is not a complete merger of “Sweden and Norway as regards international relations: they retain their separateness and individuality in the family of nations; and the king may, and often does, conclude treaties affecting one of his kingdoms only.”<sup>16</sup>

§ 122. **Incorporate union embodied in British Empire.**—The term incorporate union is usually employed to describe the mighty aggregate which has arisen out of the process through which the little Teutonic kingdom called “Wessex has grown into England, England into Great Britain, Great Britain into the United Kingdom, the United Kingdom into the British Empire,”<sup>17</sup> a process which has gradually unfolded itself during the fourteen centuries that have elapsed since the Teutonic conquest and settlement of Britain began. The history of that

both of the confederation itself and of its several members, see Wheaton's Hist. Law of Nations, 447-48, 457-60.

<sup>15</sup> It is so classed by Klüber (§ 27), and by Heffter (§ 26). Wheaton and Phillimore, however, class the union between Sweden and Norway as a personal one. Twiss, while denying that position,

says, “it is not identical with the *real* union which exists between the independent states which compose a *gesamtstaat*, as Norway has not any international existence, apart from Sweden.” i, pp. 51-52.

<sup>16</sup> Wilson, The State, § 628.

<sup>17</sup> Freeman, Norm. Conq., vol. i, p. 16.

process breaks itself naturally into two parts: the first embracing the making of England itself and the subsequent drawing together by force of its authority of the whole of the British Isles under the legal title of the United Kingdom of Great Britain and Ireland (449-1861); the second embracing the acquisition of all the territories possessed by the United Kingdom outside of the original group (1606-1899).

**Government of colonial system.**—The distinguishing feature of the elastic system through which England's colonial empire is now governed, is embodied in the application to each of its widely divergent parts of that kind of administration which seems best adapted to its special stage of development and to its local wants and traditions. The English colonial system thus embraces almost every form of government from the autocratic high commissioner, who legislates for savage Basutoland by the issuance of proclamations merely, up to the complex federal union under which the self-governing communities of Canada control their own destinies with scarcely any interference whatever from the parent state.<sup>18</sup> The sovereignty, internal and external, of each of the original home kingdoms has been completely merged in the United Kingdom formed by their successive unions, while the ultimate power over the entire integrated mass resides in the imperial and omnipotent parliament at Westminster, or rather in its popular chamber, which carries on the executive government in the name of the crown through ministers really responsible to itself alone.<sup>19</sup>

**Treaty-making power vested in crown.**—The sole and exclusive power to make treaties, leagues and alliances with foreign states and princes, binding upon the British Empire, is vested in the crown, acting under the advice of its responsible ministers.<sup>20</sup> In order to insure secrecy and dispatch in the conduct of foreign affairs, parliament permits ministers to initiate a foreign policy and to carry it out in secret at their peril, it being understood that they will be subjected to punishment in the event they conclude any treaty derogatory to the honor or interest of the Empire. As Lord Palmerston expressed it in tendering a seat in the cabinet to Mr. Cobden: "You and

<sup>18</sup> See the author's article entitled *England's Colonial Empire*, in *The North American Review* for June, 1896.

<sup>19</sup> Cf. *The Origin and Growth of the Eng. Const.*, vol. ii, ch. iii.

<sup>20</sup> *Bowyer Const. Law*, p. 160; *Blackstone*, vol. i, ch. vii; *Palmerston*, *Hansard*, vol. iv. pp. 174, 787.

your friends complain of a secret diplomacy and that wars are entered into without consulting the people. Now, it is in the cabinet alone that questions of foreign policy are settled. We never consult parliament till after they are settled. If, therefore, you wish to have a voice in these questions, you can only do so in the cabinet."<sup>21</sup> For that reason "it is neither regular to ask, nor is it convenient to answer, questions relative to treaties which are yet pending;"<sup>22</sup> and when a treaty is made in the name of the crown, acting through a responsible minister, it requires no formal sanction or ratification by parliament as a condition precedent to its validity.<sup>23</sup> Parliament can only give or withhold its sanction to such parts of a treaty as require legislation at its hands to give them force and effect.<sup>24</sup> It is clear that the crown may acquire additional territory from foreign powers without the consent of parliament, provided it is not acquired by purchase;<sup>25</sup> it is, however, a doubtful and disputed question whether the crown can alienate British territory without such consent.<sup>26</sup>

§ 123. Federalism, prior to making of second constitution of U. S.—Down to the making of the second constitution of the United States (1787) the Confederation of Swiss Cantons, the United Provinces of the Netherlands, the Germanic Confederation and our Articles of Confederation represented the total advance which the modern world had made in the structure of federal governments. Such advance was embodied in the idea of a federal system made up of a union of states, cities, or districts, representatives from which composed a single federal assembly, whose supreme power could be brought to bear not upon individual citizens, but only upon districts, cities or states as such.<sup>27</sup> The fundamental principle upon which all such fabrics rested was the requisition system, under

<sup>21</sup> Morley's *Life of Cobden*, vol. ii, p. 231; Spencer Walpole's *Foreign Relations*, p. 117. "It is for parliament to inquire, to criticise, to support, to condemn, in questions of foreign policy, but it is not for parliament to initiate a foreign policy." Beaconsfield's *Collected Speeches*, vol. ii, p. 125.

<sup>22</sup> *Mir. of Parl.* 1841, p. 1032; *Todd's Parl. Govt. of Eng.*, vol. i, p. 134 seq.

<sup>23</sup> *Hansard*, vol. 156, p. 1361; *Ib.*, vol. 201, p. 174.

<sup>24</sup> See Gladstone in *Hansard*, vol. 71, p. 548.

<sup>25</sup> *Dutch Guinea*, *Hansard*, vol. 205, p. 657; vol. 211, p. 287. *Amos, Fifty Years of Eng. Const.*, p. 403.

<sup>26</sup> See digest of cases in *Forsyth, Const. Law*, pp. 182-186; *Todd, Parl. Govt. in England*, vol. i, p. 136.

<sup>27</sup> *Freeman, Hist. of Federal Govt.*, vol. i, ch 1.

which the federal head was endowed only with the power to make requisitions for men and money upon the states or cities composing the league for federal purposes, while the states or cities, alone, in their corporate capacity, possessed the power to execute and enforce them. The first serious effort made by the English colonies in America towards federal union ended with the making of the first constitution of the United States, embodied in what is known as the Articles of Confederation. Up to that point nothing new had been achieved; the fruit of the first attempt was simply a confederation upon the old plan, with the federal power vested in a single assembly which could only deal through the requisition system with states as states.<sup>28</sup> During the war of the Revolution American experience demonstrated the fact that a league based upon the requisition system was a mere rope of sand; and yet every other federal commonwealth that had ever existed down to that time had rested upon that impotent expedient.

§ 124. Path-breaking idea embodied in second constitution.—Under such conditions necessity became the mother of invention. After a painful travail America gave birth to a novel and irresistible political idea,—what the Germans would call a path-breaking idea, *bahnbrechende Idee*. In February, 1783, Pelatiah Webster published at Philadelphia a tract entitled “A Dissertation on the Political Union and Constitution of the thirteen United States of North America,” in which he not only advocated permanent courts of law and equity, and a stricter organization of the executive power, but also a national assembly of two chambers instead of one, with power not only to enact laws, *but to enforce them on individuals as well as on states*.<sup>29</sup> A year later this tract was followed by another of the same tenor from Noah Webster of Hartford, in which he proposed “a new system of government which should act, not on the states, but directly on individuals, and vest in congress full power to carry its laws into effect.”<sup>30</sup> This brand-new idea which the Websters were the first to express,—the idea of giving to a federal government the power to execute its laws not on states in their corporate capacity, but directly on individuals,—embodied the most important and far-reaching principle to which our career as a nation has so far given birth.

<sup>28</sup> The Origin and Growth of the Eng. Const., vol. i, pp. 48-58.

<sup>30</sup> Madison Papers, vol. ii, p. 708. See also Noah Webster's Sketches

<sup>29</sup> See P. Webster's Political Es- of American Policy, pp. 32-38. says, p. 228.

As soon as it was settled that this new idea was to be made the basis of the work of the Convention of 1787, it became inevitable that the new fabric should be endowed with a strictly organized constitution with the usual branches, executive, legislative, and judicial, with all the usual machinery of government bearing directly upon every citizen of the Union without reference to the governments of the several states. Thus it was that the states of the American Union were finally welded together in a perfect federal government which is but a single state in all matters concerning the federal body as a whole, and yet a group of states perfectly independent in all matters which concern each member of the group as a local self-governing community.

§ 125. How federal unions are classified—a *staatenbund*.—With this preface clearly in view it will be easier to explain the principles upon which federal states are classified by writers on international law. The less strictly organized union or league resting upon the requisition system,—of the type prevailing prior to the making of the present constitution of the United States,—is usually styled a confederated state, or in German technical language a *staatenbund*.<sup>31</sup> The leading characteristic of such a confederation, so far as its internal relations are concerned, is that the state does not entirely surrender to the central power its right of dealing directly with other states. Only after reserving to itself the right thus to dispose of a certain part of its foreign affairs is the control over the remainder surrendered to the central authority. Originally both the Swiss and German confederations belonged to that class. While the final outcome of the struggle of the Swiss cantons to emancipate themselves from the toils of the feudal system, begun early in the fourteenth century, was assured by the accession to the league in 1513 of the last of those thirteen German cantons which were to constitute its central membership down to the French Revolution, it was not until its recognition by the great powers in the treaty of Westphalia in 1648 that the Swiss Confederation became in the eye of the public law a sovereign state.<sup>32</sup>

<sup>31</sup> As to the distinction between the two classes see J. S. Mill, *Rep. Govt.*, p. 301; Prof. Bernard's *Lectures on American War*, Oxford, 1861, pp. 68-72; Tocqueville, *Democracy in America*, vol. i, pp. 250,

265 seq.; Freeman, *Hist. of Fed. Govt.*, vol. i, pp. 11 and 12, and notes; Heffter, § 20.

<sup>32</sup> Wilson, *The State*, §§ 379, 507, 508.

**Right of cantons or states to make separate treaties.**—Under the constitution of the league as it existed prior to 1798 the several cantons retained the right to make separate treaties with foreign powers and with each other; and under the new act of confederation concluded in August, 1815, between twenty-two cantons, the right of each was reserved to conclude any alliance which was not prejudicial to the rights of the general confederation or of any of its members. In the same way the Germanic constitution as modified at the Peace of Westphalia, which converted the empire into a confederation of the loosest sort,<sup>33</sup> gave to the members of the diet, by whose votes the emperor was to be governed, the right not only to contract alliances among themselves but with foreign princes, provided no prejudice resulted thereby to the emperor and the empire. Under the constitution of the new German confederation, embraced in the Federal Act of the Congress of Vienna (1815), the right was still retained by each state to declare and carry on war and to negotiate peace with any power foreign to the confederation, and to make its own alliances, provided no injury was thereby inflicted upon the confederation itself, or upon any of its members.<sup>34</sup>

§ 126. **The unique federal creation of 1787 a bundesstaat.**—By the adoption of the second federal constitution of the United States an entirely new type of federal government was created, which writers upon public law have designated a composite state, or supreme federal government, in German technical language a *bundesstaat*. As Tocqueville<sup>35</sup> has expressed it: "This constitution, which may at first be confounded with federal constitutions which have preceded it, rests in truth upon a wholly novel theory which may be considered a great discovery in modern political science. In all the confederations which preceded the American constitution of 1789 the allied states, for a common object, agreed to obey the injunc-

<sup>33</sup> See above, p. 96.

<sup>34</sup> Each state also retained its rights of legislation as to foreign powers and to its co-states. Klüber, *Oeffentliches Recht des Deutschen Bundes*, §§ 137-143. As to the effects of the Final Act of 1820, consisting of sixty-five articles, on the treaty-making power, see above, p. 115, note. A good com-

mentary on the Final Act may be found in Twiss, vol. i, pp. 71-74.

<sup>35</sup> *Democracy in America*, vol. i, pp. 198, 199, Bowen ed. "It is a commonwealth as well as a union of commonwealths, because it claims directly the obedience of every citizen and acts immediately upon him through its courts and executive officers." Bryce, *The Am. Com.*, vol. i, p. 13.

tions of a federal government; but they reserved to themselves the right of ordaining and enforcing the execution of the laws of the union. The American states, which combined in 1789, agreed that the federal government should not only dictate, but should execute its own enactments. In both cases the right is the same, but the exercise of the right is different; and this difference produced the most momentous consequences." The federal system now existing in the United States has no prototype in history, unless Mr. Freeman has been able to maintain his somewhat difficult contention, that the Achaian League should be classed among "composite states"<sup>36</sup> by virtue of the fact that its national government acted directly, as a general rule, upon the citizen, although it does not seem to have passed from the requisition stage to that in which a supreme federal government collects its taxes through the direct agency of its own officers.<sup>37</sup> It seems to be clear that there was a common citizenship; that every Achaian citizen owed a direct allegiance to the central authority as a citizen of the league itself, and not merely of one of the cities composing it. Whatever may have been the constitution of the league, it is clear that the makers of the existing constitution of the United States derived no real guidance from that source because, as they tell us in the *Federalist*,<sup>38</sup> "could the interior structure and regular operation of the Achaian League be known, it is probable that more light might be thrown by it on the science of federal government, than by any other like experiments with which we are acquainted."

§ 127. **Its effect upon other state systems.**—The new federal creation which arose out of the deliberations of the convention of 1787 was both unique and original, and its success has abolished from the world the pre-existing type of federal league (*staatenbund*) superseded by it. The entire state-system of

<sup>36</sup> "The Achaian League was, in German technical language, a *bundesstaat* and not a mere *staatenbund*." *Hist. of Fed. Govt.*, p. 259, citing Helwing, p. 237.

<sup>37</sup> There were undoubtedly federal taxes (*αἱ κοινὰ εἰσφοραὶ*). *Pol.* iv, 60. But there is no evidence that they were gathered directly by federal collectors.

<sup>38</sup> No. xviii. Such knowledge as

the framers did possess of Greek federalism seems to have been drawn chiefly from the work of the Abbé Mably, *Observations sur l'Histoire de Grèce*. *Federalist*, xxiii, p. 117. They were familiar only with the leagues that had grown up between the Low-Dutch communities at the mouth of the Rhine, and between the High-Dutch communities in the moun-

Central and South America has been formed on the North American plan. The outer shell of the republican states then organized upon soil once belonging to Spain and Portugal is invariably on that plan, with representative institutions and public law, constitutional and criminal,<sup>39</sup> drawn from English sources, while the private law which dominates within the shell is almost purely Roman. When such states draw together in federal unions they simply adopt, with certain changes in details, the present constitution of the United States.<sup>40</sup> The success of the American experiment has also influenced in a way that is unmistakable the confederacies of the European world. In 1847,—after the seven cantons which had united four years before in the separate league known as the *Sonderbund* had been driven back to their allegiance,—Switzerland finally awoke to the fact that the old and discordant confederacy (*staatenbund*) embodied in the pact of 1815 should be transformed into a supreme federal government (*bundesstaat*). Such was the result of the adoption of the new constitution of 1848 which made Switzerland a composite state with a legislature consisting, like our own, of two houses, one representative of the people, the other of the states or cantons. To that was added by the important revision of 1874 a federal supreme court, which in many departments of jurisdiction is the highest tribunal in the land. By the new constitution the control of the international relations of the cantons was vested absolutely in the federal executive, a collegiate body or council divided into seven departments, the first of which is that of foreign affairs. In order to secure greater continuity in all departments that last named has been separated from the presidency with which it was formerly associated.<sup>41</sup>

§ 128. Constitution of North German Confederation.—As explained heretofore, the great outcome of the war of 1866 between Prussia and Austria was the expulsion of the latter from the old confederation of 1815, thus leaving the former free to form a new one in which she could be supreme.<sup>42</sup> Under

tains of Switzerland and upon the plains of Germany. *Federalist*, Nos. xix, xx.

<sup>39</sup> See Señor Matias Romero's essay on The Anglo-Saxon and Roman systems of Criminal Jurisprudence, in his work, *Mexico and the United States*, pp. 409-428.

<sup>40</sup> Les Provinces conservent tout le pouvoir non délégué par cette constitution au gouvernement fédéral. *Constitution of Argentine Confederation*.

<sup>41</sup> See Wilson, *The State*, § 509-513.

<sup>42</sup> See above, p. 122.



the constitution of the new league known as the North German Confederation,<sup>43</sup> at whose head Prussia placed herself, the military forces of all the federal states north of the Main were fused and placed under the command of the king of Prussia, who, as permanent president of the confederation, was authorized to control its foreign policy, although a nominal independence was left to the minor princes who were permitted to send and receive diplomatic agents, to summon their local legislative bodies, and to levy local taxes. While the siege of Paris was in progress a proposition was accepted so to reorganize the confederation as to unite all the states, except Austria, in a German empire with the king of Prussia as its head; and, after the necessary legislation in the various states, that sovereign assumed at Versailles in January, 1871, the title of German emperor, thus welding Germany together as a single state under a new federal constitution, which is nothing more than that of the North German Confederation modified by the treaties whereby Bavaria, Württemberg and Baden respectively entered the pre-existing body.<sup>44</sup> By the new constitution, which bears date April 16th, 1871, complete jurisdiction over the foreign affairs of the empire is vested in the imperial government, with the reservation that certain of the states shall retain the right to deal independently with foreign courts in reference to such of their affairs as do not involve imperial interests. When such states do not send special representatives for that purpose, their separate interests are looked after by the representatives of the empire. While the reservation thus made of a limited right of diplomatic intercourse in favor of certain states causes the new fabric to be still designated, in a purely technical sense, a *staatenbund*, everybody knows that it is really a supreme federal government, a *bundesstaat*, in the highest sense of that term.<sup>45</sup>

§ 129. Responsibility of federal executive—defect in constitution of U. S.—As the *staatenbund* has thus been superseded

<sup>43</sup> Adopted April 17, in 1867, *Annuaire*, xiv., 810; Lawrence's Commentary on Wheaton, vol. ii, 1-76.

<sup>44</sup> "Each of these states obtained its due representation in the federal council and federal assembly, and each reserved for itself certain powers or immunities beyond

those enjoyed by the North German States." Bryce, Holy Roman Empire, pp. 417-418.

<sup>45</sup> The supreme federal government really transacts all of the external business of the empire. Cf. Statesman's Year Book for 1894, pp. 531-534.

everywhere by the *bundesstaat*, international law has only to deal with supreme federal governments which for all international purposes appear as single states, representing the nationality of the entire federal body. The executive power of such a body charged with the conduct of its foreign affairs is necessarily the only authority of which foreign nations take cognizance. For that reason the constitution of every federal system should supply its executive with resources adequate to every international demand that can rightfully be made upon it. Unfortunately the constitution of the United States is not perfect in that respect. Foreign nations are denied the right to hold diplomatic intercourse with the several states,<sup>46</sup> and yet the supreme federal government is under no constitutional or legal obligation to assume the settlement of such damages as foreigners may suffer through the failure of the local authorities of such states to extend to them complete police protection. The position assumed by the federal government of the United States in such cases has been defined as follows: "The system of government which prevails in the United States, and which their public written constitution has made known to the government of China at the time of our entering into treaties with that country, creates several departments, distinct in function, yet all tending to secure justice and to maintain order. \* \* \* The government of the United States recognizes in the fullest sense the honorable obligation of its treaty stipulations, the duties of international amity and the potentiality of justice and equity, not trammelled by technical rulings nor limited by statute. But among such obligations are not the reparation of injuries or the satisfaction by indemnity of wrongs inflicted by individuals upon other individuals in violation of the law of the land. Such remedies must be pursued in the proper quarter and through the avenues of justice marked out for the reparation of such wrongs."<sup>47</sup>

§ 130. No federal control over states in certain cases.—A gov-

<sup>46</sup> "No state shall enter into any treaty, alliance, or confederation; \* \* \* No state shall, without the consent of Congress, \* \* \* enter into any agreement or compact with another state, or with a foreign state." Art. 1, sec. 10. The right and duty to protect the interests of the states is vested in

the general government. *Florida v. Georgia*, 17 How. 478. As to the scope of the term "agreement," see *Holmes v. Jennison*, 14 Peters, 540. <sup>47</sup> Mr. Bayard, Sec. of State, to Mr. Cheng Tsao Ju, Feb. 18, 1886, Mss. Notes, China. House Ex. Doc. 102, 49th Cong. 1st sess. For. Rel. 1886.

ernment is liable internationally for damages done to alien residents by a mob which by due diligence it could have repressed.<sup>48</sup> When in 1880 British subjects were injured by a mob in Texas, it was held by the secretary, after consulting the attorney-general, that as the offense "was against the peace and dignity of Texas," it was "cognizable only by the authorities of that state. So far as their legal remedy against the assailants is concerned, the Dows (the parties injured) stand as to their natural and civil rights in precisely the same condition as to recourse to the state tribunals as the citizens of that state; and, in their capacity of British subjects, they can resort also to the courts of the United States at their option for civil redress and indemnity."<sup>49</sup> In other words if a state of the American union becomes liable for damages done to an alien resident by mob violence, which it failed to prevent by due diligence, such state cannot be held responsible internationally because as to foreign powers it does not exist. And yet the federal executive, with whom alone such foreign powers can deal, can do no more than offer the injured parties such redress as they may find in private suits to be conducted against their assailants in the state and federal tribunals. To mitigate extreme hardships often arising out of this unfortunate condition of things, the federal executive, while disclaiming "any sense of obligation on the part of this government under the law of nations,"<sup>50</sup> has of its own motion called upon congress in a few exceptional cases to provide a just indemnity.

§ 131. **Case of McLeod.**—The inability of the federal government of the United States to respond in all cases to its international obligations, by reason of its powerlessness to control the action of the states when moving within the sphere of their sovereign authority, was strikingly illustrated in the case of McLeod, a British subject, tried in the state of New York in 1841, for the murder in 1838 of a person killed in the attack made in a port of that state on the steamer *Caroline*, employed by Canadian insurgents for the conveyance of passengers and munitions of war from the American to the Canadian shore. The British government assumed responsi-

<sup>48</sup> Mr. Evarts, Sec. of State, to Sir E. Thornton, May 22, 1880. Mr. Gibbs, May 28, 1878. Mss. Inst., Peru.

Sir E. Thornton, May 22, 1880. Mss. Notes, Great Britain.

<sup>50</sup> Mr. Fish, Sec. of State, to Mr.

Partridge, Mar. 5, 1875. Mss. Inst., Brazil.

bility for the acts of McLeod and demanded that the government of the United States should deliver him upon the ground that it was "well known that the destruction of the steamboat *Caroline* was a public act of persons in Her Majesty's service, obeying the orders of the superior authorities. That act, therefore, according to the usages of nations, can only be the subject of discussion between the two national governments." In the course of the correspondence Mr. Webster, then secretary of state, said: "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, is a principle of public law sanctioned by the usages of all civilized nations, and which the government of the United States has no inclination to dispute."<sup>51</sup> Despite that admission, McLeod, whose release was denied by the state judge on *habeas corpus*,<sup>52</sup> was subjected to trial in a New York court, which resulted in his acquittal. It thus became impossible to revise the state's proceedings in the federal tribunals; and in the hope of removing such difficulties in the future Congress passed an act in 1842 pointing out a way in which the federal courts may acquire exclusive jurisdiction over such cases. It is now provided in our Revised Statutes (sec. 753) that the writ of *habeas corpus* from a federal judge may run when "a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations."<sup>53</sup>

§ 132. **Part-sovereign states.**—Any state, no matter what the form of its internal constitution, may, through a voluntary convention or through external pressure it cannot resist, be placed

<sup>51</sup> Mr. Webster, Sec. of State, to Mr. Crittenden, March 15, 1841. Mss. Dom. Let.

<sup>52</sup> In a speech made in the Senate (April 6, 1846,) on the Treaty of Washington, Mr. Webster said: "I was utterly surprised at the decision of that court on the *habeas corpus*. On the peril and risk of my professional reputation, I now say that the opinion of the court of New York in that case is not a

respectable opinion, either on account of the result at which it arrives, or the reasoning on which it proceeds." Webster's Works, vol. v, p. 129. Webster's view of the case is approved by Phillimore, Int. Law, vol. iii (3rd ed. 1880), p. 60, and by Hall, Int. Law, § 102.

<sup>53</sup> See *Ex parte* Dorr, 3 How. 103; *Ex parte* Barnes, 1 Sprague, 133; *Ex parte* Bridges, 2 Woods, 428.

in such a relation of dependence to another state as to be deprived of a part of its external sovereignty or have the same for a time entirely suspended. In either event such a state would descend to the class usually designated as part-sovereign,<sup>54</sup> and as such continue to be a subject of international law. Even an absolute surrender of the national will, if it be temporary or revocable, will not deprive a state of its international existence.<sup>55</sup> An illustration of the nature of part-sovereign states may be found in the persons of such as have united themselves in that kind of an imperfect federal union known as a *staatenbund*. In the older Germanic and Swiss confederations, which belonged to that class, the several states reserved to themselves the right to deal with foreign powers in matters not expressly transferred by the terms of the act to the exclusive control of the federal authority.<sup>56</sup> As a necessary result complete external sovereignty was vested neither in the central government nor in the states out of whose union it arose. It is, therefore, correct to say that the central as well as the local governments in such a system are only part-sovereign. When, however, a *staatenbund* is transformed into a *bundesstaat* of the kind now embodied in the present constitutions of Switzerland and the United States, which deal with foreign powers as single states, neither the central nor local governments remain part-sovereign. Through the acquisition of complete jurisdiction over the foreign affairs of the combinations they represent, the former become fully sovereign; while the latter, by being entirely deprived of such control, lose all external sovereignty whatsoever,—they cease to be subjects of international law. The perfect external sovereignty thus centered in the *bundesstaat* is for just the opposite reason vested in such states as are united in a personal union of the kind that joined Great Britain to Hanover from 1714 to 1837. The union that binds Sweden to Norway, despite what has already been said as to its peculiar nature,<sup>57</sup> does not leave either kingdom part-sovereign, but unites both in a single state completely sovereign so far as other nations are con-

<sup>54</sup> The term part-sovereign has been adopted as more accurate than the term semi-sovereign, which implies an equal division of the powers of sovereignty between the local and foreign rulers. The latter term seems to have been introduced by J. J. Moser in his

*Beyträge zum Völkerrecht in Friedenzeiten*, vol. i, p. 508. Cf. Twiss, vol. i, p. 25; Heffter, § 19; Martens, *Précis*, § 20; Klüber, § 1; Lawrence, p. 68.

<sup>55</sup> Hall, § 4.

<sup>56</sup> See above, p. 156.

<sup>57</sup> See above, p. 161.

cerned. All other states bound together in real unions stand, of course, in the same category. The same thing may be said of the German empire as now constituted, despite the fact that certain of the states composing it retain the formal or complimentary privilege of dealing with foreign affairs not committed to the imperial government.<sup>58</sup>

§ 133. **Neutralized states only part-sovereign.**—Permanently neutralized states such as Switzerland and Belgium cannot, however, be said to possess complete external sovereignty because under the conventions securing their integrity they are deprived of a part of their independence by being denied the right to engage in any except strictly defensive warfare, and to enter into any compacts that might involve them in hostilities for other than purely defensive purposes. In the same way the Transvaal Republic, originally independent,<sup>59</sup> impaired its sovereignty when it agreed, in article 4 of the convention of February 27, 1884, to make “no treaty with any other state, other than the Orange Free State, nor with any native tribe east or west of the republic, without the approval of Great Britain.”<sup>60</sup> And yet all such states are entitled to all the privileges, and are bound by all the obligations, of international law, with complete liberty of action, except as to the particular attributes of sovereignty surrendered.

§ 134. **Protected states not persons in international law.**—Not until a state is placed by its own act, or by external pressure which it cannot resist, in such a permanent and irrevocable position of dependence upon another as to vest in the controlling state the entire direction of its foreign affairs, does it cease to be a person in international law. Such communities are usually termed protected states, because by reason of their inability to defend themselves they have been placed under a protectorate, constituted either by a voluntary stipulation between themselves and the protecting power, or by an arrangement made without their consent between other powers interested in the disposition of their territory. In

<sup>58</sup> See above, p. 169.

<sup>59</sup> The independence of the Transvaal was recognized by Great Britain in 1852, and by other powers thereafter.

<sup>60</sup> “As the rulers of the Transvaal are bound to obtain the assent of Great Britain before they can

take effective action in a most important sphere, the Boer Republic can not, in strictness, be said to possess the full rights of independence, though it is called an independent state in treaties and despatches.” Lawrence, pp. 112-113.

cases in which the international existence of protected states ceases entirely they may still enjoy, so far as their internal affairs are concerned, almost entire independence of the controlling state. In such cases the internal relations involved belong exclusively to the domain of public or constitutional law.

§ 135. **Republics of Andorra and San Marino.**—The two protected states now existing in Europe that make the nearest approach to the definition given above, are the little republics of Andorra and San Marino. The former, situated between the Pyrenees of Arrièze in France and the Pyrenees of Catalonia in Spain, holds within its territorial limits, about thirty miles in length and twenty in breadth, a small pastoral population who administer their domestic affairs under the joint protection of the French Republic and the Spanish Bishop of Urgel,—the final appeal in civil cases being either to the Court of Cassation at Paris or to the Episcopal College at Urgel. To each of the protecting powers a nominal annual tribute is paid, while the general expenses of government are defrayed by a kind of rent drawn from the occupiers of pastoral lands.<sup>61</sup> The latter, styled by Italian writers *La Republichetta*,<sup>62</sup> is an “international atom” which for many centuries enjoyed as an independent republic all the rights of local self-government under the protection of the Holy See, a duty to which the king of Italy succeeded in 1862. It may be true that as late as 1834 Andorra negotiated a treaty with Spain, and yet for all practical purposes the fact remains that neither of these miniature states has any international affairs or any real international existence.

§ 136. **Migratory Indian nations.**—In the same category must be placed the migratory Indian nations occupying lands whose ultimate title is vested in the United States. While that power in the many treaties made with such communities has recognized their political existence and their capacity to maintain the relations of peace and war, it was nevertheless decided by the Supreme Court in 1831 that the Cherokee nation dwelling within the limits of the state of Georgia was not a “foreign state,” in the sense in which that term is used

<sup>61</sup> See *Historia de la Republica d'Andorra*, Barcelona, 1848; The *Edinburg Review*, No. 230; Twiss, vol. i, pp. 42-43.

<sup>62</sup> Günther, *Europäisches Völkerrecht*, i, c. i, § 19.

in the constitution, but a "domestic dependent nation." The relation thus existing is a unique one. As the court, speaking through Chief Justice Marshall, has expressed it: "They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty of the United States, that any attempt to acquire their lands, or to perform a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility."<sup>63</sup>

§ 137. **Native states of India under British protection—Canada.**—In order, however, to view dependent protected states, not the subjects of international law, upon the largest scale we must turn to the British Empire, which exercises absolute external control over the native states of India that enjoy more or less internal sovereignty under a system of treaties in which the imperial power has agreed to respect certain limitations upon itself in favor of local rights and privileges. Such guarantees, under the "residuary jurisdiction" that embraces all matters not expressly provided for in treaties, are, however, more imaginary than real. All of the states admit the absolute supremacy of the British government; some of them recognize its right to interfere in their internal affairs; while none of them claim the right of diplomatic intercourse with each other or with foreign powers. Despite the fact that it is a perfectly organized federal commonwealth, with almost complete power to regulate its internal affairs without interference from the parent state, Canada must likewise be classed, so far as international law is concerned, as a dependent protected state.

§ 138. **Protected state may preserve international existence—U. S. of Ionian islands.**—In some cases protected communities have been subjected to external control under circumstances permitting them to retain an international existence as part-sovereign states. As Hall (sec. 4) has well expressed it, in order to secure that status to such a state, it is necessary that "its members must owe no allegiance except to the community itself, and its international liberty must be restrained in those matters only in which the control of the protecting power tends to prevent hostile contact with other states, or to secure

<sup>63</sup> The Cherokee Nation v. The State of Georgia, 5 Peters, 1.



safety if hostilities arise." A happy illustration of such a case was that presented by the United States of the Ionian Islands prior to their cession by Great Britain to Greece. These islands, which had formed a part of the maritime possessions of Venice, and which passed under the sovereignty of the French republic in 1797,<sup>64</sup> were finally, by treaties made in November, 1815, between Great Britain, and her three allies, Russia, Prussia and Austria, respectively, placed under the immediate and exclusive protection of the first named, because the Emperor Alexander had promised that the islands should neither be incorporated in any other state nor made the vassal of any suzerain. The king of Great Britain and Ireland thus assumed as sovereign protector the entire control of the foreign diplomatic relations of a single free and independent state, which was permitted to retain a trading flag of its own, and to receive commercial agents or consuls, subject to such regulations as are observed by such agents in other independent states, without the power, however, to accredit like agents on its own account. While the British government practically controlled the entire executive power in the protected state, it never attempted to bind it in any of its treaties except those made as its protector; and during the Crimean War the position of neutrality which it assumed, although denied at first by the executive, was judicially recognized by a British admiralty court.<sup>65</sup> By the external control reluctantly assumed by Great Britain, and voluntarily surrendered by her in 1864,<sup>66</sup>—in both instances under international compacts—Ionian subjects were not converted into subjects of the British crown; they retained their nationality under circumstances which made it possible for them to maintain their neutrality even during a war begun by the protecting state itself.

### § 139. Neutral city of Cracow and principality of Monaco.—

<sup>64</sup> Subsequently they were occupied by the joint forces of Russia and the Ottoman Porte, and by the treaty of Constantinople (March 21, 1800), they were made tributaries of the Sultan, as their protector and suzerain. Martens (R) vii, p. 41. Under the treaty of Amiens (1802) the Seven Islands were recognized as an independent republic. Martens (N. R.) iii, p. 13. Under the treaty of Tilsit the

Emperor of Russia, ignoring the Porte, transferred them in full sovereignty to France, and during the subsequent course of the war six of them passed to Great Britain by conquest. Only Corfu remained in the hands of France down to 1814, when it was ceded by the treaty of Paris to the Allied Powers.

<sup>65</sup> The Leucade. Admiralty Prize Cases, 1854-56, p. 217.

<sup>66</sup> *Annuaire*, xiii, 1000-1004.

In May, 1815, the city of Cracow,—which upon the dissolution of Poland had been assigned (October 13th, 1795) to Austria by the convention of St. Petersburg,<sup>67</sup>—was, after many intervening vicissitudes, declared in a treaty then made between Russia, Austria and Prussia to be (*sera envisagée*) forever a free, independent and strictly neutral city, under the protection of the three high contracting powers.<sup>68</sup> As the triple treaty was annulled and the republic of Cracow suppressed, upon the ground that it had failed to preserve the neutrality upon which its existence depended,<sup>69</sup> it is now unnecessary to re-examine the intricate and interesting question once involved in its peculiar status as a dependent community. There seems to be some doubt whether the principality of Monaco,—which, by the treaty<sup>70</sup> of Peronne in 1641, placed itself under the protection of France, a protection transferred in the great settlement of 1815<sup>71</sup> to Sardinia,—is now a part-sovereign or fully independent state. It can hardly be denied that Monaco was a protected state under the superior power of Italy, which succeeded to the rights given to Sardinia under the treaties of 1815 and 1817, until after the cession of Nice to France by Italy in 1860. The difficulty arises out of the fact that in February, 1861, the Prince of Monaco, without the concurrence of Italy, definitely ceded to the emperor of the French the communes of Mentone and Rocca-bruna, which were thus interposed between what remained of the principality and the Italian frontier. As Italy did not protest against the open repudiation of her protectorate, and as France has never attempted to assume one, it is hard to resist the conclusion that Monaco is now a sovereign political community.

**Presumption in favor of states originally independent.**—In the case of all states imperfectly independent, including such as are members of confederacies, the legal presumption is that

<sup>67</sup> Martens (R.) vi, p. 171. It was severed from Austria by Napoleon, and by the subsequent treaty of Vienna (Oct. 14, 1809) was attached to the Duchy of Warsaw, then belonging to the King of Saxony. The results of the campaign of 1812 placed the Emperor Alexander in possession of the various portions of territory which had constituted the Duchy of Warsaw (a new state created by

Napoleon), and which were redistributed between Russia, Austria and Prussia under the treaties of May, 1815. Martens (N. R.) ii, p. 225.

<sup>68</sup> Martens (N. R.) ii, p. 251.

<sup>69</sup> See Twiss, vol. i, pp. 36-41.

<sup>70</sup> Schmauss, *Corpus Jur. Gentium Academicum*, i, p. 521.

<sup>71</sup> Treaty of Paris, Nov. 20, 1815. Martens (N. R.) ii, p. 687. See the subsequent treaty of Turin,

they are in the full possession of all rights and privileges which they have not expressly resigned. *Prima facie* they are independent because such was their original condition.<sup>72</sup>

§ 140. Christian principalities of Ottoman empire.—For a diametrically opposite reason the presumption is, that those states have not an international character which have gradually acquired a limited independence<sup>73</sup> under the suzerainty of the mother state, from whose complete control they have been partially emancipated either by its own voluntary act, or through successful revolt. Leaving out of view the commonwealths once under the suzerainty of the Holy Roman Empire,—an overlordship abolished in substance through the Peace of Westphalia in 1648, and formally surrendered at the dissolution of the empire in 1806,<sup>74</sup>—the best modern illustrations of the relation in question are to be found in the cases of those Christian principalities that have won first partial, and then complete, independence of the Ottoman Empire. The struggles of the oppressed Christian populations to emancipate themselves have been systematically advanced first by Russia, then by the European Concert, in such a way as to secure them under European guaranties, first, local self government under the suzerainty of the Porte, and finally complete sovereignty.

§ 141. Emancipation of Roumania and Servia.—The statement

Nov. 17, 1817, (*Nouveau Supplément*, ii, p. 343), completing the arrangement of 1815.

<sup>72</sup> "A member of a confederation or a protected state is *prima facie* independent, and consequently possesses all rights which it has not expressly resigned; a state under the suzerainty of another, being confessedly a part of another state, has those rights only which have been expressly granted to it." Hall, p. 31.

<sup>73</sup> "The assumption of a collective authority on the part of the powers to supervise the solution of the Eastern question—in other words, to regulate the disintegration of Turkey—has been gradual. Such an authority has been exercised tentatively since 1826, systematically since 1856. It has been

applied successively to Greece, to Egypt, to Syria, to the Danubian principalities and the Balkan peninsula generally, to certain other of the European provinces of Turkey, to the Asiatic boundaries of Turkey and Russia, and to the treatment of the Armenians." Holland, *The European Concert*, p. 2. M. Rolin Jacquemyns, in speaking of the action of the powers in connection with the Greco-Turkish contest of 1885-6, has said that within the limits of Ottoman Empire and the small states adjoining there exists "*une autorité collective, historiquement et juridique établie; c'est celle des grandes puissances.*" *Rev. de Droit Int.* xviii, 603.

<sup>74</sup> See above, p. 36.

has heretofore been made that at the Peace of Carlowitz (1699) the Porte acknowledged the suzerainty of Leopold I of Austria over Transylvania.<sup>75</sup> By the treaty of Kutschau-Kainardji made between Russia and Turkey in July, 1774,<sup>76</sup> the principalities of Moldavia and Wallachia and the province of Bessarabia, which had been overrun by the armies of the Empress Catharine, were restored to the Porte upon condition that their inhabitants should be permitted to exercise the Christian religion, and that the prince of each principality should be permitted to maintain at Constantinople a *chargé d' affaires* to be entitled to the privileges accorded to such by the law of nations. By the treaty of Adrianople,<sup>77</sup> made in September, 1829, which declared that the principalities were under the suzerainty of the Porte and the guarantee of Russia, they were given the right to a national administration, with all the privileges of complete commercial intercourse. As heretofore pointed out the Peace of Paris (1856) substituted a European for a Russian guarantee.<sup>78</sup> In 1861 the Porte, in concert with the guaranteeing powers, consented to the union of the principalities under Prince Couza, who was succeeded in 1866 by Charles of Hohenzollern as Prince of the United Principalities; and by the treaty of Berlin (1878) the fruit of the union, Roumania, was acknowledged as independent, Prince Charles assuming the title of king in March, 1881.<sup>79</sup> Servia, which became a Turkish province after the disastrous battle of Kosovo in June, 1389, did not win the right of Christian worship and an independent internal administration until the making of the treaty of Adrianople<sup>80</sup> between Russia and Turkey in September, 1829; a concession followed in 1838 by an organic statute conferring the sovereignty of the province, under the suzerainty of the Porte, upon Prince Milosch, in whose family it was made hereditary. By the treaty of Paris<sup>81</sup> the relations thus established were placed under the guarantee of all the powers, and that condition of things continued down to the

<sup>75</sup> See above, p. 107.

<sup>76</sup> Martens (R.) ii, p. 286.

<sup>77</sup> By the fifth article it was provided that the hospodar should hold his office for life under certain provisions contained in a separate act annexed to the treaty; and in other respects subject to the regulations of the separate act of the

convention of Ackerman (Oct. 7, 1826). Martens (N. R.) viii, p. 143; *Ibid.*, vi, p. 1053.

<sup>78</sup> See above, p. 119.

<sup>79</sup> On May the 27th of the same year he was crowned with European sanction.

<sup>80</sup> Martens (N. R.) viii, p. 116.

<sup>81</sup> *Ibid.* (N. R. G.) xv, p. 770.

treaty of Berlin, through which Servia became entirely independent.

§ 142. **Emancipation of Montenegro.**—Montenegro,—originally a district of Servia governed by a prince dependent upon the king of that country,—maintained its independence from the time of the Ottoman conquest of Servia (1389) down to 1516, when its prince, George Tzernoievich, with the consent of the people, transferred his office to the bishop and retired to Venice. The office of prince bishop (*Vladika*)<sup>82</sup> thus created, in which the spiritual and temporal powers were merged, although by law elective became in practice hereditary in the family of Petrovich after the close of the seventeenth century. Not until 1623 was the Porte ever able, by force of arms, to establish even a nominal supremacy over Montenegro; and from that time a continued resistance to such supremacy was carried on with varying fortunes down to 1706 when the Montenegrins attempted to give strength to their cause by placing themselves under the protection of Peter the Great of Russia. After that event it became the custom for the successor of each *Vladika* to receive consecration at St. Petersburg, the same being considered as a virtual investiture of the office of prince or ruler.<sup>83</sup> This act of homage to Russia failed, however, to end the strife between Turkey and Montenegro, the former continuing its efforts to subdue the principality down to 1852, when it was advised by two of the powers to recognize Montenegro's *de facto* independence without the surrender of its *de jure* title. Thus it was that in the Treaty of Paris (1856) the declaration was made that "the Sublime Porte considers Montenegro to be an integral part of the Ottoman Empire, but that it has no intention to alter the actual state of things in that country."<sup>84</sup> Not until the making of the treaty of Berlin (1878) was Montenegro recognized by the Porte and all the contracting powers as an independent state.

§ 143. **Bulgaria still dependent.**—Roumania, Servia and Montenegro, which thus became sovereign states after abiding for a long time under the suzerainty of the Ottoman Empire, left behind them Bulgaria, a Danubian principality which has not yet been able to secure its independence. The treaty of Ber-

<sup>82</sup> The word signifies prince or ruler.

<sup>83</sup> As to the statement that the *vladika* who succeeded in 1830 refused the episcopal dignity, see

Phillimore, Int. Law, vol. i, § 94; Twiss, vol. i, p. 108.

<sup>84</sup> Martens (N. R. G.) xv, pp. 736, 738. Protocol of conference 25 and 26 March, 1856.

lin, by which the three first named were finally emancipated, only provided that Bulgaria should be "an autonomous and tributary principality under the suzerainty of His Imperial Majesty, the Sultan," with a Christian government and a national militia; and that another province bounded on the north and west by Bulgaria should be constituted under the name of Eastern Roumelia,<sup>85</sup> subject to the direct authority of the Sultan, with a Christian governor-general and administrative autonomy. In 1879 Alexander of Battenberg was elected prince of Bulgaria, and in 1885 he excited a revolution in Eastern Roumelia which resulted in its union with Bulgaria and with the proclamation of himself as sovereign. Upon his forced abdication in 1887 he was succeeded by Prince Ferdinand, of Saxe-Coburg, despite Russia's opposition unsupported by any other European state. The powers have neither recognized the union brought about by the successful revolution of 1885, nor the election of Prince Ferdinand in 1887, and yet they have not attempted to undo either. While in 1883 the representative of the principality was denied the privilege of signing a treaty concerning the navigation of the Danube, upon the ground that the signature of the Porte was sufficient, the fact remains that its rulers are pressing so aggressively their right to control its affairs, internal and external, as to leave but little doubt that in the near future such efforts will be followed by complete independence.

§ 144. **Suzerainty of Porte over Egypt.**—The suzerainty of the Porte over Egypt, which for centuries was a vassal state of the Ottoman Empire, administered through a Turkish pasha, —was placed in imminent peril when Mehemet Ali, who, after the annihilation of the Mamelukes, became the undisputed master of the country, attempted in 1831 to win from the Sultan entire independence.<sup>86</sup> After a series of brilliant military successes he advanced so near to Constantinople that Russia was forced to prevent its capture by sending her fleet to the Bosphorus in February, 1833. In the following May the convention of Kutayah, brought about through the mediation of France and Great Britain, secured the peace of the Levant for a time by a cession to Mehemet Ali of the whole of Syria, and to his son Ibrahim the collectorship of Adana. When the

<sup>85</sup> For the details as to Bulgaria and Eastern Roumelia, see Holland, *The European Concert*, pp. 238-40.

<sup>86</sup> In November, 1831, Mehemet invaded Syria, and the Turks were defeated at the decisive battle of Konieh on December 21, 1832.

former renewed his attempt to impair the integrity of the empire, he was met by the intervention of Great Britain, Russia, Austria and Prussia, who, in the interest of the peace of Europe, made with the Porte in July, 1840, the Quadruple Treaty of London,<sup>87</sup> whose terms the powers agreed to enforce against Mehemet, to whom was given, upon the payment of an annual tribute, the administration of Egypt, with the reversion of it to his descendants in the direct line. By virtue of that treaty, and the Sultan's firman of June, 1841, Egypt was erected into an hereditary paschalic under Mehemet Ali and his descendants, who were authorized to maintain a limited army, contract loans and make non-political conventions with foreign powers.

**Sultan's nominal control over foreign affairs.**—The local authority thus granted was subject, however, to the suzerainty of the Sultan, who retained the right to grant *exequaturs* to foreign consuls resident at Alexandria or Cairo, to give operation to treaties of commerce concerning Egypt by his firman addressed to the pasha, and to direct generally the external affairs of the country as the overlord to whom foreign nations must address themselves in the first instance. This conventional arrangement, which became a part of the public law of Europe, and which still exists in theory, has been set aside in fact as the result of the political and financial difficulties which forced Great Britain and France in 1879 to appoint controllers-general of their own, with the rank of Egyptian ministers, with power to inquire into every financial branch of the public service. In order to rid Egypt of that kind of foreign control Arabi Pasha created the revolt in 1882 which Great Britain, owing to the lack of co-operation from France, was forced to crush alone.<sup>88</sup> Since that time her army of occupation has remained under the pledge that it will be withdrawn so soon as the finances of the country can be reorganized and stable authority secured under a reliable and permanent native administration. In the meantime, government is carried on

<sup>87</sup> For the text, see Holland, *The European Concert*, pp. 90-93. While France was not a party to the treaty she gave the settlement her moral influence. Memorandum of Mr. Thiers, Minister of Foreign Affairs (Oct. 5, 1840). Martens (N. R. G.) i, p. 183; Twiss, vol. i, p. 94.

<sup>88</sup> "In December England agreed, though France demurred, to the abolition of the Dual Control which was effected by a decree of 18th of January, 1883." Holland, *Concert of Europe*, p. 108, citing *Parl. Papers*, 1883, Egypt, No. 6, p. 32.

under the direction and advice of Great Britain as the real suzerain.

**Mixed tribunals and Suez Canal.**—In the hope of securing a more perfect administration of justice, mixed tribunals were established in 1875, consisting of courts of first instance with a mixed staff of judges, subject to a court of appeals composed of four native and six European members, the latter being drawn from the several countries specially interested. In October, 1887, Great Britain and France entered into a convention for the neutralization of the Suez Canal,<sup>89</sup> which, under the terms of the treaty, is to be free to ships of all nations even in time of war, subject only to the proviso that the belligerents shall neither embark nor disembark troops or materials of war along the canal or in its ports of access. The stipulation that the neutrality of the canal shall be guarded in the first instance by the Khedive, and in case of his inability by the Porte in conjunction with the powers, was promptly agreed to by Germany, Austria, Italy and Spain; and, after some objections from Russia and Turkey, by the last named in 1888.<sup>90</sup>

§ 145. **Belligerent communities—internal and external sovereignty contrasted.**—It is proper to reckon among part-sovereign states those communities which in their effort to separate from the mother state and to establish a distinct political existence of their own have won, through a recognition of their belligerency, a temporary or inchoate sovereignty which may ripen into a perfect one with the final recognition of their independence. Whether such an effort shall be made, for what reason, and in what form, are internal and domestic questions which are purely national; whether such a community shall be admitted into the family of nations, and upon what terms, are questions purely international. In that way every state possesses two kinds of sovereignty: first, an inter-

<sup>89</sup> As to the negotiations and disagreements concerning the international status of the canal that took place between its opening in 1869 and the settlement of 1888, see Lawrence's *Essay on Some Disputed Questions in Modern International Law*, ii.

<sup>90</sup> In November, 1875, the Khedive sold his canal shares to the

British Government; in a circular dispatch of Jan. 3, 1883, Lord Granville proposed that the canal should be neutralized; and during negotiations with France in 1884 he proposed that that process should be extended to Egypt as a whole. *Holland, Concert of Europe*, pp. 103, 109 and note 4.



nal sovereignty, inherent in the people as a whole, whose exercise is vested in its rulers by virtue of its constitutional law (*droit public interne*); second, an external sovereignty consisting of its right as an independent political community to deal with all others of its class upon equal terms under the rules of international law (*droit public externe*). In the case of an older state such sovereignty was acquired when the organization of civil society began; in the case of a younger one it dates from the time when it finally makes good its independence against the community from which it has separated itself. That process of separation is usually broken into two distinct stages: first, that which is marked by a recognition of belligerency; second, that which is marked by a recognition of independence. The starting point is the effort made by the revolting community to establish internal sovereignty which depends upon its own acts alone, and not upon the subsequent recognition of other states. It was therefore held by the Supreme Court of the United States to be "a principle which is believed to be undeniable, that the several states which compose this union, so far at least as regards their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign states, and that they did not derive them from concessions made by the British king. The treaty of peace contains a recognition of their independence, not a grant of it. From hence it results, that the laws of the several state governments were the laws of sovereign states, and as such were obligatory upon the people of such state, from the time they were enacted."<sup>1</sup>

§ 146. Recognition of belligerency and its effects.—After the struggle for sovereignty has begun, a recognition of belligerency may come either from the parent state or from foreign states, or from both. It is not to be expected that either will consider whether or no it will make such recognition until the revolting community has made such a show of force,—by subjecting a definite area of territory to the control of an organized government through the maintenance of armies fighting under the rules of civilized warfare, or by the equipment of cruisers, if the struggle is in whole or part maritime,—as to establish beyond question the existence of war, as now

<sup>1</sup> *McIlvaine v. Coxe's Lessee*, 4 et al. v. *Gaillard et al.*, 12 Wheat., Cranch, p. 212. See also *Harcourt* 524.

understood, as a fact.<sup>2</sup> The new organization thus set up is expected to have such a *de facto* political existence and such resources as to enable it, if left alone, to constitute a state capable of maintaining a permanent place in the family of nations. The power first called upon to deal with the new condition of things is necessarily the parent state itself, who must, if it refuses to recognize the insurgents as belligerents, regard them as rebels on land and pirates at sea, and their acts in taking supplies from the invaded territory as robbery. With that purely internal question of municipal law between a recognized state and a part of its revolted subjects foreign states have nothing whatever to do, so long as the state of war thus existing does not affect their interests. While as a general rule the parent state is not swift to extend a recognition of belligerency to those in arms against it, motives of humanity, coupled with the desire to protect its forces from military reprisals, usually force it to that result so soon as the struggle assumes serious proportions.

§ 147. **Indirect recognition—duty of executive.**—It cannot be expected, however, that the parent state will volunteer a direct and formal recognition; it hardly ever does more than perform certain acts from which its indirect recognition may be inferred. During the war between the American colonies and the mother country, Denmark, who had not recognized their belligerency, delivered to Great Britain in 1779 some merchant vessels sent by Paul Jones as prizes into Norwegian ports. The United States afterwards made claim upon Denmark upon the ground that the conclusion by England and the American insurgents of cartels and the like amounted to an indirect recognition of the latter as belligerents, and consequently cast upon Denmark and other foreign nations the duties of neutrality.<sup>3</sup> In an indirect manner a recognition of

<sup>2</sup> "It is certain that the state of things between the parent state and insurgents must amount in fact to a *war*, in the sense of international law; that is, powers and rights of war must be in actual exercise; otherwise the recognition is falsified, for the recognition is of a fact." Dana's *Wheaton*, p. 35. As to the general question involved in a recognition of belligerency, see Bluntschli, § 512, and in

the *Revue de Droit International*, ii, 452; Calvo, § 68-70; Bernard, *Historical Account of the Neutrality of Great Britain during the American Civil War*, ch. 5 and 7; Lawrence, pp. 77-79; Hall, § 5; The Lilla, 2 Sprague, p. 177; Halleck, p. 73 *seq.*; Walker, pp. 115-118.

<sup>3</sup> See Sparks's *Dip. Corr.*, iii, p. 121; Sparks's *Life of Franklin*, viii, 407-462; *State Papers*, iii, 4; Lawrence's *Wheaton*, **Introd.**,

belligerency was extended by the government of the United States to those of its citizens who combined against it under the perfectly organized *de facto* government of the Southern Confederacy. When the question, whether or no such recognition had in fact been indirectly extended, was presented for judicial review, the Supreme Court said: "As a civil war is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in our domestic history which the court is bound to notice and to know. \* \* Whether the President is fulfilling his duties, as commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this court must be governed by the decisions and acts of the political department of the government to which this power was intrusted. 'He must determine what degree of force the crisis demands.' The proclamation of blockade is, itself, official and conclusive evidence to the court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case. The correspondence of Lord Lyons with the secretary of state admits the facts and concludes the question."<sup>4</sup>

§ 148. **Duty of foreign state when recognition of belligerency demanded.**—Has a revolted community, after it has arrayed a considerable population in arms under an organized government occupying a definite area of territory, a legal right to demand recognition of its belligerency of foreign nations; or must such recognition be sought at their hands as a matter of pure grace and favor? While there are authorities that support the affirmative as to the legal right,<sup>5</sup> the sounder view seems to be that as the belligerent community is not a legal person, and as the only ground upon which it can rest its demand is that of humanity, it has nothing higher than a moral claim to such recognition.<sup>6</sup> From the standpoint of

cxxxiv; Mr. Wheaton's dispatch to Mr. Upshur, Nov. 10, 1843. "The claim against Denmark was kept alive by intermittent action until 1844, and does not appear to have been ever formally dropped." Hall, p. 34, note.

699. Proclamation of blockade is conclusive evidence of war. The Mary Clinton, Blatchf. Pr. 556.

<sup>5</sup> Bluntschli (§ 512) maintains the right directly, and Vattel (III, ch. xviii, § 293-4) by implication.

<sup>6</sup> Hall, pp. 32-35.

<sup>4</sup> Prize Cases, 67 U. S., 635-

international law a foreign state has no right to recognize the belligerent character of those in insurrection against a parent state, until its own interests become so involved, or so threatened as to make such recognition a necessary measure of self protection.<sup>7</sup> Before a foreign state attempts to influence the result of the contest, by extending recognition to insurgents against a firmly established government to which it owes legal and friendly duties, it must maturely consider whether from the peculiar nature of the contest its interests are so involved as to make such action upon its part really necessary. It is not within the province of the private citizens of a foreign state, or of its judicial or naval officers, at home or abroad, to pass upon that question, which belongs exclusively to the executive department of the government armed with the right to prescribe the rule for the guidance of all.<sup>8</sup> While such rule should not be proclaimed with precipitation, every state foreign to the contest "owes it to its own citizens, to the contending parties, and to the peace of the world, to make that decision seasonably. If it issues a formal declaration of belligerent rights prematurely, or in a contest with which it has no complicity, it is a gratuitous and unfriendly act. If the parent government complains of it, the complaint must be upon one of these grounds. To decide whether the recognition was uncalled for and premature, requires something more than a consideration of proximate facts, and the overt and formal acts of the contending parties. The foreign state is bound and entitled to consider the preceding history of the parties; the magnitude and completeness of the political and military organization and preparations on each side; the probable extent of the conflict, by sea and land; the probable extent and rapidity of its development; and, above all, the probability that its own merchant vessels, naval officers and consuls may be precipitated into sudden and difficult complications abroad. The best that can be said is that the foreign state may protect itself by a seasonable decision either upon a test case that arises, or by a general prospective decision; while, on the other hand, if it makes the recognition prematurely, it is liable

<sup>7</sup> Le seul motif vraiment rationnel et légitime pour qu'un état attribue le caractère de belligérant aux factions d'un autre état, c'est que la lutte de ces factions compromet les droits et les intérêts du gouvernement étranger, qui par la reconnaissance du titre de belligérant, définit la position qu'il entend assumer à l'égard des combattants. Calvo i, § 68.

<sup>8</sup> U. S. v. Palmer, 3 Wheat. 610; The Divina Pastora, 4 Wheat. 52; The Nuestra Senora, Ibid., 497.

to the suspicion of an unfriendly purpose to the parent state.”<sup>9</sup>

§ 149. **Reasons for prompt recognition in case of maritime war.**—If a land war is in question, and the insurrection is confined to the interior of a country surrounded by loyal provinces, and in that way isolated from foreign states, it is not the custom for such states to act at all, because as their interests are not likely to be involved they have no reason for self-protection. If, however, the revolted district be so near to the frontier of a foreign state as to force upon it the decision of the question whether or no war actually exists, it is within its province alone to determine that question in the light of the special facts involved upon which it must rely for the vindication of its conduct.<sup>10</sup> In the case of a maritime war, states interested in commerce upon the sea have a greater right to take prompt and decided action, without suspicion of bad faith, because at any moment they may be called upon to pass upon the status of cruisers, the question of prize, or the legality of blockades. If it is war, the commissioned cruisers of either side may search or capture foreign merchant vessels; if it is not, such vessels can resist all such attempts. If it is war, the prize courts of either side can adjudicate questions properly brought before them; if it is not, they cannot lawfully exist. If it is war, foreigners must respect the blockades by which the parent states close insurgent ports *jure gentium*; if it is not, they will not respect paper decrees closing such ports, in any event.

§ 150. **Notable recognitions of belligerency.**—In order to determine the circumstances under which a recognition of belligerency is permissible, it is helpful to study the cases in which such recognition has been actually extended by conscientious and important foreign states. When in 1825 England recognized the belligerent rights of the provisional government of Greece, and Turkey complained that no national character could properly belong to subjects in rebellion, Canning’s reply was that “the character of belligerency was not so much a principle as a fact, that a certain degree of force and consistency acquired by a mass of population engaged in war entitled that population to be treated as a belligerent, and, even if this title were questionable, rendered it the interest well understood of all civilized nations so to treat them.”<sup>11</sup> A

<sup>9</sup> Dana’s Wheaton, pp. 36-37.

<sup>10</sup> Hall, p. 36.

<sup>11</sup> Hansard, vol. clxii, p. 1566. See

also Abdy’s Kent (1878), 94; Lord Russell’s speech, May 6, 1861; Sta-

pleton’s Life of Canning, 476.

profitable study may also be made of the fact involved in the recognition of belligerency by France and Holland during the American Revolution;<sup>12</sup> of those involved in a like recognition by the United States in favor of the South American colonies of Spain during the civil war between them and the parent state; and of those involved in a like recognition by the United States in favor of Texas during the civil war between that state and Mexico.<sup>13</sup>

§ 151. **Great Britain's recognition of Southern Confederacy.**—The most important and exhaustive recent discussion of the circumstances under which a foreign state may properly extend a recognition of belligerency was that which ensued between Mr. Adams and Earl Russell (April 7 to September 18, 1865), in the course of which the former contended that Great Britain's recognition of the belligerent rights of the Southern Confederacy was "unprecedented and precipitate." Earl Russell contended in reply that, while the facts involved were without an exact parallel, his government was in duty bound to pass upon them promptly under circumstances that forced it to decide on the one hand whether it would permit the right of search and blockade as acts of war; and on the other whether those commanding the ships of the Confederates, appearing in every part of the world under their letters of marque, should be treated as pirates or as lawful belligerents.<sup>14</sup> There was no dispute as to the two controlling facts. On April 19th, 1861, President Lincoln put forth his proclamation blockading the ports of the seceded states, an act which he said was performed "in pursuance of the laws of the United States and of the law of nations in such case provided."<sup>15</sup> In the prize cases heretofore cited<sup>16</sup> it was held by the Supreme Court of the United States that the President had

<sup>12</sup> Annual Register, 1776, pp. 182, 183, 1779, p. 249; Martens' *Causes Célèbres*, i, 113; correspondence between Mr. Adams and Earl Russell (April 7th to Sept. 18th, 1865).

<sup>13</sup> Wharton, Int. Law Dig., § 69; Opinions of Attorneys-General, iii, 120; Canning's Life, 399; British Annual Register, 1823, 146; Mr. Forsyth to the Mexican Minister, Sept. 20, 1836.

<sup>14</sup> See Lawrence's Wheaton (ed.

1863), 44; an article entitled "A famous diplomatic dispatch," in North American Review for April, 1886; Goldwin Smith on the recognition by Great Britain of Southern belligerency in 13 Macmillan's Mag., 168; Bemis's pamphlets on the recognition of belligerency, Boston, 1865.

<sup>15</sup> Extract from the proclamation.

<sup>16</sup> See above, p. 187.

a right *jure belli* to institute such a blockade, which neutrals were bound to regard; that the proclamation of blockade was, itself, official and conclusive evidence to the court that a state of war existed which demanded and authorized a recourse to such a measure under the circumstances peculiar to the case. Not until May 13, more than three weeks after the issuance of such proclamation by the President, did the queen proclaim her neutrality between the two belligerents. As the propriety of that act had been indirectly affirmed by our own Supreme Court,<sup>17</sup> it is unnecessary to make farther reference to a contention which drew its only real support from passions that have happily passed away long ago.

§ 152. **Recognition should be formal.**—When a foreign state deems it necessary to protect itself by a recognition of belligerency, it should always render its intention perfectly clear by making it in a formal way so that all may know the date from which its neutrality begins.<sup>18</sup> After such a step has been taken it is irrevocable, except by agreement, so long as the circumstances exist under which it was granted, because, while it may be a revocable concession as between grantor and grantee, as to third parties it creates new legal relations which cannot be arbitrarily determined so long as a state of war actually continues.<sup>19</sup> A proof of that assertion may be found in the fact that such declarations do not benefit the insurgents only. While they gain a recognized status, conferring on them the right to commission cruisers at sea, to make loans, and to enjoy all the protection incident to civilized warfare on land, the parent state is at the same time entitled to have the blockades of its own ports respected, to assert against neutral commerce all the powers of a party to a maritime war, and at the same time to be exempt from responsi-

<sup>17</sup> "It would seem, then, that if the British Government erred in thinking that the war began as early as Mr. Lincoln's proclamation in question, they erred in company with our Supreme Court." Woolsey, *Int. Law*, § 180. See also Bernard's *British Neutrality*, chaps. iv-vii; M. Bluntschli's summing up of the controversy in *Rev. de Droit, Int.* ii, 462.

<sup>18</sup> On April 22, 1793, President Washington issued his celebrated proclamation of neutrality, recognizing the existence of war between France on the one part, and Great Britain and other powers on the other, and declaring the purpose of the U. S. to observe a course "friendly and impartial towards the belligerent powers."

<sup>19</sup> Hall, pp. 37-38.

bility for the acts of its revolted subjects in the insurgent territory.<sup>20</sup>

§ 153. **Recognition of independence—when an act of intervention.**—When one state signifies its assent to the admission of another into the family of nations by a recognition of its independence, the propriety and timeliness of such an act must be tested by substantially the same principles that govern when a recognition of belligerency is in question. A distinction must be kept steadily in view in both cases between an act of recognition performed by the parent state, and a like act when performed by a foreign one.<sup>21</sup> Whether performed by the one or the other, it is supposed to be simply an acknowledgment of a pre-existing fact, an admission the former is not likely to make until forced by necessity to abandon all hope of subduing the community in revolt against it. When, therefore, the party mainly interested makes such an admission, no doubt should remain in the minds of other governments as to their course in the premises.<sup>22</sup> Difficulty often arises when a foreign state desires to recognize the independence of the struggling community before the parent state is ready to do so, because a premature or unjustifiable recognition either of belligerency or independence is really an act of intervention which the parent state may meet by a declaration of war. If the parent state and the foreign state differ, as they often do, as to the circumstances justifying recognition, each must decide for itself, and if there is a conflict the only arbiter is arms.

§ 154. **Notable recognitions of independence.**—A pointed illustration of the two contingencies may be found in the circumstances attending the recognition of the independence of the United States by foreign powers. After Great Britain herself had recognized their independence in the preliminaries of 1782,

<sup>20</sup> See declaration of Mr. Adams, June 14, 1861, as to effect of concession of belligerent rights to Confederate States. Papers relating to Foreign Affairs, etc., p. 89; Dana's Wheaton, p. 37.

<sup>21</sup> The word "recognition" does not have the same meaning in the one case as in the other. Such was the contention of Sir James Mackintosh in his speech on the recognition of South Am. States, and Canning held a similar view.

See Mackintosh's *Miscellaneous Works* (ed. 1851), p. 749; Hansard, N. S. xi, 1397.

<sup>22</sup> "When a state has itself recognized the independence of a revolted province it cannot pretend that recognition by other states is premature." Hall, p. 88. It was nearly seventy years after the declaration of independence by the Netherlands that it was recognized by Spain in the treaty of Münster, 1648.



she did not consider it as an unfriendly act for other powers to follow her example. But when at an early stage in the struggle (1778) France and Holland extended such recognition she made it the cause of war against both.<sup>23</sup> Mr. John Quincy Adams, when writing to President Monroe<sup>24</sup> in 1816 upon a kindred subject, contested the grounds upon which Great Britain had acted. He said "there is a stage in such (revolutionary) contests when the party struggling for independence has, as I conceive, a right to demand its acknowledgment by neutral parties, and when the acknowledgment may be granted without departure from the obligations of neutrality. The neutral nation must, of course, judge for itself when this period has arrived; and as the belligerent nation has the same right to judge for itself, it is very likely to judge differently from the neutral, and to make it a cause or pretext for war, as Great Britain did expressly against France in our revolution, and substantially against Holland."

§ 155. Channels of intercourse must be kept open.—While political sympathies generally influence the time at which such recognitions are made, the commercial interests of nations forbid that they shall close their eyes very long to accomplished facts. All states owe it as a duty to their citizens to keep open the channels of intercourse so that they may trade with and sojourn in every state having a *de facto* existence. Thus by necessity states are compelled to establish relations with all new communities as soon as that may be done without injury to the parent state from which they have revolted. Such state can, however, justly claim injury if a recognition of independence occurs while it is making a substantial struggle for the recovery of its authority, regardless of the fact whether the war is just or unjust. On the other hand, it has no right to complain after its efforts in that direction have become so feeble and inadequate as to afford no reasonable hope of ultimate success.

§ 156. Recognitions of South American republics by U. S. and Great Britain.—Such were the principles clearly defined during the course of the long discussion which preceded the recognition by the United States and Great Britain of the indepen-

<sup>23</sup> Martens, *Causes Célèbres*, i, 370-498; Wheaton, *Hist. Law of Nations*, pt. iii, § 12, 220-294.

<sup>24</sup> Mss. Monroe Pap., Dept. of State. Wheaton, on the other

hand, admits that, under the circumstances, the act of France was probably "an unjustifiable aggression."

dence of the South American republics. Of the insurrections which broke out through the whole of South America in 1810, that which occurred in Buenos Ayres<sup>25</sup> was immediately successful; and in due time like success followed the efforts made by Chile, Venezuela and the provinces north of La Plata. And yet so cautious was the government of the United States that when Mr. Clay proposed in Congress in 1818 a sympathetic mission to the revolted provinces his motion was rejected by a large majority.<sup>26</sup> President Monroe in his message of December, 1819, while recommending a revision and improvement of neutrality laws, manifested, however, a somewhat different spirit when he said that "the steadiness, consistency, and success, with which they have pursued their object, as evidenced more particularly by the undisputed sovereignty which Buenos Ayres has so long enjoyed, evidently give them a strong claim to the favorable consideration of other nations. These sentiments on the part of the United States have not been withheld from other powers with whom it is desirable to act in concert." In his message of December, 1820, he gave emphasis to that statement by expressing the hope that a change of government in the parent state would bring about a recognition of independence in view of the fact that "in no part of South America has Spain made any impression on the colonies." Nevertheless the senate refused to pass Mr. Clay's fresh resolution for the recognition of their independence, brought forward in the House of Representatives February, 1821, after its adoption by that body. Not until January, 1822, did Congress conclude to adopt, by an almost unanimous vote, the President's recommendation that the independence of Mexico and the Spanish provinces of South America should be acknowledged, and that diplomatic relations should be established with them.<sup>27</sup> On the 6th of April Mr. Adams, secretary of state, in explaining to Mr. Anduaga, the minister of Spain,<sup>28</sup> the motives that prompted the final act said: "In every question relating to the independence of a nation two principles

<sup>25</sup> It formally declared its independence in 1816.

<sup>26</sup> 115 yeas to 45 yeas. 2 Annals, 1st sess. 15th Cong., 1655. See also, as to the entire transaction, J. C. Bancroft Davis's notes to Treaties of the U. S.

<sup>27</sup> On the 4th of May, 1822, Congress made an appropriation "to

defray the expenses of missions to the independent nations on the American continent." 3 St. at L., 678.

<sup>28</sup> Mss. For. Leg. Notes. As to the reception of the action of the U. S. in England, see Gallatin's Writings, vol. ii, p. 240.

are involved, one of *right* and the other of *fact*; the former exclusively depending upon the determination of the nation itself, and the latter resulting from the successful execution of that determination. \* \* This recognition is neither intended to invalidate any right of Spain, nor to affect the employment of any means which she may yet be disposed or enabled to use with the view of reuniting those provinces to the rest of her dominions. It is the mere acknowledgment of existing facts with the view to the regular establishment with the nations newly formed of those relations, political and commercial, which is the moral obligation of civilized and Christian nations to entertain reciprocally with one another." Not until 1825 did Great Britain resolve to make a like acknowledgment, the reason for which as stated by Lord Liverpool—the head of a government in which Canning was foreign secretary—was "that there was no right while the contest was actually going on. \* \* The question ought to be—was the contest going on? He for one could not reconcile it to his mind to take any such step so long as the struggle in arms continued undecided. And while he made that declaration he meant that it should be a *bona fide* contest."<sup>29</sup> Great Britain thus refused to act until it was absolutely clear that Spain had really given up the contest, and that the South American republics had in fact gained their independence.

§ 157. **Recognition of Texas by U. S.**—The United States acted with equal deliberation in the recognition of the independence of Texas, which, after a year of warfare, made its declaration in December, 1835. Although the revolted Texans really ended the war in the decisive battle of San Jacinto in April, 1836, and took the Mexican president prisoner, President Jackson in his message<sup>30</sup> of December of that year counseled delay because, he said, "a premature recognition under these circumstances, if not looked upon as a justifiable cause of war, is always liable to be regarded as a proof of an unfriendly spirit to one of the contending parties. All questions relative to the government of foreign nations, whether of the Old or New World, have been treated by the United States as questions of fact only." Not until March, 1837, was the independence of Texas recognized by the United States, when Mr. Forsyth, secretary of state, said: "The indepen-

<sup>29</sup> Hansard, N. S. x, 974; Martens (N. R.) vi, 148, 154.

<sup>30</sup> Messages of the Presidents, vol. iii, p. 266.

dence of other nations has always been regarded by the United States as a question of fact merely, and that of every people has been invariably recognized by them whenever the actual enjoyment of it was accompanied by satisfactory evidence of their power and determination permanently and effectually to maintain it. This was the course pursued by the United States in acknowledging the independence of Mexico and the other American states, formerly under the dominion of Spain. The United States, in recognizing Texas, acted in perfect accordance with their ordinary and settled policy."<sup>31</sup>

§ 158. All must finally recognize governments *de facto*.—Thus has our federal republic emphasized the doctrine, which all states are forced to accept in their actual dealings with each other, that all must finally recognize the government *de facto*. Even in monarchical countries in which ideas of legitimacy and divine right are at the root of state institutions, while there is a greater prejudice against the acceptance of a new regime founded on revolution, it is practically impossible for their administrators to hold out against accomplished facts. While the European governments refused to recognize the French Republic of 1792 because of its instability and its objectionable character, they found it convenient to recognize successively the revolutionary governments of Louis Phillippe in 1830, of the Republic in 1848, and of the Empire in 1852.

§ 159. Recognitions, formal and informal.—While any act which clearly indicates the intention to recognize independence is sufficient, the most formal way to express it is by a separate declaration to that effect addressed to the new state, or by a like declaration embodied in a treaty with it. In the manner first named Great Britain chose to recognize the Congo Free State. In a declaration made in a treaty of alliance dated February 6, 1778, France set forth the fact that the "essential and direct end of the present defensive alliance" is to maintain the sovereignty and independence of the United States.<sup>32</sup> Great Britain, France and Russia, after having indirectly recognized the independence of Greece by the making of consular

<sup>31</sup> Mr. Forsyth, Sec. of State, to Mr. Castillo, Mch. 17, 1837. Mss. Notes, Mex. In 1840 the independence of Texas was recognized by Great Britain and France.

<sup>32</sup> As to the obligations imposed on the U. S. by that treaty, see

Phillimore, Int. Law (3 ed.), vol. iii, p. 228; Lyman's Diplomacy of the U. S., 38; Randall's Jefferson, vol. 1, chap. xiv; Chirac v. Chirac, 2 Wheat., 259; Lodge's Hamilton,

49.

and commercial agreements with her in 1827, formally recognized it in a protocol in 1832; and in that form the German Empire was recognized by the plenipotentiaries of the great powers who met in the conference held at London in January, 1871. The independence of Belgium was promptly recognized by the great powers in 1830, without the consent of Holland, by admitting her as a party to a treaty in which her boundaries were defined and her neutral character established. And yet the fact must be borne in mind that the cases of Greece and Belgium are rather illustrations of forcible intervention than of mere recognition. Indirect recognition may result by implication from the sending of a diplomatic representative to a new state, or from receiving one from it, or even from the grant of an *exequatur* to one of its consuls.<sup>33</sup>

§ 160. Attributes of sovereign states as moral persons.—As soon as a political community which has set up a separate national existence of its own receives recognition of its independence, it enters at once into the full enjoyment of sovereignty as a corporate person endowed not only with the right to perpetuate its existence as such by an unbroken succession of new members, but with the attributes and responsibilities incident to “moral persons, having a public will, capable and free to do right and wrong, inasmuch as they are collections of individuals, each of whom carries with him into the service of the community the same binding law of morality and religion which ought to control his conduct in private life.”<sup>34</sup> Such a sovereign has the right to claim independence of and equality with all others of its class, and to exercise jurisdiction throughout its territory. The postulate is fundamental that jurisdiction and territory are co-extensive.<sup>35</sup> With a few exceptions, which will be explained when the<sup>36</sup> two broad divisions of the subjects are examined in detail, a sovereign state has jurisdiction over all persons and things within its territorial limits, and in some instances such jurisdiction over both extends beyond its limits and thus becomes extraterritorial. Among its several attributes of sovereignty may also be noted the rights of a state to maintain diplomatic intercourse with other states; to make treaties with them; and, under certain

<sup>33</sup> Hertslet's Map of Europe by Treaty, Nos. 149, 152 and 441; Parl. Papers, Africa, No. 4, 1885; Wharton's Int. Law Dig., § 115; Hall, § 26.

<sup>34</sup> Maine, Int. Law, p. 33.

<sup>35</sup> Walker, Science of Int. Law, p. 112 seq.

<sup>36</sup> Cf. the two following chapters.

exceptional conditions, to intervene in their internal affairs.<sup>37</sup> Against the exceptional and extraordinary right of intervention stands the normal right of every state to manage its own affairs, internal and external, without outside interference. It is the privilege of every state to adopt any form of government it deems best suited to its internal wants and conditions, and its identity is never lost so long as its corporate existence survives. While that is preserved neither internal revolutions, nor alienations of parts of its territory can diminish any of its rights or discharge it from any of its obligations.<sup>38</sup>

§ 161. **Effects of temporary suspension of state life.**—The life of a state is not necessarily extinguished even by the temporary suspension during a civil war of its authority over those who owe it allegiance. Neither a change in the person of its ruler nor a complete transformation in the internal organization of its government can affect the treaties<sup>39</sup> or public debts of a state so long as the corporate identity remains. As the people as a whole were bound at their creation by the acts of authorized agents, each new government succeeds not only to the fiscal rights but to the fiscal obligations of its predecessor. The obligation to pay all debts previously contracted endows each new government of course with the public domain and all other property to which the state is entitled.<sup>40</sup> A transfer of the public property through revolution to a new government does not necessarily work any change in the property rights of private individuals. The dominant party can, however, if possessed of the supreme powers of the state, appropriate the whole or a part of the property of such individuals through a system of confiscation.<sup>41</sup> A revolutionary

<sup>37</sup> See chapters iv, v and vi of this part.

<sup>38</sup> "The identity of a state, therefore, is considered to subsist so long as a party of the territory which can be recognized as the essential portion through the preservation of the capital or of the original territorial nucleus, or which represents the state by continuity of government, remains either as an independent residuum or as the core of an enlarged organization." Hall, p. 24. Twiss, vol. i, pp. 20-21.

<sup>39</sup> "The treaty relating to national objects remains in force so

long as the nation exists as an independent state." Dana's Wheaton, p. 46 "There may be exceptions, however, to this rule with respect to certain treaty engagements, which come under the general division of *personal* as contradistinguished from *real* treaties." Twiss, vol. i, p. 21, citing Vattel, II, ch. 12, § 183; Wolf, *Jus Gentium*, § 414.

<sup>40</sup> Heffter, *Völkerrecht*, § 24.

<sup>41</sup> The right to confiscate exists in full force, when the war is domestic or civil. Page v. U. S., 11 Wallace, pp. 268-331.

government may also during the period of its authority alienate the whole or a part of the public domain. Upon a return to the ancient regime all private property not confiscated, and the public domain not alienated, revert to their former owners just as in the case of conquest they revert upon the evacuation of territory occupied by a public enemy.<sup>42</sup> The validity of all intervening transfers and all acts of confiscation are then subject to contest under municipal law as administered in state tribunals. Where foreign governments or their subjects treat with the actual head of the state, or a government *de facto* acquiesced in by the nation, and thus acquire a part of the public domain or private confiscated property, the lawful sovereign after his restoration should, as a general rule, recognize such transactions as valid, although they were consummated by those whom he considered usurpers.<sup>43</sup> On the other hand where such alienations have been made to the subjects of the state itself, such restored sovereign is generally conceded the right to annul or confirm them according to the dictates of policy, special consideration being given to the rights of *bona fide* purchasers of such alienations.<sup>44</sup>

§ 162. **A state's right to reputation.**—As a state is a moral person with susceptibilities and with a character as such to maintain, it is claimed that another one of its attributes is the right of reputation, which no one should attempt by deed or word to injure or take away. For that reason it is said that no state through its officials or through its public documents has the right to wound the feelings or injure the good name of another, by asserting its inferiority or by reflecting upon the character of its social or political institutions,—a deliberate insult to one of its functionaries being considered the same as an insult to the state itself.<sup>45</sup> Under that rule, however, a state is not bound to take away from the press or private citizens the right to criticise both foreign states and their sovereigns,—those who abuse that right being subject to responsibility according to the laws of the state to which they belong.<sup>46</sup>

§ 163. **How a state may be extinguished through absorption,**

<sup>42</sup> "If the revolution fails, the *status ante* revives." Twiss, vol. i, p. 21.

<sup>43</sup> Grotius, *de Jur. Bel. ac Pac.*, II, c. 14, § 16.

<sup>44</sup> Klüber, *Droit des Gens*, sec. ii,

chap. 1, § 258; Dana's *Wheaton*, § 31.

<sup>45</sup> Woolsey, *Int. Law*, § 82.

<sup>46</sup> In 1799 certain English subjects, prosecuted for libel on Paul I of Russia, were punished by fine

division, or merger.—Having now defined the process through which a new political community may win a place in the family of nations, and the cardinal rights of such as enjoy that privilege, an indication must be given of the methods through which any state, young or old, may lose its place and disappear from the map of the world. The foremost attribute of sovereignty is the right of self-preservation, a right which entitles every state to maintain a continuous international existence. Unless it gives adequate provocation by its own acts, no state or combination of states has the right to dismember or eliminate it. In the absence of such provocation its international life can be legally determined only by its own will. For that reason every independent community is expected to put itself in a position to protect its territory, and the persons and property of its members against unjust aggressions. As Vattel has expressed it: “The nation ought to put itself in such a state as to be able to repel and humble an unjust enemy. This is an important duty which the care of its own perfection and even its self-preservation imposes both on the state and its conductor.”<sup>47</sup> Thus every state holds its life subject to the contingency of destruction at the hands of any other state or states which may be powerful enough to make good the contention that its annihilation is necessary for their protection. The three powers who finally absorbed Poland, in proportions agreed upon among themselves, gave as a justification for that act their security as neighboring nations against the internal discords of the smaller state. While one state may thus be broken up, and its fragments distributed among its neighbors, another may be so divided as to originate two or more new states. An explanation has been given already of the circumstances under which the great powers were called upon to intervene in the affairs of the kingdom of the Netherlands, finally converted by their authority into the entirely distinct and independent kingdoms of Holland and Belgium.<sup>48</sup> Upon the same principle the ancient kingdom of New Spain disappeared, and out of its fragments arose the several independent republics of Central America. In such cases the process of transformation cannot be considered complete until the independence thus claimed by the new com-

and imprisonment; and in 1803 the English court convicted Jean Peltier, a French refugee, for libel-

ling Napoleon, then First Consul. See Phillimore, i, p. 447.

<sup>47</sup> *Droit de Gens*, I, ch. 14, § 177.

<sup>48</sup> See above, p. 118.



munities has been duly recognized by other states.<sup>49</sup> Single commonwealths may also disappear by being merged in federal unions which assume the entire control of their international affairs. Such was the case when in 1815 the republic of Valais and the principality of Neuchâtel were admitted into the Helvetic Confederation;<sup>50</sup> and in 1845 when the republic of Texas was by a resolution of Congress admitted as a state of the American Union. Thus through the application of external force it cannot resist, or through its own voluntary act, a state may cease to exist absolutely, as in the case of Poland, or lose only its international existence, as in the case of Texas. In either event it ceases to be a subject of international law.

§ 164. **Effect of extinction on state obligations.**—In order to determine the status of the obligations of a state which has passed through any of the vicissitudes already described, it is necessary to distinguish between the case of one that has lost its corporate identity, and one which has simply suffered dismemberment without the loss of such identity. It is also necessary to distinguish between the general personal obligations of a state, and its special and local obligations which may be said to “run with the land.” Whenever an entire state loses its identity by being absorbed into another, the absorbing power as the heir to its whole property naturally becomes liable for its entire debt, and at the same time extends its treaty obligations to the annexed territory. After the incorporation of Naples in the kingdom of Italy, it was decided by the courts of both France and Italy that a treaty made in 1760 between France and Sardinia, relative to the execution of judgments of the courts of one within the limits of the other, applied to every part of the new Italian state into which Sardinia had expanded.<sup>51</sup> When a state is annihilated, as in the case of the kingdom of the Netherlands, and two entirely new and distinct states are created out of its fragments, neither of which represents the defunct nationality, what then becomes of its obligations? From Grotius<sup>52</sup> we learn that

<sup>49</sup> Twiss, vol. i, p. 19.

<sup>50</sup> Martens (N. R.), iv, p. 173.

<sup>51</sup> “There is this difference, however, between the effect of acquisition by cession and by absorption of an entire state, that in the latter case, the annexing power being heir to the whole property of the

incorporated state, it is liable for the whole debts of the latter, and not merely for those contracted for local objects or secured upon special revenues.” Hall, § 29.

<sup>52</sup> *De Jure Belli ac Pacis*, II. c. ix, § 10.

where a state is divided "anything which may have been held in common by the parts separating from each other must either be administered in common or be ratably divided." Chancellor Kent<sup>53</sup> made that vague rule a little more definite when he said that "if a state should be divided in respect to territory, its rights and obligations are not impaired; and if they have not been apportioned by special agreement, those rights are to be enjoyed, and those obligations fulfilled, by all the parts in common."<sup>54</sup> Phillimore, after quoting both Grotius and Kent, declared that "*if a nation be divided into various distinct societies*, the obligations which had accrued to the whole, before the division, are, unless they have been the subject of a special agreement, ratably binding upon the different parts." So far as Phillimore is concerned there is no basis for Hall's statement<sup>55</sup> that "it is difficult to be sure whether these writers only contemplate the rare case of a state so splitting up that the original state person is represented by no one of the factions into which it is divided," because he limits his comments to a case in which a nation is "divided into various *distinct societies*." In that event he says that prior obligations, in the absence of special agreement, are "ratably binding upon the different parts." Or as Heffter (§ 25) has expressed it: "Property rights and duties of an entirely extinguished state survive its dissolution, subject only to a change in their administration; in cases of partition they devolve proportionately upon each of the dismembered parts. To that extent it may be said that the treasury of the absorbing state succeeds absolutely to the rights and duties of the extinguished one." It may be true that new creations arising out of the annihilation of an older state, which they do not represent, are not legally bound to assume ratably a part of its general indebtedness,—that such obligation is purely a moral one. Whether moral or legal, the obligation of Holland and Belgium to bear ratably the general debt of the defunct kingdom of the Netherlands was distinctly recognized and enforced in the treaty of 1839 in which the European Concert made an equitable settlement of all the interests involved.

§ 165. Effect of dismemberment on state obligations.—It is far more usual, however, for such questions to arise when a state, without a loss of its corporate identity, has a portion of its territory and population taken from it by conquest to form an

<sup>53</sup> Com., i, p. 25.

<sup>55</sup> P. 99, note.

<sup>54</sup> Vol. i, § cxxxvii.

integral part of another state; or when the severed territory is erected into a new and entirely independent state. Three recent precedents justify the statement that when a conquering state seizes a part of the territory of another and adds it to its own, it is in duty bound to assume not only the local and special obligations that "run with the land," but a ratable part of the general debt of the state suffering dismemberment. In that way a part of the debt of Denmark was apportioned to Schleswig-Holstein<sup>56</sup> when those provinces became Prussian in 1866. In the same year the emperor of Austria consented to the union of the Lombardo-Venetian kingdom with that of Italy,<sup>57</sup> on condition of the liquidation of the debts chargeable to the ceded territory in conformity with the treaty of Zurich; and Italy, in a convention with France, agreed to assume so much of the Papal debt as was proportionate to the revenues of the Papal provinces appropriated by it.<sup>58</sup> "If the cession or alienation consist of a portion of the territory, the charges which weigh upon the whole will be apportioned (unless something to the contrary is stipulated) among the various divided parts formed, except such indivisible charges as the so-called guaranteed loans recognized as such by diplomatic usage." The same author in explaining what he means by "guaranteed loans" says that "international usages have replaced that species of obligation by the special dedication of certain properties or rents to the payment of loans contracted by the state, loans which in order to be valid must have been made in accordance with the laws of the state contracting them. Diplomatic language recognizes also under the denomination of guaranteed loans those contracted for the benefit of a country or special region, and it is understood that an obligation rests upon them, without adding to them in any way the significance of a civil mortgage."<sup>59</sup>

§ 166. When severed territory becomes a distinct state—local rights and obligations.—A narrower and more technical rule prevails when the parent state is deprived of a portion of its territory which is erected into an entirely distinct political community. The cogent reasoning in such a case is that as a

<sup>56</sup> Martens (N. R. G.), xvii, ii, 474-486.

<sup>57</sup> Peace of Prague, Article II. *Annuaire des Deux Mondes*, xiv, p. 804.

<sup>58</sup> Lawrence's Wheaton, vol. i, p. 214.

<sup>59</sup> Heffter, p. 72. See also, D. Haas, *Division of the Debts of States*, Bonn, 1831; Leonhardi and Emminghaus, *Digest of Germanic Law*; F. de Martens, *Int. Law*, vol.

i, p. 369.

man who loses an arm or leg in battle is not thereby relieved of any part of his obligations, so a state that is so dismembered as to suffer no loss of identity remains bound as before for its entire general indebtedness. "Such a change," Halleck<sup>60</sup> says, "no more affects its rights and duties, than a change in its internal organization, or in the person of its rulers. This doctrine applies to debts due to as well as from the state, and to its rights of property and treaty obligations, except so far as such obligations may have particular reference to the revolted or dismembered territory or province." In other words as the old state continues its corporate life without interruption, it retains all general state property, and all general benefits resulting from treaties, with full liability for all general obligations with which the new creation taken from its side may disavow all legal connection. The new state on its part carries with it only local obligations, whether contracted for local objects or secured by a lien on local revenues, and such local duties as arise out of agreements to maintain the channel of a river, or to levy no more than certain tolls along its course. As a compensation for such burdens the new state is entitled to property within it of a local character, or to such, not within it, as belongs to state institutions localized there, and to the privileges arising from treaties specially contracted for the benefit of its territory, such for instance as contain demarcations of its boundaries, and such as secure to its inhabitants, or a part of them, the right to navigate streams running through other countries from its frontiers.<sup>61</sup>

§ 167. **Contention of U. S. with Great Britain after war of 1812.**—In the treaty of 1783, severing the United States from Great Britain and defining their respective boundaries, the citizens of the former were secured certain fishing rights upon the coasts of Newfoundland, Nova Scotia and Labrador. After the war of 1812 the question arose whether such rights had been only suspended by the war or whether they had been entirely abrogated. Upon the part of the United States the former contention was maintained upon the ground that its inhabitants derived the fishing privileges in question not from the article in the treaty of 1783, which merely recognized them, but from the fact that the severance from the mother country did not take away from the people of the United States the right to their common enjoyment as it had existed before that

<sup>60</sup> Int. Law, i, 76.

<sup>61</sup> Hall, § 27.

event. Great Britain upon her part contended "that the claim of an independent state to occupy and use at its discretion any part of the territory of another without compensation or corresponding indulgence cannot rest on any other foundation than conventional stipulation."<sup>62</sup> That view of the matter, which finally prevailed, was the basis of the settlement of the controversy made by treaty in 1818.<sup>63</sup>

§ 168. **Summary.**—After a careful review of all the authorities the general statement may be made (1) that no matter whether a state is entirely extinguished by a division into two or more distinct states, or (2) whether it loses its identity by being absorbed into another state, or (3) whether a state without a loss of its identity has a portion of its territory taken from it to form an integral part of another state, or (4) whether such severed part is erected into an entirely new and independent state, all local charges, and guaranteed debts to which certain domains and their revenues are dedicated, survive as charges upon the localities to which they relate, with their equities unimpaired. In the case first named the general debt of the state should certainly be ratably binding, morally, if not legally, on its several parts; in the second it passes as a whole to the absorbing state; in the third the acquiring state should assume a ratable proportion of it; and in the fourth, every principle of equity and good conscience requires that it should be provided for out of the common state property and the residue divided in proportion to the revenues of the two distinct commonwealths. In the notable case of West Virginia that obligation, though formally recognized,<sup>64</sup> has never been discharged.

<sup>62</sup> British and Foreign State Papers, vii, 79-97.

<sup>63</sup> See below, § 344, 345.

<sup>64</sup> "Even in the throes of revolution declaring separation from the mother state provision was made

for the assumption of a just share of the old state debt, though its adjustment has never yet been reached." Art. "West Virginia" in Enc. Brit., 9th ed., vol. xxiv, p. 520.

## CHAPTER II.

### SOVEREIGNTY AND JURISDICTION IN RELATION TO PERSONS.

§ 169. **Territory and jurisdiction coextensive.**—From the fundamental doctrine of territorial sovereignty, upon which the modern international system reposes, flows the corollary that territory and jurisdiction are coextensive.<sup>1</sup> Jurisdiction is in fact an attribute inherent in sovereignty that follows it wherever it goes. As Chief Justice Marshall has expressed it: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."<sup>2</sup> Or in the ampler phrase of Fœlix "every state possesses the power of regulating the conditions on which the real or personal property, within its territory, may be held or transmitted; and of determining the state and capacity of all persons therein, as well as the validity of the contracts and other acts which arise there, and the rights and obligations which result from them; and, finally, of prescribing the conditions on which suits at law may be commenced and carried on within its territory."<sup>3</sup> From this general right of control results the exclusive power of every state to fix by legislation the personal and civil status of its citizens and the status and condition of all real and personal property situated within its limits whether belonging to citizens or aliens. Upon that basis rest two of the three maxims of Huber:<sup>4</sup> first, that the laws of every empire have force only within the limits of its own government, and bind all who are subjects thereof, but not beyond them; second, that all persons who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof.

<sup>1</sup> "The whole space over which a nation extends its government becomes the seat of its jurisdiction, and is called its territory." Vattel, *Droit des Gens*, i, c. 18; § 205. Si gens quaedam regionem vacuum occupat, imperium in ea simul occupat. Wolf, *Jus Gentium*, § 85. "The right of empire or jurisdic-

tion is distinguished from the right of dominion or property." Twiss, i, § 139.

<sup>2</sup> *The Schooner Exchange v. McFaddon et al.*, 7 Cranch, p. 136.

<sup>3</sup> *Droit Int. Privé*, § 9.

<sup>4</sup> *De Conflictu Legum*, Lib. 1, tit. 3, § 2, p. 538.

**Legal fiction of extritoriality—illustrations.**—Necessity and convenience have, however, forced the incorporation into international public law of the doctrine, that in reference to certain persons and certain kinds of property the jurisdiction of a state may be extended beyond its actual territorial limits; and, in order to uphold the theory that territory and jurisdiction are coextensive, the legal fiction<sup>5</sup> has been invented, that in certain cases a detached portion of a state may become migratory with the capacity to float on the sea, or to superimpose itself upon the territory of another state with its municipal institutions in full force upon it. Such is the fiction when a foreign sovereign goes in his public capacity within the limits of another state; or when the army of one state marches over the territory of another with which it is at peace; or when the ambassadors or other public ministers of one state go upon a diplomatic mission to another and establish a residence there. The fiction is that such residence is a part of the state from which the envoys have come, with all of its domestic institutions, including its special forms of religious worship, in full force; and with perfect immunity from the jurisdiction, both civil and criminal, of the country to which it has been temporarily transferred. A still more striking illustration of the fiction may be found in the case of a public ship of state sailing over the seas free from the right of search, or in a friendly port which it may enter without express permission, and there enjoy “an exemption from the jurisdiction of the sovereign within whose territory she claims the rights of hospitality,”<sup>6</sup> excepting only necessary sanitary rules and ordinary harbor regulations.<sup>7</sup>

§ 170. **Comity the basis of international private law.**—Whenever a state desires to give an extritorial effect to its laws within that wide and difficult domain occupied by international private law it resorts to an entirely different expedient.

<sup>5</sup> Par une espèce de fiction légale, commandée en quelque sorte par la situation élevée qu'elles occupent, les personnes qui représentent un État au dehors sont généralement regardées comme n'ayant pas quitté le territoire de leur nation et comme devant à ce titre échap-

per à la jurisdiction du pays où elles se trouvent, pour rester exclusivement soumises aux lois de leur propre pays. Calvo, § 503.

<sup>6</sup> The Schooner Exchange v. MeFaddon et al., 7 Cranch, 117.

<sup>7</sup> See below, § 258.

It then falls back upon the third axiom of Huber,<sup>8</sup> "that the rulers of every empire from comity admit that the laws of every people, in force within its own limits, ought to have the same force everywhere, so far as they do not prejudice the powers or rights of other governments, or of their citizens." This expedient has prospered through the willingness upon the part of states to modify their exclusive rights of sovereignty in order to prevent "gross inconvenience and injustice to litigants, whether natives or foreigners."<sup>9</sup>

**Result of a strict enforcement of the *lex loci*.**—In the absence of that disposition to relax sovereign rights the mutual concessions which civilized nations have made for such reasons would have been impossible. If each state in the full exercise of its sovereignty had simply insisted that its courts shall apply the *lex loci* to all jural relations coming before them there could have been no such thing as international private law, whose province it is to determine which of two conflicting systems of law shall prevail in a given case. In that event the intercourse between nations would have been continually vexed with inconveniences and injustices arising out of conditions in which a right duly acquired under the laws of one country could be annulled by contrary laws prevailing in another. In order to prevent as far as possible that general result there has been growing up among civilized states, since the middle of the seventeenth century, a body of rules<sup>10</sup> touching the purely private relations of individuals, whose aim is to secure the recognition and enforcement in the courts of every state of any right which has been duly acquired under the laws of another. It has not been found convenient, however, to relax the exclusive sovereign right of every state to determine the status and disposition of immovable property. All rights

<sup>8</sup> *De Conflictu Legum*, Lib. 1. tit. 3, § 2, p. 538.

<sup>9</sup> Dicey, *Conflict of Laws*, p. 10.

<sup>10</sup> Savigny, writing in 1849, says, "one can say that this branch of science has already become a common property of civilized nations, not through possession already gained of fixed, universally acknowledged principles, but through a community in scientific in-

quiries which reaches after such possession. A vivid picture of this unripe but hopeful condition is furnished by the excellent work of Story, which is also in a high degree useful to every investigator, as a rich collection of material." A *Treatise on the Conflict of Laws*, forming the 8th vol. of his *System des Heutigen Romischen Rechts*. See W. Guthrie's trans.



in immovables are, as a general rule, regulated by the *lex situs*.<sup>11</sup> This growing system of mutual concessions has therefore been limited to the regulation of rights in movables upon the basis principle that the personal status and jural capacity of a person is to be determined by the law of his domicil. In that way this branch of law has been mainly occupied with the application of the *lex domicilii* to questions of marriage, divorce, succession, wills, citizenship, minority, legitimacy, lunacy, guardianship, and administrations, foreign judgments and contracts, bankruptcy and the like. By Savigny<sup>12</sup> and many other foreign jurists, it has been held that a person's status, subject to certain exceptions, depends entirely upon the law of his domicil, or as Lord Westbury expressed it in *Udny v. Udny*,<sup>13</sup> a person's civil status ought to be "governed universally by one single principle, namely, that of domicil, which is the criterion established by law for the purpose of determining civil status." Hence the general rules, subject to certain exceptions, that the assignment of movables, wherever situated, in accordance with the law of the owner's domicil is valid; that a person's capacity to enter into a contract is governed by the law of his domicil at the time of its making; that a marriage is valid when each of the parties has, according to the law of his or her respective domicil, the capacity to enter into that relation; that a will of movables is to be interpreted with reference to the law of the testator's domicil at the time when it was made; and that the distributable residue of the movables of a deceased person is governed by the law of his domicil at the time of his death.

**Connection between international private law and public.**—As all such rules concern the purely private relations of individuals, and as they all relate to rights depending upon the law of one state whose enforcement may be forbidden in the courts of another, they can only be connected with international law

<sup>11</sup> *Birtwhistle v. Vardill*, 7 Cl. & F. 895; *Re Don's Estate*, 4 Drew, 194; *Duncan v. Lawson*, 41 Ch. D. 394; *Heyer v. Alexander*, 108 Ill. 385; *Succession of Larendon*, 39 La. An. 952; *Welch v. Adams*, 152 Mass. 74. Cf. *Story, Conflict of Laws*, §§ 431-463; *Nelson, Private Int. Law*, p. 277, commenting on *Ja-*

*cobs v. Crédit Lyonnais*, 12 Q. B. D. (C. A.) 589, 603, *per curiam*; *Westlake* (3rd ed.), p. 261.

<sup>12</sup> *Conflict of Laws*, § 362, *Guthrie's trans.* (2nd ed., 1880), p. 148.

<sup>13</sup> L. R. 1 Sc. App. 441, 457. See also *Sottomayor v. De Barros*, 3 P. D. (C. A.) 1; *Dicey, Conflict of Laws*, pp. 79, seq., 479, 728 seq.

proper by virtue of the fact that the tacit consent<sup>14</sup> which upholds the system of reciprocal concessions is a part of the code regulating the intercourse of nations. The law of the state actually enforced within the territory of another is national law; the rule by virtue of which it is so enforced is an international rule. In that way only is international private law, whose province it is to prevent conflict in matters of purely individual right, connected with international public law which is strictly confined to the relation of states with states.

§ 171. Law of nations deals only with states as corporate persons, and not with individuals composing them.—The fact has more than once been emphasized that the persons who compose the family of nations are corporate persons, states, which must be either sovereign or part-sovereign, because, when a state is entirely deprived of its external sovereignty, it reaches the vanishing point at which it disappears from international law. The family of nations may, therefore, be compared in a general way to that kind of a federal league heretofore described as a *staatenbund* for the reason that in both cases the law that constitutes the union operates only upon states as such and not upon the individuals of whom they are composed.<sup>15</sup> The independent state is a collective person, with a moral nature, into whose corporate being are absorbed, so far as international law is concerned, all the citizens that compose it. As an Oxford scholar has recently expressed it: "By a state, or political society, we understand, at the present day, a community (1) of considerable size (2) occupying a clearly defined territory, (3) owing direct and complete allegiance to a common authority, and (4) invested with a personality which enables it to act more or less as an individual."<sup>16</sup>

**Rights and obligations incident to states as such.**—International rights and obligations belong to the corporate person of the state as an individual; its citizens as such possess neither. Their obligations are to their own state which in turn guarantees them protection under the terms of its domes-

<sup>14</sup> "It is of course a merely voluntary act on the part of any state when it gives effect to foreign law." Holland, *Elements of Jurisprudence*, p. 368.

<sup>15</sup> See above, p. 165.

<sup>16</sup> Edward Jenks's *Law and Politics in the Middle Ages*, p. 68.

tic constitution, a protection which they can demand from their own state as a matter of municipal law. But in their relations with other states they have in their citizen capacity neither rights nor duties which they can sustain as such. As against other states a citizen can only assert his rights through the agency of his own state, which is consequently responsible to them for his acts. "If his throat is cut as a prisoner of war taken in the service of the state, it is his state that is internationally outraged; if he cuts the throat of a prisoner that he has taken, it is his state that has committed a breach of the law of nations. Internationally the jural existence of the citizen is thus wholly sunk in the jural existence of the state; or, in other words, the state is a jural unity of the component elements of which the law of nations takes no account."<sup>17</sup>

§ 172. Who are entitled to a state's protection? *Status more important than citizenship.*—International law proper, to whose consideration this work will be limited, knows nothing of the component elements of states until one of them assumes in its corporate capacity the enforcement of the rights or the settlement of the obligations of citizens or subjects standing in such a relation to it as to warrant its representation of them. In that way it becomes a matter of prime importance to ascertain who are the component elements of a state whose rights it must enforce and for whose wrongful acts it must give satisfaction. In other words, this question must be asked and answered: In what relation must a person stand to a state in order so to clothe himself with its nationality that it will be bound to assume his rights and obligations in his dealings with other states? Primarily the question who is or is not a citizen or subject of a particular state is a question of municipal law; and when that has been answered, international law has no right to inquire into the manner in which a state's sovereignty is exercised over such subject or citizen within its jurisdiction, whether the same is territorial or such as is exercised in unappropriated places. A person without being clothed with the full citizenship of a state, under its municipal law, may, however, still bear such relations to it that his status will compel it to assume responsibility for him. The right of a state to protect a subject abroad may, therefore, rest upon a relation far short of full citizenship. A foreigner may by

<sup>17</sup> Lorimer's *Institutes of the Law of Nations*, vol. ii, p. 131.

virtue of his domicile acquire the national character of a state to such an extent as to secure its protection beyond its bounds. In the famous case of *Koszta*, who based his claim to protection upon domicile, Mr. Marcy said: "It is a maxim of international law that domicile confers a national character; it does not allow any one who has a domicile to decline the national character thus conferred; it forces it upon him often very much against his will and to his great detriment. International law looks only to the national character in determining what country has the right to protect."<sup>18</sup> Therefore, whenever the question is asked whether or no a state is in duty bound to enforce the rights or answer for the acts of any individual, the response must depend upon the relation he bears to the state which assumes or is called upon to speak for him, and that relation is one rather of status than of citizenship. "The rule fixing citizenship upon an individual,—the rule, that is, ascribing nationality,—is matter for municipal law. In international law locality, not nationality, is the all-important test of character."

§ 173. **Inhabitants of whom every state is usually composed.**—The inhabitants of whom every state is usually composed may be roughly divided into natural born citizens; naturalized citizens; denizens; domiciled aliens; and mere casual visitors or travelers passing through the country, to all of whom certain duties are due. The persons who bear such relations to a state, perfect or imperfect, as will authorize or require it to exercise jurisdiction over them may therefore be grouped under the following heads:

1. Persons as to whose nationality no real question can exist, such as have been born upon its soil of native parents

<sup>18</sup> Mr. Marcy, Sec. of State, to Mr. Hülsenmann, Sept. 26, 1853. Mss. Notes, Austria; Wharton Int. Law Dig., vol. ii, §§ 175, 198. See also 3 Lawrence *Com. sur droit int.* 138; 4 *ibid.* 179, 180. While Mr. Marcy's position is sustained by Calvo, *Droit International* (3rd ed.), ii, p. 96, it has been assailed by Hall (§ 72), who says, "Domicil no doubt imparts national character for certain purposes; but those purposes, so far as they have to do with public international law, are connected with the rules of war

alone, and Mr. Marcy's contention was wholly destitute of foundation." However extreme Mr. Marcy's view may appear to foreign jurists, its tendency was followed by the Supreme Court of the U. S. in the Prize Cases (2 Black, 635) in which it was held, "First, that if a place was in the firm possession and under the control of the rebel enemies, it was, for the time, and in the technical sense of the prize law, enemy's territory; second, that the property of a person domiciled in that

who have never thrown off their allegiance, and foundlings who, in the absence of a known father or mother, must be attributed to the soil upon which they are born or found.

2. Persons as to whose nationality there may be a question, such as children born of the subjects of one power within the territory of another; legitimate minors whose fathers are dead; illegitimate minors whose nationality depends upon that of the mother where national character is of a personal and not of a local origin; married women whose nationality, with certain notable exceptions, is merged in that of foreign husbands whose subsequent change of nationality carries with it a like change as to them; naturalized persons, who can only be controlled or protected to a limited extent outside of the jurisdiction of the new state whose citizenship they have assumed; and the children of such naturalized persons who are minors at the date of the naturalization of their parents.

3. To citizens either by birth, marriage or naturalization must be added (1) such foreigners resident as enjoy special privileges as denizens without being full citizens; (2) such domiciled aliens, not being denizens, as have acquired by virtue of their domicile certain rights and privileges; (3) mere travelers passing through or visiting the country temporarily.

§ 174. Right of a state to protect its subjects abroad; allegiance; Calvin's case.—A part of the general right of self-preservation possessed by every state is the special right to protect its subjects abroad which is correlative to its liability to respond for injuries inflicted upon aliens within its own limits.<sup>19</sup> Foremost among those who have the right to call upon a state to stand as their representative and protector as to other states are such as have been clothed with its nationality through birth upon its soil of native parents who have never surrendered their natural allegiance. In the famous case of Calvin or Colvill<sup>20</sup> decided in 1608, after argument in the exchequer chamber before the chancellor and the twelve judges, the entire doctrine of allegiance was exhaustively

place at the time of the capture was liable to condemnation as enemy's property in the sense of the prize courts." Dana's note, 160, to Wheaton's Elements.

<sup>19</sup> Hall, § 87. "Finally the right of protecting subjects abroad falls

under the head of self-preservation." Ibid., § 73.

<sup>20</sup> 7 Rep. 1; 2 State Trials, 559 (e) (6 Jac. 1, A. D. 1608). See also notes of the judgments in State Papers, Dom. xxx, 40, and xxxiv, 10. Cf. Denman's Broom's Const. Law, 1885, pp. 4-59.

reviewed as to the post-nati, as those subjects were called who were born in Scotland after the accession of James I. The contention was that they were no more aliens than those born upon the soil of England. All of the judges, except two, declared that Calvin, an infant born in Edinburgh in 1605, was no alien; that allegiance is the "true and faithful obedience of the subject due to the sovereign;" and that persons born in the allegiance of the king are his natural subjects, regardless of locality. As allegiance was due by both kingdoms to one sovereign,<sup>21</sup> it was held for that reason that internaturalization followed, although each kingdom has its own parliament and its own laws. It thus became a settled doctrine of English law that any one is entitled to English nationality by birth who could prove that he came into life upon English soil of parents under actual allegiance to the sovereign,<sup>22</sup> even when the place of birth was within limits held for the king by a mere temporary right of forcible occupation.<sup>23</sup> When foreign territory previously uninhabited is occupied by English settlers, the laws of England go into immediate operation, as in the colonies founded by such settlers in America. On the other hand, when a conquest is made of inhabited territory English law does not operate until it is expressly proclaimed.<sup>24</sup>

**Natural allegiance originally perpetual. British naturalization acts.**—Natural allegiance acquired by birth upon English soil was, at an early day, held to be neither local nor temporary but perpetual and indissoluble, imposing upon the subject for his whole life the duty to render military service to the crown whenever required to do so.<sup>25</sup> Those who were alien-born could, under the old system, acquire British citizenship only by an act of parliament, by letters patent or through the results of conquest. The whole subject has, however, during the last reign been thoroughly reviewed in a series of stat-

<sup>21</sup> See Excursus III, Thomas' Leading Cases in Const. Law, p. 37.

<sup>22</sup> "All persons born within the United Kingdom, or in the colonies, fall within [the] description [of natural-born British subjects]. And this extends even to those born of aliens residing in this country, provided their parents were not at the time in enmity with our sovereign." 2 Steph. Com., 12th ed., p. 405. See also

Cockburn, Nationality, p. 7; Dicey, Conflict of Laws, pp. 175 et seq., 740.

<sup>23</sup> 2 Dyer, 224a.

<sup>24</sup> Blankard v. Galdy, 2 Salk. 411.

<sup>25</sup> In the United States the courts have been inclined to follow the rule of the English common law, and to hold that neither a native nor a naturalized citizen can throw off his allegiance without the consent of the state. Kent.

utes (regulating the acquisition of national character, expatriation and the status of aliens), which ends with the Naturalization Act, 1870 (33 and 34 Vict.). By that act the ancient doctrine of perpetual allegiance has been renounced and provision made for the naturalization of British subjects in foreign states, for their resumption of British nationality and also for the neutralization of aliens, who are permitted not only to acquire and hold real and personal property like natural born British subjects, but to acquire title to the same through an alien as through a natural born British subject.<sup>26</sup> Great Britain has thus placed herself in full accord with the modern tendency to extend to the stranger every privilege not in conflict with the duty of self-protection, by conceding to the naturalized alien nearly all of the rights of full citizenship.

§ 175. **Rights of English subjects in America.**—In the great title deed<sup>27</sup> under which the English settlers in America took actual and permanent possession of the best part of the Atlantic seaboard it was provided “that all and every persons being our subjects which shall go and inhabit within the said colony and plantation, and even their children and posterity, which shall happen to be born within any of the limits thereof, shall have and enjoy all liberties, franchises, and immunities of free denizens and natural subjects within any of our other dominions, to all intents and purposes as if they had been abiding and born within this one realm of England, or in any other of our dominions.”

**Interstate citizenship.**—When the colonies declared their independence of the mother country they drew together in a federal league based upon the old and ineffectual system of requisitions upon states as states. The only feature that lifted the first federal constitution above others of its class was the new system of interstate citizenship embodied in the rule that any one might at will transfer his membership from one state to another.<sup>28</sup> In the second federal constitution

Comm., ii. 49; 8 Opinions of Atty.-General, 157; Story on the Constitution, iii, 3, n. 1; Wharton, State Trials, 654.

<sup>26</sup> Cf. The Origin and Growth of the Eng. Const., vol. ii, pp. 229, 424.

<sup>27</sup> Charter granted by James I, April 10, 1606, contained in Charters and Constitutions compiled

under order of U. S. Senate by B. P. Poore, part ii, p. 1888. See also Hazard's His. Collections.

<sup>28</sup> “The principle of inter-citizenship infused itself neither into the constitution of the old German Empire, nor of Switzerland, nor of Holland.” Bancroft, Hist. of Const., vol. i, p. 118.

of 1787,—based upon the new and fundamental idea that the federal power shall operate directly upon the citizen and not upon the states as such,—the original provision as to interstate citizenship was reproduced in section two of article four, which provides that, “The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.” There was, however, no attempt made either in the second constitution itself, or in any act of congress passed after its adoption, to establish or define citizenship of the United States as such, as a distinct and independent thing from state citizenship.<sup>29</sup>

**Federal citizenship created by fourteenth amendment.**—Federal citizenship was first created by section 1 of the Fourteenth Amendment, which provides that “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.” In the weighty judgment in which the effect of that provision was reviewed the fact was recognized that the order of citizenship had been reversed; that under the amendment the primary citizenship in this country is to the United States; and the secondary to the state of the citizen’s residence. It was further held that the two citizenships are separate and distinct from each other. In the words of the court, “It is quite clear, then, that there is a citizenship of the United States and a citizenship of the state, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.”<sup>30</sup> A person may be a citizen of the United States without being a citizen of a state. He cannot, however, be a citizen of a state without being a citizen of the United States. The former may be acquired through birth or naturalization; the latter, only through residence. So far as international law is concerned the most important declaration contained in the judgment quoted above is that “Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government.

<sup>29</sup> “That the constitution itself has defined citizenship of the United States by declaring what persons, born within the several states, shall or shall not be citizens of the United States, will not be pretended. It contains no such declaration.” Mr. Justice Curtis in *Dred Scott v. Sandford*, 19 Howard, 575.

<sup>30</sup> *The Slaughter-House Cases*, 16 Wallace, 78.



Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States." It is, therefore, by virtue of his national citizenship that every citizen of the United States now has the right to call upon the federal government to stand for him as to foreign states.

§ 176. **Relation of allegiance to citizenship. Former not now perpetual.**—With the indications now given as to the nature of allegiance and citizenship, as those terms are understood throughout the English-speaking world, clearly in view, it will be easier to explain their relation to each other. The acquisition of national character through birth has ever depended under English practice not simply on the fact of birth upon English soil, but on the further fact of birth within the allegiance, that is within the king's dominions, of parents under actual obedience to him.<sup>31</sup> If the question be asked, what is allegiance? the answer may be given that it is the true and faithful obedience which the subject of every state owes to the state or its head in return for the protection which the state affords him. If the question be asked, how many kinds of allegiance are there? the answer is (1) natural allegiance (*alta ligeantia*) of the subject born; (2) acquired allegiance (*ligeantia acquisita*), growing out of some act or circumstance other than birth, such as denization or naturalization; (3) local allegiance (*ligeantia localis*), resulting from the protection given to an alien friend residing within the state no matter for how short a time; (4) legal allegiance (*ligeantia legalis*), resulting from an actual personal oath taken by the subject, an oath which by the common law could be tendered to every one who had attained the age of twelve years.<sup>32</sup> As stated heretofore it was once a fundamental tenet of the English common law that natural allegiance was perpetual and could not be renounced without the consent of the sovereign; and the same doctrine was maintained in the United States during the earlier period of our national history.<sup>33</sup> Both countries have, however, expressly repudiated it by statute. An act of congress adopted July 27, 1868, declared that "the right of expatriation is a natural and inherent right of all people, indispensa-

<sup>31</sup> The three conditions to be considered were the time of birth, the place of birth, and the actual obedience of the parents. 7 Rep. 18.

<sup>32</sup> Coke, Lit. 129a; Brown's Law Dict. (Sprague's ed.); 8 Opin. Atty-Gen., 139; 9 Ibid. 356.

<sup>33</sup> See above, p. 214.

ble to the enjoyment of the right of life, liberty, and the pursuit of happiness,"—principles distinctly recognized in the British Naturalization Act, 1870, providing for the naturalization of British subjects in foreign states, and for the enjoyment of the same privilege within British jurisdiction by the subjects of such states.<sup>34</sup>

**How British and American citizenship acquired.**—British national character, which is *ipso facto* lost by naturalization within a foreign state,<sup>35</sup> may now be acquired by birth within the allegiance, or by naturalization in the prescribed forms. In identically the same way the national citizenship of the United States may be acquired under the Fourteenth Amendment, which provides that a person may become such a citizen, first, by birth in the United States "subject to the jurisdiction thereof," second, by naturalization therein.<sup>36</sup> The old common law idea of birth within the allegiance was thus perpetuated in the phrase as to jurisdiction, which excludes from the operation of the amendment children of ambassadors, ministers, consuls, and citizens or subjects of foreign states born within the United States.<sup>37</sup> One who is endowed with the citizenship of a state by birth, naturalization, or otherwise, may as a member of the body politic become subject to its laws and entitled to its protection, and to the enjoyment of civil or private rights, without being clothed with political rights. Political privileges are not essential to citizenship, there is no necessary connection between citizenship and the right to vote.<sup>38</sup>

§ 177. **Feudal rule of citizenship and reaction against it.**—According to Roman ideas a person was a citizen who had the freedom of a city with the right to participate in the exercise of all its privileges, civil and political.<sup>39</sup> His city was his country,<sup>40</sup> and his countrymen were those who shared with him the benefits of a municipal constitution. Under that system, resting upon personal rights inherent in the individual, the

<sup>34</sup> U. S. Rev. Stat., § 1999; St. 33 Vict., c. 14, May 10, 1870.

<sup>35</sup> *i. e.*, after the date of the Naturalization Act of 1870.

<sup>36</sup> *Elk v. Wilkins*, 112 U. S. 94; *McKay v. Campbell*, 2 Sawy. (U. S.) 118; *Minor v. Happersett*, 21 Wallace, 167.

<sup>37</sup> *Slaughter-House Cases*, 16 Wallace, 73.

<sup>38</sup> *U. S. v. Cruikshank*, 92 U. S. 542; *Minor v. Happersett*, 21 Wall. 162; *Lyons v. Cunningham*, 66 Cal. 42; *Lanx v. Randall*, 4 Dill. (U. S.), 425, judgment of Mr. Justice Miller in the circuit court.

<sup>39</sup> Cf. 6 Am. and Eng. Enc. of Law, p. 15, note 2, citing *Thomson v. State*, 15 Ind. 449.

<sup>40</sup> See above, p. 10.

national character of a child depended primarily upon the national character of the parents, and not upon the place of birth. With the growth of feudalism, which brought about a far more intimate connection between the individual and the soil upon which he was born, the Roman theory was so far modified by the idea of locality that it became "the rule of Europe"<sup>41</sup> for states, within whose limits children were born to subjects of foreign powers, to consider such children as natives solely by virtue of the place of their birth. The reaction against that doctrine, which has finally established as a general rule the principle that children of aliens remain aliens by virtue of the status of their parents, dates from the establishment of the Code Napoleon providing that the nationality of a child shall follow that of its parents. The new doctrine thus announced has gradually worked its way into the codes of most civilized states, either in its entirety or with such modifications as protect children against the effects of the old rule by arming them with the power to choose their own nationality.<sup>42</sup> Austria-Hungary, Belgium, Costa Rica, Denmark, Germany, Greece, Norway, Roumania, Russia, Servia, Spain, Sweden, Switzerland and Salvador, which claim children of their subjects as subjects wherever born, admit the corresponding principle that the national character of a child depends upon that of his parents and not upon the place of his birth. The greater number of the South American states cling to the old rule, while England, France, the Netherlands, Portugal and the United States, which uphold to a greater or less extent its theory, avoid its effects by giving in various forms to children born of aliens the right to elect on attaining their majority either the nationality of their parents or that of the country in which they were born. So generally has that just principle been recognized by the more important states that it may now be regarded as the prevailing rule upon the subject.

§ 178. **The old rule in the U. S.**—Few states have done less to abrogate the old rule than the United States. The Fourteenth Amendment provides that "all persons born or naturalized in the United States, and *subject to the jurisdiction thereof*, are citizens of the United States and of the state

<sup>41</sup> Demolombe, *Cours de Code* see Pothier, *Des Personnes et des Napoléon*, liv. i, tit. i, ch. i, No. 146. For the old law of France, *Choses*, pt. i, tit. ii, sec. i.

<sup>42</sup> Hall, pp. 234-238.

wherein they reside." By section 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." It is therefore clear that Indians not taxed and all persons who fall within the clauses italicized are not citizens within the terms either of the constitution or statute. It appears, therefore, that children born in the United States to foreigners here on transient residence are not citizens, because by the law of nations they were not at the time of their birth "subject to the jurisdiction."<sup>43</sup> When the question is asked as to the status of children born here to domiciled aliens, the only answer that can be made—in the absence of an affirmative statute giving them the right of election upon attaining their majority—is that they are provisionally citizens of the United States, until they voluntarily renounce that character after they have become of full age. It has been held by the department of state that minor children, born in this country to naturalized citizens, after visiting Germany temporarily, are entitled to passports to return to this country upon the eve of their majority;<sup>44</sup> and that a person born here, although he was immediately carried abroad by his parents, has the right to elect the nationality of the United States when he arrives at full age.<sup>45</sup> On the other hand it has been declared by the same authority that a child born here to French parents, who goes during his minority to France, and there remains voluntarily after he attains his majority, will be held to have abjured his American nationality,<sup>46</sup>—and that a child born here to a foreign father, when taken by him abroad, acquires his domicil and nationality.<sup>47</sup>

§ 179. **Domicil of dependent persons.**—During the lifetime of the father his domicil remains that of his legitimate or legitimated minor child; after the father's death the domicil of such minor is that of the mother while he lives with her; after the death of both parents the domicil of such minor, or of an illegitimate minor after his mother's death, is probably that of the

<sup>43</sup> Cf. Wharton, Int. Law Dig. vol. ii, § 183.

<sup>44</sup> Mr. Evarts, Sec. of State, to Mr. White, April 23, 1880, Mss. Inst. Germ.

<sup>45</sup> Mr. Evarts, Sec. of State, to Mr. Cramer, Nov. 12, 1880, Mss. Inst. Denmark; and the same to

Mr. Hitt, Feb. 10, 1880, Mss. Inst., France.

<sup>46</sup> Mr. Evarts, Sec. of State, to Mr. Noyes, Dec. 31, 1878, Mss. Inst., France.

<sup>47</sup> Mr. Frelinghuysen, Sec. of State, to Mr. Cramer, June 4, 1883, Mss. Inst., Switz.

guardian and may be changed by him.<sup>48</sup> As the paternity of an illegitimate child must always be a matter of doubt, the domicile of origin is the domicile of his mother at the time of his birth, and her nationality thus becomes as a general rule his nationality. A notable exception, however, exists in the case of the illegitimate issue of an English woman born abroad, by reason of the fact that it is only by statute, in which illegitimates are not included, that children born out of the kingdom are admitted to be British subjects. On the other hand the illegitimate issue of foreign mothers born on British soil are British<sup>49</sup> because "any person who, whatever the nationality of his parents, is born within the British dominions, acquires British nationality at birth, and is a natural-born British subject. This principle is not affected by the Naturalization Act, 1870. The son of French citizens, born in London or in Calcutta, is from the moment of his birth a British subject. The only respect in which his position, in regard to nationality, differs from that of a son of English parents, who is born in London, is that he can, when he has attained full age, renounce British nationality and by making a declaration of alienage become thereupon in the eye of English law an alien."<sup>50</sup> All children, legitimate and illegitimate, fall within the general rule if born upon British soil, no matter whether their parents be natives or aliens. British nationality is fixed by the place of birth and when thus acquired it can be lost only (1) by naturalization in a foreign state; (2) by a declaration of alienage; (3) by the combined effect of descent and place of residence during infancy; (4) by marriage, in the case of a woman.<sup>51</sup>

§ 180. **Nationality of married women.**—While marriage never affects the nationality of a man, as a general rule the wife's nationality is merged in that of the husband. If he is a foreigner she becomes so; and any subsequent change of nationality on his part involves a like change as to her.<sup>52</sup> So it is that a woman is deemed to be a subject of the state of which

<sup>48</sup> *Somerville v. Somerville*, 5 Ves. 749a; *Pottinger v. Wightman*, 3 Mer. 67; *Holyoke v. Hoskins*, 5 Pick. 20; *Ryall v. Kennedy*, 40 N. Y. (S. C.) 347, 361; *Westlake*, 3rd ed., pp. 300, 301.

<sup>49</sup> *Hall*, § 69; *Bluntschli*, § 366.

<sup>50</sup> *Dacey*, *Conflict of Laws*, p. 741, quoting *Naturalization Act, 1870*, s. 4.

<sup>51</sup> *Naturalization Act, 1870*, ss. 6, 4, 10.

<sup>52</sup> *Warrender v. Warrender*, 2 Cl. & F. 488; *Westlake*, 3rd ed., p. 302, s. 253; *Story*, *Conflict of Laws*, s. 46; *Savigny*, s. 357.

her husband is for the time being a subject; and after his death she continues in that relation until she changes her nationality.<sup>53</sup> The English common law, which did not admit that marriage affected a woman's nationality, has been made to conform to the general principle by the Naturalization Act, 1870, sec. 10. While the United States has always held "that, irrespective of the time or place of marriage, or the residence of the parties, any free white woman, not an alien enemy, married to a citizen of this country, is to be taken and deemed a citizen of the United States,"<sup>54</sup> it was for a long time undisputed law that a female citizen of the United States did not lose her nationality by marriage with an alien husband. By the law department of the government it was declared that an American woman whomarried a Spanish subject residing here, and who died in Spain after her removal to that country with her husband and child, was at the time of her death an American citizen.<sup>55</sup> Judicial interpretation, however, is now pointing in the opposite direction. "Since the right of expatriation has been so fully recognized, and since the converse proposition that an alien woman, by marriage with an American citizen, becomes a citizen, has been declared by statute, it appears that a woman's marriage with a foreigner should be regarded as an act of expatriation, at least when accompanied with residence abroad."<sup>56</sup> Such was the new doctrine announced by Judge Brown,<sup>57</sup> now of the Supreme Court, who,—after quoting the act declaring that an alien who married a citizen shall be deemed a citizen, and also section 1999 of the Revised Statutes defining the right of expatriation,—said: "It seems to me that we should regard the sections above quoted as announcing the views of congress upon this branch of international law, and ought to apply the same rule of decision to a case where a female American citizen marries an alien husband that we should to a case where an alien woman marries an American citizen. \* \* \* It will be noticed that legislation upon the subject of naturalization is constantly advancing toward the idea that the husband, as the head of the family, is to be considered its political representative, at least for

<sup>53</sup> Pennsylvania v. Ravenel, 21 Howard, 103.

<sup>54</sup> Wharton, Int. Law Dig., vol. ii, p. 421.

<sup>55</sup> 19 Opinions, Atty-General, 321. See also Comitiss v. Parker-

son, 56 Fed. Rep. 556; Beck v. McGillis, 9 Barb. (N. Y.) 35.

<sup>56</sup> 6 Am. and Eng. Enc. of Law, p. 31.

<sup>57</sup> Pequignot v. Detroit, 16 Fed. Rep. 211.

the purposes of citizenship, and that the wife and minor children owe their allegiance to the same sovereign power." It is to be hoped that, with section 10 of the British Naturalization Act, 1870, clearly in view, congress will soon convert the wise deliverance of Mr. Justice Brown into statute law.

§ 181. **Naturalization in U. S.**—International law does not attempt to say who are natural born subjects, as the right to define their character is purely a matter of municipal law. The former, after conceding the right to each state to exercise complete jurisdiction over such subjects within its territory and to protect them when beyond its limits, simply accepts as conclusive any authoritative designation it may make of such as are entitled to stand to it in that relation. No such absolute concession is made, however, as to those adopted citizens who are united to a state artificially through the tie of allegiance resulting from the legal process of naturalization. In such a case the rights of the adopting state are to a certain extent subject to the pre-existing right of control vested in the state of birth. When the state of nativity concedes to a subject the right of expatriation there can be no conflict; and that is generally true so long as the naturalized citizen remains within the jurisdiction of the state of his adoption. But whether with or without the consent of the native state, naturalization is complete and conclusive as between the naturalizing state and any third state. The congress of the United States has the exclusive power to establish a uniform rule of naturalization,<sup>58</sup> and it vests the function not only in the federal courts but in such courts of record in the states as have common law jurisdiction, a seal and a clerk. The alien who seeks the privilege must declare upon oath before a competent court, at least two years prior to his admission to citizenship, that it is his *bona fide* intention to become a citizen, and renounce his allegiance to any prince, potentate or state, and particularly by name to the prince or state whereof he is at the time a subject or citizen;<sup>59</sup> and when the judgment of naturalization, which cannot be collaterally impeached,<sup>60</sup> is made, the applicant is endowed with all the privileges belonging to natural-born citizens of the United States, excepting only such as are withheld

<sup>58</sup> U. S. v. Villato, 2 Dall. 373;      <sup>60</sup> Spratt v. Spratt, 4 Pet. 393;  
Thurlow v. Com. 5 How. 504; Stark v. Chesapeake Ins. Co., 7  
Smith v. Turner, 7 How. 283.      Cranch. 420; U. S. v. Walsh, 22

<sup>59</sup> Rev. Stat. U. S., §§ 2165, 2167. Fed. Rep. 644.

by the federal constitution.<sup>61</sup> The child of an alien thus naturalized partakes of his father's naturalization even if he was born abroad, provided his father emigrated to this country with him and was naturalized during his minority.<sup>62</sup> Artificial citizenship thus gained may be lost by emigration and other acts, manifesting an intention voluntarily to abandon such nationality and allegiance.

§ 182. **English Naturalization Act, 1870.**—Formerly in England naturalization could be granted only by an act of parliament. Now, under the Naturalization Act, 1870,<sup>63</sup> it may be granted at the discretion of the secretary of state for the home department to any alien who resides in the United Kingdom or who has been in the service of the crown for five years, provided he continues to reside or serve as before. After he has taken the oath of allegiance and obtained the certificate, he becomes a British subject within the United Kingdom, with the right to sit in either house of parliament, and to be a member of the privy council. India and the colonies have their own laws regulating naturalization within their borders. To British citizenship thus granted there is annexed, however, a serious limitation. The certificate declares the naturalized alien to be entitled to all the privileges and subject to all the obligations of a natural born subject of the United Kingdom “with this qualification—that he shall not, when within the limits of a foreign state of which he was a subject previous to his obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect.”

**A qualification construed in case of Bourgoise.**—Such qualification is a recognition by the English parliament that the ancient maxim of *nemo potest exuere patriam* is still in force in all states; and that the right of expatriation does not exist where it has not been expressly granted by the state of nativity. As stated heretofore the Naturalization Act, 1870, in theory, does not change that principle so far as Great Britain is concerned.<sup>64</sup> Through the provisions of that act the doctrine of perpetual allegiance is simply modified by a consent that British nation-

<sup>61</sup> Osborn v. U. S. Bank, 9 Wheat. 738.

<sup>62</sup> 10 Opinions of Atty.-Genl., 329. See also U. S. Rev. Stat., § 2172; State v. Penney, 10 Ark. 621;

Crane v. Reeder, 25 Mich. 303; Calais v. Marshfield, 30 Me. 511.

<sup>63</sup> 33 and 34 Vic., c. 14.

<sup>64</sup> See above, p. 219.



ality may be lost or relinquished through naturalization in a foreign state by a declaration of alienage; by marriage, in the case of a woman; or by the combined effects of descent and place of residence during infancy. A striking illustration of the British doctrine may be found in the case of Bourgoise,<sup>65</sup> a Frenchman, who, after obtaining in 1871 a certificate of naturalization with the usual qualification, married an English lady; and in 1880 returned with her to France, where two children were born to them and their births duly registered in the English embassy at Paris. After his death in France in 1886, and the appointment there of a guardian for his children, application was made to the English court of chancery to make a like appointment. The question thus arose whether or no the naturalization of Bourgoise was effective in France, whose laws provide that the French national character can only be lost through an absolute naturalization abroad.<sup>66</sup> The English court held that it had no jurisdiction to appoint a guardian for the children of Bourgoise, who died a subject of France, because, under his qualified British naturalization, he had not "ceased to be a subject of that state in pursuance of the laws thereof."

§ 183. **Early American doctrine of expatriation. Cases with Prussia in 1840, 1853.**—We have seen that in our earlier history the American doctrine as to the right of expatriation was identical with the British.<sup>67</sup> Story, among others, declared "the general doctrine" to be "that no persons can, by any act of their own, without the consent of the government, put off their allegiance and become aliens," although the government of the United States had in its controversies with Great Britain at an earlier day claimed the right to protect persons who had been naturalized by it, despite the fact that the state of their nativity had either forbidden a renunciation of its allegiance or had attempted to subject it to certain conditions. When, in 1840 a Prussian, who had been naturalized in the United States, was required after his return to his native country to perform military service, he called upon Mr. Wheaton, then

<sup>65</sup> *Re Bourgoise, Infants*, L. R. 41 Ch. D. 310.

<sup>66</sup> "Article 17 of the Code Civile laid it down, that 'La qualité de Français se perdra par la naturalisation acquise en pays étranger;' but this clearly referred to an ab-

olute naturalization, and did not touch the question whether a qualified naturalization operates to deprive a natural-born French subject of his status." Walker, *Science of Int. Law*, p. 213.

<sup>67</sup> See above, p. 217.

American minister at Berlin, for protection. He was told that "having returned to the country of your birth, your native domicil and natural character revert, so long as you remain in the Prussian dominions, and you are bound in all respects to obey the laws exactly as if you had never emigrated."<sup>68</sup> And when in 1853 another Prussian, who had obtained the naturalization of this country, claimed its protection after his return to that country, the declaration was made that, "If a Prussian subject chooses to emigrate to a foreign country without obtaining the certificate which alone can discharge him from the obligations of military service, he takes that step at his own risk. He elects to go abroad under the burden of a duty he owes his government. His departure is in the nature of an escape from her laws; and, if at any subsequent period, he is indiscreet enough to return to his native country he cannot complain if those laws are executed to his disadvantage."<sup>69</sup>

**A marked departure in 1859; Mr. Cass's declaration.**—A marked departure from such views took place when in 1859, during a controversy between the United States and Prussia as to conscription laws, Mr. Cass declared that "the moment a foreigner becomes naturalized his allegiance to his native country is severed forever. He experiences a new political birth. A broad and impassable line separates him from his native country. \* \* Should he return to his native country he returns as an American citizen, and in no other character."<sup>70</sup> The contention was then made that the country of naturalization has the right to protect its citizen in the land of his nativity from punishment for any crime not complete before expatriation. "The offense must have been complete before his expatriation. It must have been of such a character that he might have been tried and punished for it at the moment of his departure."<sup>71</sup> While the Prussian government refused to admit that distinction between inchoate and perfect obligation it ended the contro-

<sup>68</sup> Mr. Wheaton to Mr. Forsyth, July 29, 1840.

<sup>69</sup> Mr. Everett, Sec. of State, to Mr. Barnard, Jan. 14, 1853. Mss. Inst., Prussia. See also as to the foregoing documents Senate Ex. Doc. No. 37, 36th Cong., 1st Sess., pp. 7, 49, 54, 135, 167.

<sup>70</sup> "From that time onwards the

successive governments of the United States have shown a disposition to carry the right of expatriation to the furthest practicable point." Hall, p. 244.

<sup>71</sup> Mr. Cass, Sec. of State, to Mr. Wright, July 8, 1859. Mss. Inst., Prussia.

versy by discharging the party in question from the army as an act of courtesy to the United States.<sup>72</sup>

**Act of Congress, 1868. Right of every state to settle question for itself.**—The disposition thus manifested to press the right of expatriation to the greatest possible extent culminated in the act of 1868,<sup>73</sup> in which Congress took the final step, so far as this country is concerned, by declaring 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.” In accordance with that declaration, which is made binding upon every officer of the government, our department of state holds that the right of expatriation is absolute, and that conditions imposed by government of origin have no extraterritorial force. Such was the position of Mr. Evarts who, in 1879, wrote that “it is noticed with regret that the Swiss local authorities, at least, are disposed to maintain the doctrine of perpetual allegiance by denying the right of a native of that country to become naturalized elsewhere without their consent. This pretension has always been regarded here as extravagant, and as such has been resisted, so that several of the most important European countries with monarchical governments, which were most strenuous in supporting it, have receded from their claims and have concluded naturalization treaties with the United States.”<sup>74</sup> As every state is equally entitled to its own views as to the nature and extent of the right of expatriation, and as no general understanding has been reached on the subject, no one state can do more than settle the question for itself by its own action, and as to others by express treaty stipulations. Since the declaratory act of 1868 the government of the United States has been steadily working in that direction, and the result has been a series of treaties in which it is generally provided that a naturalized citizen of one country upon his return to the land of his birth can be tried there only for offenses against its laws complete before his emigration. When military service is specially mentioned, the stipulation usually is that it cannot be imposed upon the naturalized citizen after his return, nor can punishment be inflicted for its neglect, unless the obligation to perform it had actually matured before his departure.

<sup>72</sup> Halleck (Baker's ed.), i, 357-359.

<sup>74</sup> Mr. Evarts, Sec. of State, to Mr. Fish, Nov. 12, 1879. *Mss. Inst., Switz.; For. Rel.* 1879.

<sup>73</sup> Rev. Stat. § 1999.

A possibility of future service is not sufficient, the call must actually have been made.<sup>75</sup>

§ 184. **Traveling sovereigns—immunities and disabilities abroad.**—Having now defined the character of persons who may claim to be citizens of a state by birth, marriage or naturalization, and who are subject as such to its jurisdiction at home and specially entitled to its protection abroad, an inquiry must be made as to the rights a state may lawfully claim in behalf of such citizens when they desire to enter into and abide for a time in a foreign state. At the outset a sharp distinction must be drawn between those who go abroad in a public and those who go in a private capacity, because the former are clothed with that immunity from local jurisdiction as to their persons, and in the case of sovereigns and their diplomatic representatives as to their retinues, which is embodied in the legal fiction of extritoriality. The necessity and convenience of that fiction in the case of a sovereign, who as the head of the state represents not only its dignity but its independence and equality as a corporate person, is too obvious to require demonstration. And yet even a sovereign has no right to enter upon foreign territory except through the permission of its governing power who, for grave reasons of state, may withhold in an exceptional case the comity or courtesy usually extended.<sup>76</sup> When, however, the privilege has been granted, such sovereign enters with an immunity or exemption from the local jurisdiction of the foreign state so long as he remains there in his sovereign capacity.<sup>77</sup> No dues or taxes can be exacted of him; his home, which is his sanctuary, cannot be invaded by police or admini-

<sup>75</sup> See Art. II of the Baden Treaty of 1868. Treaties of the U. S., p. 43; Lawrence, p. 196.

<sup>76</sup> A refusal of such a courtesy without grave cause would no doubt be considered as a very serious offense.

<sup>77</sup> Bynkershoek, *De Foro Legat.* c. iii, § 13, and c. ix, § 10; Marshall, C. J., in *Schooner Exchange v. McFaddon*, 7 Cranch, 136. "The immunity of a sovereign as the representative of his state for anything done or omitted to be done by him in his public capacity has been affirmed by the English

courts in *De Haber v. the Queen of Portugal* (XX Law Journal, 2, B. 488); and the French courts gave effect to the same principle in the cases of actions brought by a M. Masser against the Emperor of Russia, and by a M. Solon against the Viceroy of Egypt." Hall, p. 176, note 1. "Where a foreign sovereign has his name added as defendant in a suit against his agents, in order to be in a position to thus claim his property, he does not thereby subject himself to the jurisdiction of the court." *Vavasour v. Krupp*, L. R. 9 Ch. D. 351.

istrative officers; he cannot be subjected to the jurisdiction, ordinary or extraordinary, of civil or criminal tribunals; and such immunities extend equally to every member of his suite. If, forgetful of the obligations thus imposed, he commits acts against the peace or order of the community which exempts him from all punishment, or permits his attendants to commit such acts, the only redress that remains to the offended state is to expel him with his retinue from its territory.

It seems to be clear that there was a time when visiting sovereigns could exercise within their dwellings and over their own subjects a complete jurisdiction both civil and criminal.<sup>78</sup> When, however, Queen Christina of Sweden in 1657, after her abdication, had her favorite, Monaldeschi, put to death in Paris by the captain of her guard,<sup>79</sup> public indignation was so intense as to compel her expulsion. According to modern usage the visiting sovereign is not expected to exercise his sovereignty actively even over his own suite within the foreign jurisdiction. If one of them commits a crime it is expected that he will be sent home for trial; and if civil controversies arise among them, or between one of them and subjects of the foreign power, neither the sovereign nor his judges should attempt to act away from home, because in any event any decision they might render could not be enforced outside of their own country. It has been held that a visiting sovereign becomes justly liable to expulsion in the event he attempts to make his house a refuge for accused persons, not of his suite, who are pursued by the local authorities.<sup>80</sup> Whenever a sovereign puts aside his public capacity by traveling incognito, or by entering the military service of a foreign state, he becomes for the time being a private individual and subject as such to the jurisdiction of the sovereignty in which he happens to be until he sees fit to resume his privilege, which he may do at any time. It may happen that a person who is a sovereign over one state may be a subject in another, as in the case of the Duke of Cumberland who, after his accession to the

<sup>78</sup> 7 Co. 15. *Mare Clausum*, p. 326.

<sup>79</sup> Cf. Hosack, *Rise and Growth of the Law of Nations*, Appendix, v.

<sup>80</sup> Bynkershoek, *De Foro Legatorum*, c. iii; Phillimore, ii, § civ-viii; Bluntschli, §§ 129, 136-42, 150-3; Heffter, § 42 and 53-4; Calvo,

§ 530-2; Klüber, § 49; Martens, *Précis*, § 172. The last named seems to concede to the visiting sovereign both civil and criminal jurisdiction over his suite, while Phillimore and Klüber concede to him only the civil. Cf. Hall, p. 176 and note 1.

throne of Hanover, took the oath of allegiance in England, and sat as an English peer by hereditary right. In such a case when permanent privileges are assumed with the consequent liability to punishment for an abuse of them, it is not clear that the recipient should have the right to shield himself by resuming at will his inviolability as a sovereign elsewhere. When a sovereign as a private individual holds property in a foreign state the better opinion is that its courts have the right to bind it by proceedings taken in them, whether it be real or personal;<sup>81</sup> and when a sovereign voluntarily enters the courts of a foreign state, or accepts their jurisdiction, he has no special privileges whatever.<sup>82</sup>

§ 185. Foreign army in a friendly state—other immunities.—

It may be stated as a general rule that a foreign army passing over the territory of a friendly state, whether as an ally in a common cause or not, is entirely exempt from its civil and criminal jurisdiction,<sup>83</sup> for the reason that any other rule would be destructive of discipline. If the passing soldiers commit offenses against the inhabitants they are to be dealt with by their officers under the military authority of the state to which they belong. If such culprits are handed over to the civil courts of the country traversed, it must be as an act of concession and as an expression of confidence upon the part of their officers. If an exception to this general rule exists, it is in favor of the local jurisdiction over an offending member of the force found entirely outside of its lines. When states bear such relations to each other that the passage of troops is frequent, it is usual to regulate the line of march and the method in which offenders against peaceful inhabitants shall be punished by special conventions, such as those made

<sup>81</sup> Bynkershoek, *De Foro Legatorum*, c. xvi; Klüber, § 49; Martens, *Précis*, § 172-3. Bluntschli §§ 129, 134, 136-142, 150-3; Calvo, § 547-9; Fiore, §§ 492, 498-9.

<sup>82</sup> "He brings with him no privileges that can displace the practice as applying to other suitors." *The King of Spain v. Hullet and Widder*, 1 Clark and F. H. of L. 333; *the Newbattle* L. R. P. D. 33; Calvo, § 549.

<sup>83</sup> In the seventeenth century Zouch only mentioned the immu-

ity in his Dissertation concerning the punishment of Ambassadors (Trans. by D. J., p. 26); and in the eighteenth Casaregis concedes exclusive jurisdiction to a sovereign over his military and naval forces and over his ships wherever they may be: *Libere jurisdictionem sive voluntariam sive contentiosam, sive civilem, sive criminalem; quod occupant tanquam in suo proprio, exercere possunt, etc.* *Discoursus de Commercio*, 136, 174.

between Prussia and Hanover in 1816, and between Prussia and Brunswick in 1835.<sup>84</sup> The immunities of public vessels and fleets when on the high seas or in the territorial waters of foreign states can be treated more conveniently in the following chapter, to be devoted to the consideration of sovereignty and jurisdiction in relation to property,—a chapter in which an examination will also be made of the partial immunities enjoyed under like circumstances by private merchant vessels. In the same way it will be more convenient to treat in the chapter to be specially devoted to diplomatic intercourse the immunities incident to the persons, families and suites of diplomatic representatives, and the partial immunities to which consuls are likewise entitled.

§ 186. **A state's right to receive and expel visitors.**—A general description must next be given of the rights which a state may lawfully claim in favor of such of its citizens as desire to enter foreign territory in a purely private capacity. If the sovereign himself cannot visit a foreign state without its permission expressed or implied it is not reasonable to suppose that his subjects are clothed with a higher privilege. Every independent state possesses, certainly in theory, the right to grant or refuse hospitality.<sup>85</sup> Undoubtedly such a state possesses the power to close the door to all foreigners whom for social, political or economic reasons it deems it expedient to exclude; and for like reasons it may subject a resident foreigner or a group of them to expulsion,<sup>86</sup> subject of course to such retaliatory measures as an abuse of the excluding or expelling power may provoke. At the very beginning of our national life the government of the United States recognized the fact that "Every society possesses the undoubted right to determine who shall compose its members, and it is exercised by all nations in peace and war. A memorable example of the exercise of this power in time of peace was the passage of the alien law of the United States in the year 1798. \* \* It may

<sup>84</sup> Martens (N. R.) iv, 321; Grotius. See *De Jure Belli ac Pacis*, ii, c. 2, xiii.

<sup>85</sup> As against that right stands the claim that every state at peace with another has a certain right of intercourse. For the maxims underlying that supposed right, see Heffter, *Völker*, § 33, 5th ed.

<sup>86</sup> Sometimes called the *Droit de Renvoi*.

always be questionable whether a resort to this power is warranted by the circumstances, or what department of the government is empowered to exert it; but there can be no doubt that it is possessed by all nations, and that each may decide for itself when the occasion arises demanding its exercise." <sup>87</sup>

**Right to exclude obnoxious foreigners defined.**—Not long ago this government became impressed with the fact that the occasion had arisen for the exclusion of Chinamen and alien paupers, and in 1882 Congress passed an act entitled "An Act to Regulate Immigration," <sup>88</sup> in which it was provided among other things that the commissioners at the various ports should prohibit the landing on these shores of "any convict, lunatic, idiot or any person unable to take care of himself or herself without becoming a public charge." When in a case<sup>89</sup> made under the act it was contended before the Supreme Court "that the framers of the constitution have so worded that remarkable instrument, that the ships of all nations, including our own, can, without restraint or regulation, deposit here, if they find it to their interest to do so, the entire European population of criminals, paupers, and diseased persons, without making any provision to preserve them from starvation, and its concomitant sufferings even for the first few days after they have left the vessel," the answer was that such contention is entirely untenable. The political department of the government has asserted with equal emphasis that "the power of expelling obnoxious foreigners is one incident to sovereignty." <sup>90</sup> "During the revolutionary period of 1848, "an act of parliament (11 and 12 Vict., c. 20) was passed in Great Britain, \* \* by which power was given to the executive in England and Ireland to remove aliens from the realm; and in the United States it was declared by an order, dated 19th August, 1861, that no person, if a foreigner, should be allowed to land in the United States, without a passport from his own government, countersigned by a minister or consul of the United States." <sup>91</sup> It is, however, often a delicate question to

<sup>87</sup> Mr. Marcy, Sec. of State, to Mr. Foster, Oct. 17, 1873. Mss. Mr. Fay, Mar. 22, 1856. Mss. Inst., Inst., Mex. Switz.

<sup>88</sup> 22 Stat. at L., 214.

<sup>89</sup> *Edye v. Robertson*, Coll., 112 U. S. 580-600.

<sup>90</sup> Mr. Fish, Sec. of State, to

<sup>91</sup> *Abdy's Kent*, 110. The order in question which grew out of the exigencies of the civil war is no longer in force.



determine when the right of expulsion may be exercised without giving just offense to the state whose citizen or citizens are thus cast out. The *Institut de Droit International*, while recognizing the right of expulsion to the full extent, has adopted a project designed to temper its practical application.<sup>92</sup>

§ 187. **How far citizens abroad are amenable to local jurisdiction.**—What degree of protection can a state demand for such of its citizens as have been voluntarily received by another as acceptable sojourners? The fundamental condition upon which such persons accept the hospitality of a foreign state is that they will be amenable to its laws, both civil and criminal. “Every nation, whenever its laws are violated by any one owing obedience to them, whether he be a citizen or stranger, has a right to inflict the penalties incurred upon the transgressor if found within its jurisdiction. The case is not altered by the character of the laws unless they are in derogation of the well-established international code. No nation has a right to supervise the municipal code of another nation or claim that its citizens or subjects shall be exempted from the operation of such code, if they have voluntarily placed themselves under it.” It may be said that the exclusive territorial jurisdiction of every state gives it complete control over all foreigners not protected by special immunities. While they remain upon its soil, subject to the generally received limitation, that, in the absence of express agreements to the contrary, no state can arrest or punish citizens of another for offenses committed outside of its jurisdiction, even though they are regarded as such by the law of the state to which the offender belongs. When a state demands the right to punish a foreigner for a criminal act committed within the limits of another sovereignty before his arrival, it asserts a claim to concurrent jurisdiction which, if valid, would overthrow the fundamental assumption upon which the present state-system is founded. And yet self-evident as that principle would seem to be, the rule that a state can only punish crimes committed within

<sup>92</sup> As to the project of International Declaration adopted in 1888, see *Annuaire de l'Institut*, 1888-9, 245. M. Rolin Jacquemyns (*Rev. de Droit Int.*, xx, 498), in his scheme of restriction, declares that “en l'absence d'un état de

guerre,” “l'expulsion en masse de tous les étrangers appartenant à une ou plusieurs nationalités déterminées ne se justifierait qu'à titre de représailles.” Hall very properly concludes that such ought to be the law, p. 224, note 1.

its territorial jurisdiction is subject to serious exceptions arising<sup>1</sup> (1) out of the general consent of nations that one crime committed on the high seas against all mankind may be punished by any state into whose hands the offender may fall; (2) out of the refusal of certain states to admit that their right to punish crime rests upon considerations purely territorial.<sup>2</sup>

§ 188. Piracy, *jure gentium*.—It is a settled rule of international law that every state possesses jurisdiction over all pirates seized by its vessels or officers because their crime is one necessarily committed outside of the territorial jurisdiction of any civilized state against the entire body of civilized states considered as a single community. As the offense is against all mankind it may be punished in the proper tribunal of any country in which the offender may be found, or into which he may be carried, although committed on a foreign vessel on the high seas. That is only true, however, as to the jurisdiction over such acts as constitute piracy *jure gentium*.<sup>3</sup> In contemplation of that law "Piracy is robbery or forcible deprivation on the high seas, without lawful authority, and done *animo furandi*, and in the spirit and intention of universal hostility. It is the same offense on sea as robbery is on land."<sup>4</sup> A single act of violence, if adequate in degree,—such, for instance, as a successful revolt of a crew who, after killing the captain,<sup>5</sup> take a ship out of the hands of its officers and make depredations on other shipping,—may constitute the offense if committed on the sea outside the jurisdiction of any state, without authorization from any recognized political community. Many acts perfectly legal when committed with such organization become piratical when committed without it. For that reason every belligerent community is eager to secure recognition as such in order that its commission may save its cruisers from being ranked as pirates.<sup>6</sup> If such a

<sup>1</sup> Mr. Marcy, Sec. of State, to Mr. Jackson, Jan. 10, 1854. Mss. Inst., Prussia.

<sup>2</sup> See below, p. 240.

<sup>3</sup> Bynkershoek, *Quaest. Jus. Pub.*, lib. i, cap. 17; Howell's State Trials, xii, 1271-2; Blackst. Comm., iv, 286; Phillimore, i, 394, 406; Le duc de Broglie, "*Sur la Piraterie*," *Ecrits*, iii, 335-375; Kent, i, 184-6; Wildman's Int. Law, ii, 150; U. S. v. Palmer, 3 Wheat. 610; U. S. v.

Kintock, 5 Wheat. 152; U. S. v. Pirates, *Ib.*: 185; U. S. v. Holmes, *Ib.* 412; Bluntschli, § 343; Calvo, vol. i, § 485.

<sup>4</sup> Am. and Eng. Enc. of Law, 18, p. 461.

<sup>5</sup> Mr. Marcy, Sec. of State, to Mr. Starkweather, Sep. 18, 1854. Mss. Inst., Chili. A pirate must, however, be in the predicament of an outlaw, *hostis humani generis*.

<sup>6</sup> For a statement of the circum-

community goes down in the struggle, the protection of its commission ends with its *de facto* existence.<sup>7</sup> If, however, a commission has been lawfully granted, captures made under it, although unauthorized by the laws of war, are not piratical so long as the commissioned state survives to answer to other states for misdeeds committed in its name.<sup>8</sup>

§ 189. **Case of the Huascar. Statutory piracy.**—In 1877 a revolutionary movement took place in Peru whose only visible result was the seizure, at Callao, of the ironclad Huascar by her crew and some of her officers, who began a roving career without any kind of a commission and without any kind of a political organization behind them capable of granting one. After stopping two British vessels, from one of which a supply of coal was taken without payment, the admiral commanding the English squadron in the Pacific, who justly regarded the Huascar as “piratical against British subjects, ships and property,” fought an inconclusive engagement with her, after which she surrendered to a Peruvian squadron. It is hard to understand why any one should question the correctness of the position of the English admiral whose conduct was approved by his government, after the law officers of the crown had reported that the acts of the Huascar were piratical.<sup>9</sup> As conflicting authorizations are supposed to be void, a vessel is considered a pirate which, under commissions from different sovereigns at war with each other, depredates impartially upon the commerce of them all.<sup>10</sup> A general description has thus been given of the crime of piracy as defined by the law of nations, so that

stances under which insurgents can not be considered pirates, see *U. S. v. Baker*, 5 Blatch., p. 6; (Proceedings published in full in separate volume entitled *Trial of Officers, etc., of the privateer Savannah*, N. Y., 1862;) Wharton, *Int Law Dig.*, vol. iii, pp. 464-75.

<sup>7</sup> When the Southern Confederacy fell in the spring of 1865, the cruiser *Shenandoah* was in the Antarctic seas, and, in ignorance of that event, continued her depredations upon American vessels around Cape Horn until Aug. 2, when her captain, hearing of the extinction of his government, desisted from further hostilities. Upon that statement the British

government, when the *Shenandoah* was given up at Liverpool in November, permitted the captain and crew to go free, while the ship was turned over to the United States. *British State Papers*, *British Case* presented to the Geneva Arbitrators, 156-60.

<sup>8</sup> Lawrence, *Principles of Int. Law*, pp. 210-11.

<sup>9</sup> *Parl. Papers*, Peru, No. I, 1877. Hall, pp. 277-8.

<sup>10</sup> A commission, however, to a private armed vessel from either of the belligerents affords a defense, according to the law of nations. *U. S. v. Baker*, 5 Blatch., 11-13.

it may not be confused with that kind of piracy which is created by the statute law of particular states, and which can only be punished by them when committed by their own subjects and foreigners within their jurisdiction. In its legislation on the subject the United States has not only embraced the crime of piracy as defined by the law of nations, but has also declared certain acts to be piracy which are not so under that law.

§ 190. **Slave-trade: Hostile action of Great Britain and other nations, after 1807.**—When the slave-trade, at one time considered as perfectly legitimate commerce, came to be regarded as an odious crime which all civilized nations should aid in suppressing, the question arose as to the most practical means to be employed to secure that end. As there was no international rule justifying interference with it in any form, and as no general consent could be obtained adequate to create such a rule, it only remained for such states as desired to suppress it to make it the subject of hostile municipal legislation. As early as 1792 Denmark led the way by prohibiting the importation of slaves from abroad into her colonies after 1802; and by the second constitution of the United States Congress was empowered to prohibit their importation after 1808,—a provision supplemented by a series of statutes<sup>11</sup> which culminated in the act of March 3, 1820, providing that all persons over whom the jurisdiction of the United States extended who were concerned in the slave-trade, or in kidnaping negroes or mulattoes, were to be considered as pirates punishable by death. In 1807 Great Britain passed the first act declaring the slave trade illegal; in 1814 the treaties of Paris, Kiel and Ghent provided for its final abolition; in 1815 that provision was repeated in the declaration of the Congress of Vienna; in 1815 and 1817, in treaties made by Great Britain with Spain and Portugal those countries agreed that the trade should be abolished; and in 1827, in a convention concluded by Great Britain with Brazil it was made piratical for the subjects of that country to engage in it after 1830. In 1823 the House of Representatives instructed the President of the United States to enter into such negotiations with the maritime powers of

<sup>11</sup> In 1807 the importation of slaves was made to cease after Jan. 1, 1808; in 1818 the penalties for participation in it by citizens of the United States were increased; and in 1819 the vessels and effects of all citizens found to have been engaged in it were made subject to seizure and confiscation.

Europe and America as would secure "the effectual abolition of the African slave-trade, and its ultimate denunciation as piracy under the law of nations by consent of the civilized world." While Great Britain was induced to pass an act in March of the following year declaring the slave-trade to be piracy, the attempt then made to have it declared to be so, *jure gentium*, by the general consent of nations, was signally unsuccessful.

**Cases of the Amedie, Fortuna, Diana, Louis and Antelope.**—Equally so was the attempt made at an earlier day to have the traffic pronounced illegal everywhere through judicial interpretation. In the case of the American vessel,<sup>12</sup> *The Amedie*, the Lords of Appeal in prize cases delivered a hostile judgment in 1807, through Sir William Grant, after Great Britain had declared the traffic unlawful and after the United States had forbidden all citizens and residents to carry slaves from this country to a foreign one, or from one foreign country to another. Sir William's effort was to create out of the acts of certain nations, without the concurrence of the rest, the international rule that the slave-trade was at least *prima facie* illegal *jure gentium*. No matter if it be true, as Mr. Dana contends,<sup>13</sup> that that question was unnecessary to the decision of the case, it was in fact argued and passed upon by the judges who declared through their spokesman that "we can now assert that this trade cannot, abstractly speaking, have a legitimate existence, \* \* \* we have now a right to affirm that *prima facie* the trade is illegal, and thus to throw on claimants the burden of proof that, in respect of them, by the authority of their own laws, it is otherwise. \* \* \* In this case, the laws of the claimant's country allow no property such as he claims." While Lord Stowell permitted himself to be bound by this new invention in the case of *The Fortuna*,<sup>14</sup> decided in 1811 in the High Court of Admiralty, he exempted from its operation the subsequent case of *The Diana*<sup>15</sup>—a Swedish vessel captured by a British cruiser while actually carrying slaves to the possessions of Sweden in West India—upon the ground that that country which had not prohibited the traffic by treaty

<sup>12</sup> 1 Acton's Admiralty Reports, had nothing to do with her being engaged in the slave trade." 240.

<sup>13</sup> "The proceeding, from beginning to end, was one of prize of war solely; and her condemnation

Dana's Wheaton, note 86, p. 208.

<sup>14</sup> Dodson's Admiralty reports, 81.

<sup>15</sup> *Ibid*, 95.

or statute, still continued to uphold it in practice. And in the case of *The Louis*,<sup>16</sup> decided in 1817, he finally repudiated the general principle announced in the case of *The Amedie* by deciding that even if the laws of France had prohibited the traffic, which was doubtful, the right of visitation and search, purely a belligerent right, could not under the law of nations be exercised in time of peace to enforce that prohibition through a British court upon the property of French subjects. He held that the slave-trade could only become piracy, in the absence of a general convention, when so treated in practice by all civilized nations. Such was the doctrine laid down by the Supreme Court of the United States in 1825 in the case of *The Antelope*<sup>17</sup> in which Chief Justice Marshall, speaking for the court, held that while the African slave-trade is contrary to the law of nature, it is not prohibited by the law of nations; that although prohibited by some nations, it may still be carried on by the subjects of such as have not prohibited it by statute or treaty; that it is not piracy unless made so by the statutes or treaties of the state to which the trader belongs; that the right of visitation and search does not exist in time of peace; that a vessel engaged in the slave-trade, even when it is prohibited by the laws of the country to which it belongs, cannot, for that cause alone, be seized on the high seas, and brought in for adjudication, in time of peace, in the courts of another country; that only where the laws of another country are violated, or where there is a treaty providing for the mutual right of search and capture, can that right be lawfully exercised.

**Great Britain's claim of right of visit, 1841, resisted.**—When, in 1841, British cruisers attempted to stop American vessels suspected of being engaged in the traffic, the British foreign office, disclaiming the right of search in time of peace, claimed the right of visit in order to discover “whether the vessel pretending to be American and hoisting the American flag be *bona fide* American,”—a right which Mr. Webster resisted upon the ground that there is no distinction between the right of visit and the right of search, because the former really includes the latter. In the next year the controversy was composed for a time by that article of the Treaty of Washington, which provided that each nation should maintain on the coast of Africa a naval contingent adequate “to enforce, separately and respectively, the laws, rights and obligations of

<sup>16</sup> 2 Dodson Admr. Rep., 210.

<sup>17</sup> 10 Wheat. 66-132.

each of the two countries.”<sup>18</sup> Great Britain’s more practical policy was to remove the difficulties in the way of suppressing the traffic through treaty engagements mutually conceding the right of search so that the cruisers of each of the contracting powers might have the right to examine and if necessary seize and bring to trial vessels of other nations suspected of the offense. As early as 1817 she inaugurated that policy in a treaty with Portugal; in the same year the mutual right of search was secured in the Treaty of Madrid made with Spain; in 1818 in a treaty with the Netherlands; in 1831 and 1833 in treaties with France; and in 1841 in a treaty with Austria, Prussia and Russia.

**Reluctance of France and U. S. to concede right of search.**— France, who refused to accede to that quintuple arrangement, held on to her agreements of 1831 and 1833 until 1845, when the prejudices of her people against the right of search in any form induced her to renounce both, as she had the right to do under their terms. After that time, while France agreed to maintain a squadron on the African coast to co-operate with the British cruisers in suppressing the traffic, it really flourished under the protection of her flag by reason of the fact that Arab dhows could easily obtain from a French consul a license conferring upon them French nationality with its consequent exemption from search and seizure.<sup>19</sup> It was almost equally hard for Great Britain to induce the United States to consent to the mutual right of search of vessels supposed to be slavers. The temporary suspension of the question by the Treaty of Washington in 1842 did not prevent a sharp remonstrance on the subject by the Senate of the United States in 1858;<sup>20</sup> and

<sup>18</sup> *Treaties of the United States*, p. 436.

<sup>19</sup> “They were then safe from capture even if their decks were crowded with slaves. The utmost a British officer could do, and this rather on sufferance than by right, was to send a boat and to demand to have the ship’s papers shown over the side of the vessel.” Lawrence, p. 215. For practice under the treaty of Washington, see Foote’s *Africa and the American Flag*.

<sup>20</sup> When in that year the British

government stationed cruisers near the island of Cuba for the purpose of preventing the slave trade, the Senate resolved “that American vessels on the high seas in time of peace, bearing the American flag, remain under the jurisdiction of the country to which they belong; and, therefore, any visitation, molestation, or detention of such vessel by force, or by the exhibition of force on the part of a foreign power, is in derogation of the sovereignty of the United States.”

not until 1862 did the two countries finally agree upon a treaty<sup>21</sup> in which the mutual right of search was conceded to public vessels, specially provided with instructions for that purpose, which were authorized to visit merchant vessels suspected of trading in slaves within two hundred miles of the African coast south of parallel thirty-two, and within thirty leagues of Cuba. The abolition of slavery in that island as well as in the several American Republics has, however, put an end to the traffic on the western coast of Africa, while that which still thrives on the eastern is yielding to the measures taken in recent years to suppress it,—chief among which may be mentioned the Final Act of the Brussels Conference,<sup>22</sup> 1890, explained already.

§ 191. **Territoriality of crime disputed by many nations.**—Despite the general rule “that the criminal jurisdiction of a nation is limited to its own dominions and to vessels under its flag on the high seas, and that it cannot extend it to acts committed within the dominion of another without violating its sovereignty and independence,”<sup>23</sup> the territoriality of crime is disputed by a formidable group of nations who claim that their tribunals have the right to take cognizance of offenses committed by foreigners in foreign territory.<sup>24</sup> Some of the group in question limit their efforts to the punishment of foreigners found on their soil who have committed acts abroad against the safety or high prerogative of the state as a sovereign, while others include foreigners who have committed crimes abroad against their citizens as private individuals. Under the first head may be mentioned France, Germany, Austria, Italy, Spain, Belgium, and Switzerland; under the second, Russia, the Netherlands and Greece. Austria and Italy claim only the right to punish conditionally offenses committed abroad against their citizens, after extradition has been offered to and refused by the state in which the crime was com-

<sup>21</sup> Negotiated by Mr. Seward and Lord Lyons. *Treaties of the United States*, p. 455.

<sup>22</sup> See above, p. 95.

<sup>23</sup> Mr. Calhoun, Sec. of State, to Mr. Everett, Sep. 25, 1844. *Mss. Inst. Great Britain*.

<sup>24</sup> For the older authorities for and against the validity of such laws, see Foelix, liv. ii, tit. ix,

ch. iii. See also Fiore, *Delitti commisi à Vetranger*, *Rev. de Droit Int.*, xi, 302; Von Bar, § 138; *Progetto del Codice Penale del Regno d'Italia*, p. 263; Martens, *Précis*, § 100; Phillimore, i, § cccxxxiii; Hall, § 62. As illustrations of the views of those who deny the doctrine of the territoriality of crime, see Massé, § 524; Woolsey, § 76.



mitted.<sup>25</sup> The French law, which is typical of the class to which it belongs, provides for the punishment of those who in other countries have offended the sovereignty of France by criminal acts against the safety of the state, by counterfeiting its seal or coin having actual currency, or by the forgery of paper money. In the varying lists of offenses committed abroad against private individuals, for which certain states attempt to punish foreigners within their limits, are usually included murder, arson and forgery, and sometimes libel.

§ 192. Cutting's case, 1886.—An exhaustive exposition of that aspect of the subject may be found in the recent case of Mr. Cutting, which may be stated as follows: "On June 18th last (1886) A. K. Cutting, a citizen of the United States, who for the preceding eighteen months had been a resident 'off and on,' of Paso del Norte, Mexico, \* \* published in a newspaper of El Paso, Tex., a card commenting on certain proceedings of Emigdio Medina, a citizen of Mexico, with whom Mr. Cutting had been in controversy. For this publication Mr. Cutting was imprisoned on the 22nd of June last, at El Paso del Norte, in Mexico. \* \* But the paper was not published in Mexico, and the proposition that Mexico can take jurisdiction of its author on account of its publication in Texas is wholly inadmissible and is peremptorily denied by this government. If Mr. Cutting can be tried and imprisoned in Mexico for publishing in the United States a criticism on a Mexican business transaction in which he was concerned, there is not an editor or publisher of a newspaper in the United States who could not, were he found in Mexico, be subjected to like indignities and injuries on the same ground. To an assumption of such jurisdiction by Mexico neither the government of the United States nor the governments of our several states will submit."<sup>26</sup> On behalf of Mexico Mr. Romero produced

<sup>25</sup> On Nov. 15, 1899, the department of state (U. S.) received a telegram from the *chargé* at Rome, stating that Diblassi had been sentenced to six years imprisonment. Diblassi fled to Italy after killing Ellis, a health officer in Boston, owing to Ellis' attempt to enforce sanitary regulations. Instead of demanding extradition the Italian court was permitted to proceed upon evidence supplied by the

Massachusetts authorities. As to the punishment of such criminals in Austria, when extradition is declined by the offended state, see the essay on the doctrine of asylum, by R. von Mohl, in his *Staatsr. Völkerr. u Politik*, vol. i, 644-649.

<sup>26</sup> Mr. Bayard, Sec. of State, to Mr. Jackson, July 20, 1886. Mss. Inst., Mex.; Senate Ex. Doc. 224, 49th Cong., 1st sess.; For. Rel.,

“the Mexican laws, article 186, whereby jurisdiction is assumed by Mexico over crime committed against Mexicans within the United States or any other foreign country; and under this he maintained the publication of a libel in Texas was made cognizable and punishable in Mexico.”<sup>27</sup> The contention of the United States which prevailed in that case embodies a clear and positive statement of the views of those who are prepared to maintain the ancient principle as to the territoriality of crime<sup>28</sup> against the dangerous innovation which assumes “that the principle is not founded on reason, and that as intercourse grows closer in the world nations will the more readily aid general justice.”<sup>29</sup>

§ 193. **Foreigner can only demand fair trial under local law.**—Such is the general nature of the criminal jurisdiction which may be asserted against any one who goes beyond the limits of his own nation. Whenever it is properly asserted by a foreign tribunal having jurisdiction over the offense charged, the state to which the accused belongs can only demand that he be fairly tried under the municipal law of the forum, provided such law is “in conformity with those sanctions of justice which all civilized nations hold in common,”<sup>30</sup> and does not contravene some special right acquired by treaty by the country whose protection is invoked. It is the duty of a state to construe and administer its own laws, and if that be done, promptly and impartially, and with a just regard to the rights of a foreigner within its bounds, his state has no right to complain. There is no ground for interference except in case of refusal of justice or of palpable injustice; or where “summary, sanguinary, or undue punishment”<sup>31</sup> has been inflicted. There must be “arbitrary acts of oppression or deprivation of property as contradistinguished from penalties and punishments, incurred by the infliction of the laws of the country within whose jurisdiction the sufferers have placed them-

1886. For an exhaustive review of the whole subject, see Mr. Moore's Report on extra-territorial crime and the Cutting case, issued by the Dept. of State of the United States in 1877, and the article upon the report by Mr. Albéric Rolin in the *Revue de Droit Int.*, 1888, p. 559.

<sup>27</sup> Mr. Bayard, Sec. of State, to

Mr. Jackson, July 27, 1886. Mss. Inst., Mex.

<sup>28</sup> See Dana's Wheaton, pp. 189-190.

<sup>29</sup> Woolsey, § 76.

<sup>30</sup> Mr. Bayard, Sec. of State, to Mr. Jackson, July 20, 1886, quoted above.

<sup>31</sup> Mr. Webster, Sec. of State, to Mr. Ellis, Jan. 3, 1842. Mss. Inst., Mex.

selves.”<sup>32</sup> While it is not to be anticipated that proceedings in a foreign “jurisdiction will be conducted otherwise than in strict conformity to law with every constitutional guarantee for the fair trial and defense of the accused, yet it is the clear right and duty of \* \* any government to satisfy itself that its citizens enjoy whilst temporarily in foreign lands, every right and privilege before the bar of justice, and to see that they are allowed the fullest means of defense.”<sup>33</sup> If a suitor applies to a foreign tribunal for justice, he must submit of course to the rules by which that tribunal is governed. Submission to the laws of a foreign state is the condition upon which its hospitality is extended. Every state has the right to prescribe the reasonable conditions upon which a foreigner may reside within its territory.<sup>34</sup>

§ 194. **State’s right to punish its citizens for crimes committed abroad.**—In connection with the duty of states to protect their citizens against injustice from foreign tribunals must be considered the jurisdiction claimed by most of them to punish such citizens, by virtue of the tie of personal allegiance, for certain heinous crimes committed by them in foreign territory. As the jurisdiction is personal it cannot generally be exercised until the offender comes again within the jurisdiction, territorial or maritime, of the country to which he belongs. The right to punish then becomes purely a question of municipal law whose provisions must regulate the conditions under which a trial may be had. Russia, many of the German states, Italy, Austria, some of the Swiss cantons, and Norway enforce their domestic criminal law against all of their subjects who have committed offenses abroad either against the state itself, their fellow subjects or foreign subjects.<sup>35</sup>

§ 195. **British legislation on the subject.**—Owing to differences in their constitutional systems a more limited control

<sup>32</sup> Mr. Marcy, Sec. of State, to Mr. Jackson, Jan. 10, 1854. Mss. Inst., Austria.

<sup>33</sup> Mr. Bayard, Sec. of State, to Mr. Lowell, Apr. 10, 1885. Mss. Inst., Gr. Brit.

<sup>34</sup> “The government of the United States recognizes the right of Mexico to prescribe the reasonable conditions upon which foreigners may reside within her territory, and the duty of American

citizens there to obey the municipal laws.” Mr. Frelinghuysen, Sec. of State, to Mr. Morgan, Feb. 17, 1885. Mss. Inst., Mex.

<sup>35</sup> “France notices *no crimes of Frenchmen against foreigners*; nor ‘*delits*’ of one Frenchman against another on foreign soil; nor ‘*crimes*’ of Frenchman against Frenchman, except on complaint of the injured party.” Woolsey, § 76.

is asserted by Great Britain and the United States, whose criminal jurisprudence rests upon the general principle common to both that crimes are territorial, and justiciable only in the courts of the country where committed. From that general rule both countries have, however, made serious departures through positive legislation. By 35 Hen. VIII., c. 2, all offenses declared to be treason, misprision of treason or concealment of treason committed by any person out of the realm of England were made triable in the Court of King's Bench by a jury of the shire in which the court sits or before commissioners assigned for the purpose in any shire; and in a series of statutes as to murder, beginning with 33 Henry VIII., c. 23, and ending with 24 and 25 Vic. c. 100 s. 9, it was finally provided that where any murder or manslaughter is committed on land out of the United Kingdom, whether within the queen's dominions or without, and whether the persons killed were subjects of her majesty or not, the offense may be dealt with in all respects as if it had been committed in England in the county or place in which the suspected person is apprehended or in custody. To these offenses must be added such as are created by the Foreign Enlistment Act,<sup>36</sup> most of which can be committed either within or without her majesty's dominions; offenses created by the acts prohibiting the slave-trade;<sup>37</sup> offenses which may be committed abroad by certain civil and military officers of colonies and other British possessions in the discharge of or under color of their official powers; and finally such offenses as may be defined by the queen legislating through Orders in Council by virtue of the authority conferred by the Foreign Jurisdiction Acts.<sup>38</sup> The act of 1875 authorizes the queen to exercise "power and jurisdiction over her subjects within any islands and places in the Pacific Ocean not being within her majesty's dominions nor within the jurisdiction of any civilized power," while that of 1878 gives to her power to legislate for her subjects in any place where they are resident or resort "which is not subject to any government from whom her majesty might obtain power and jurisdiction by treaty" or any of the other means mentioned in the act of 1843 whose first recital is that the queen has "by treaty,

<sup>36</sup> 33 and 34 Vic., c. 90.

confined to the queen's dominions.

<sup>37</sup> See *R. v. Zulueta*, 1 C. and K., 226-27; *Santos v. Illidge*, 8 C. B. (N. S.), 861. It is doubtful whether such acts are locally

<sup>38</sup> 6 and 7 Vic., c. 94 (1843), 29 and 30 Vic., c. 87 (1886), 38 and 39 Vic., c. 85 (1875), 41 and 42 Vic., c. 67 (1878).

capitulation, grant, usage, sufferance, and other lawful means, power and jurisdiction within divers countries and places out of her majesty's dominions."<sup>39</sup> No crime committed abroad can now be tried in England unless an express statutory provision has been made to that effect.

§ 196. Like legislation in the U. S.—The constitution of the United States (art. I, § 8) provides that Congress shall have power "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;" and (art. III, § 2) that "the trial of all crimes, except in the case of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed." A crime committed against the laws of the United States upon the high seas or elsewhere, out of the limits of a state, is not local, and may be tried at such place as Congress may designate. It has therefore been provided that the trial of all persons who commit such crimes, out of the jurisdiction of any particular state or district, shall be had in the district where the offender is found, or into which he is first brought.<sup>40</sup> As the states of the American union, as such, are unknown in our intercourse with foreign nations, the entire jurisdiction over crimes committed beyond their limits has been vested in the federal government, whose criminal jurisdiction is purely statutory.<sup>41</sup> As heretofore explained penalties are imposed by statute not only upon piracy, *jure gentium*, but upon other like acts which would not constitute piracy under that law.

<sup>39</sup> "A variety of Orders in Council have been made under the authority of these acts for regulating the proceedings to be taken before various courts to which they apply. I may mention in particular the orders which apply to the courts in China, the courts in various parts of the Turkish Empire, particularly in the courts at Constantinople and in Egypt, and the order relating to the Western Pacific Islands dated August 13, 1877." Sir J. F. Stephen, *Hist. of the Criminal Law of Eng.*, vol. ii, p. 59. See also, *Ibid.* 13-16.

construction of that section, see *U. S. v. Albery*, *Hemp.* 444; *U. S. v. Thompson*, 1 *Sum.* 168; *U. S. v. Corrie*, 23 *Law Rep.* 145; *U. S. v. Mingo*, 2 *Curt.* 1; *U. S. v. Magill*, 1 *Wash.* 463; *U. S. v. Bird*, 1 *Sprague*, 299; *U. S. v. Baker*, 5 *Blatch.* 6; *U. S. v. Arwo*, 19 *Wall.* 486; *U. S. v. Jackalow*, 1 *Black.* 484.

<sup>41</sup> The U. S. courts have no jurisdiction of offenses at common law. *Ex parte Bollman*, 4 *Cranch*, 75; *Turner v. Bank of N. A.*, 4 *Dal.* 10; *U. S. v. Ta-wan-ga-ca*, *Hemp.* 304; *Case v. Woolley*, 6 *Dana*, 17.

<sup>40</sup> *Rev. Stat.*, § 730. For the

An explanation has also been given of such statutes as attempt to assimilate slave-trading to that crime.<sup>42</sup>

§ 197. **Offenses punishable by U. S. ministers and consuls in certain countries.**—Leaving out of view piracy and slave-trading and such other crimes as may be committed against the laws of the United States upon the high seas, reference need be made only to such offenses as may be punished abroad by United States ministers and consuls in certain countries. The Revised Statutes<sup>43</sup> ordain that in order to carry into full effect the provisions of the treaties of the United States with China, Japan, Siam, and Madagascar, respectively, the minister and the consuls appointed to reside in each of those countries shall “be invested with the judicial authority herein described, which shall appertain to the office of minister and consul, and be a part of the duties belonging thereto, wherein, and so far as, the same is allowed by treaty,”—subject to the limitation that “jurisdiction in both criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries; and over all others to the extent that the terms of the treaties respectively justify or require.”<sup>43a</sup>

§ 198. **Duty of a state to protect aliens. Their status in Greece and Rome.**—While it may be theoretically true that a state in the extreme exercise of its sovereignty may exclude all foreigners from its limits, such a policy would at once deprive it of a place in the family of nations and of the consequent benefits of international law. Nations must hold intercourse with each other, and the right of a state to protect its subjects abroad imposes the reciprocal duty upon it to answer for injuries unlawfully inflicted upon foreigners within its territory and jurisdiction.<sup>44</sup> In order to illustrate the fact that that obligation is as old as civilization an account has been given of the status of aliens and of the privileges accorded them in the Greek city—states whose policies were liberal or exclusive according as they were commercial or non-commercial.<sup>45</sup> So important did the foreign colony become at Rome that the tribunal of the *prætor peregrinus* had to be established

<sup>42</sup> See above, p. 236.

<sup>43</sup> Secs. 4083, 4086.

<sup>43a</sup> Constitution of U. S. does not guarantee right of trial by

jury in such cases. In *re* Ross, 140 U. S., 453.

<sup>44</sup> See above, p. 213.

<sup>45</sup> See above, p. 11.

for their special benefit, out of whose procedure arose the *jus gentium*, "an independent international private law, which, as such, regulated intercourse between peregrins, or between peregrins and citizens, on the basis of their common *libertas*."<sup>46</sup> While the *connubium* and *commercium* as well as the *suffragium* and *honores* of the citizen were denied to the alien friend,<sup>47</sup> even the *jus civile*, the special law administered between Roman and Roman, could be extended to members of allied states to which *commercium* and *recuperatio* were granted by treaty.<sup>48</sup>

§ 199. **Treatment of aliens in middle ages.**—In the states that arose upon the wreck of the Roman Empire aliens were treated throughout the middle ages with more or less liberality, according as the policy of each particular state tended to foster or exclude foreign merchants and artisans. Such commercial cities as Genoa, Venice and Pisa obtained even from the Sultan special quarters and privileges for their traders in the cities of the Asiatic seaboard.<sup>49</sup> Some states permitted merchants and artisans to enter and to ply their vocations with the right to acquire personal property and to sue and be sued in the ordinary civil courts with due protection to life and limb. Sometimes they were placed under the care of a special host;<sup>50</sup> and sometimes as suitors they were granted the boon of a jury *de medietate linguæ*.<sup>51</sup> As a return for such privileges the foreign merchant was expected to bear heavy taxation in addition to many special exactions. If he desired to withdraw from the realm he was liable to be amerced of a part of his goods, movable or immovable, through the *gabelle d'emigration*;<sup>52</sup> if he desired to remove from one state to another property derived from a deceased ancestor, he was expected to pay for the privilege through the royal fine imposed as the *droit de détraction*, or *droit de retraite*.<sup>53</sup>

§ 200. **Special policies of England, Germany and France.**—As a general rule the alien was prohibited by the municipal laws of all states from holding real property, and to that rule English law formed no exception. And yet prior to the disabling

<sup>46</sup> See above, p. 22.

<sup>47</sup> Walker, p. 215.

<sup>48</sup> Muirhead, Roman Law, p. 225.

<sup>49</sup> Hallam, Middle Ages, vol. ii, 392.

<sup>50</sup> Cf. Stat. 5 Hen. iv. c. 9.

<sup>51</sup> Cf. Stat., 28 Edw. 3 c. 13.

<sup>52</sup> Originally no one had the right to quit his country except under such conditions as its government saw fit to impose. Martens, *Précis*, §§ 90, 91; Heffter, §§ 15, 33; Vattel, i, 69, § 220.

<sup>53</sup> Vattel, ii, 8, § 113.

legislation<sup>54</sup> against aliens brought about by British jealousy of the Dutch followers of William III, England encouraged the coming of foreign merchants and artisans, who, except in time of war, were permitted to come and go freely.<sup>55</sup> They were permitted to buy and sell with but few restrictions;<sup>56</sup> they were provided with special facilities for the recovery of debts,<sup>57</sup> in addition to the right of trial by a jury *de mediate lingua*.<sup>58</sup> The most rigorous policy against aliens was no doubt that which prevailed in the German states and in France, where the more perfect development of the feudal system vested in the local magnate, or seigneur, despotic rights over foreigners known in the aggregate as *jus albinagii* or *droit d'aubaine*. This general right of pillage, which finally passed from the local magnates to the sovereign himself, was usually enforced (1) in the form of extraordinary taxation levied upon foreigners upon special occasions; (2) in the form of confiscations to the use of the crown of all property of a deceased foreigner to the exclusion of his representatives, whether claiming by descent or under a will.<sup>58a</sup> The reaction against such barbarous usages has resulted in a general policy in favor of aliens which has finally secured for them in all advanced states a civil status almost as favorable as that of citizens. Prior to the French Revolution of 1789 the *droit d'aubaine* had been abolished or modified as to certain states, as in the treaty of 1778 between France and the United States stipulating for the mutual abolition of both the *droit d'aubaine* and the *droit de détraction*; and by a decree of the Constituent Assembly in 1791 the former was entirely abrogated as to all nations without regard to reciprocity.<sup>59</sup> The narrow and jealous policy against aliens

<sup>54</sup> Stat. 12 and 13, Will. III, c. 2, s. 5.

<sup>55</sup> Stat. 9 Hen. III, st. 1, c. 30.

<sup>56</sup> 9 Edw. III, st. 1, c. 1; 25 Edw. III, st. 4, c. 2; 2 Rich. II, st. 1, c. 1; Stat. 2, Edw. III, c. 9; St. 3, Car. I, c. 4.

<sup>57</sup> *Statutum de Mercatoribus*, 11 or 13, Edw. I.

<sup>58</sup> 27 Edw. III, st. 2, c. 24. Stat. 28, Edw. III, c. 13; Stat. 3 and 4, Will. IV, c. 91, s. 37. Cf. Cunningham, *English Commerce* (Modern Times), pp. 47, 111, 119, 178, 287.

<sup>58a</sup> Grotius, *De Jure Belli ac*

*Pacis*, lib. ii, cap. vi, § 14; Vattel, ii, 8, § 112.

<sup>59</sup> That concession was retracted, however, and the subject restored to the basis of reciprocity by the Code Napoléon in 1803. Finally that part of the code was repealed by the Ordinance of July 14, 1819, permitting foreigners to possess both real and personal property in France, and to take by succession *ab intestato*, or by will, equally with native subjects. In 1853 a treaty was made between the United States and France which



contained in the disabling clause of the Act of Settlement yielded in England, after nearly a century and a half, to more liberal ideas embodied in a series of statutes beginning with 7 and 8 Victoria, c. 66 (1844) and ending with 33 and 34 Vict., c. 14 (1870). By the act last named real and personal property may be acquired, held and disposed of, by aliens as by native-born British subjects; and within the United Kingdom an alien enjoys all the privileges of a British subject, except that of owning a British ship, and the right to office, or to any municipal parliamentary or other franchise.<sup>60</sup>

§ 201. **Mere travelers or sojourners.**—International law is concerned in the first place with the alien, who, without a domicil, in a foreign state, simply passes through its territory as a mere traveler or sojourner. As such he is entitled to the full protection of its laws, and amenable to its criminal jurisdiction for any breaches of the peace or other offenses he may commit against the person or property of others.

§ 202. **Domiciled aliens; what constitutes domicil.**—Far more interest attaches, however, in the second place, to the domiciled alien, who goes into a foreign country and resides there with the intention of remaining permanently, or for an indefinite period. He need not become a citizen in order to acquire a domicil;<sup>61</sup> and the residence necessary to constitute it need not be long in point of time. "If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicil."<sup>62</sup> On the other hand mere length of residence will not of itself

was intended to authorize citizens of each country to hold real and personal property in the other, equally with its own citizens. As the treaty admitted the right of each state of the Union to regulate the subject for itself, the President undertook only to recommend to each state to enact the necessary legislation, France reserving the right to govern herself by rules of reciprocity. U. S. Laws, x, 992. It is claimed, however, on high authority, that the treaty-making power under our constitution is adequate to establish by federal authority alone such a rule of law in each state, without the aid of

state legislation. *Fairfax v. Hunter*, 7 Cranch, 627; *Ware v. Hylton*, 3 Dallas, 242; 8 Opinions of Atty-Gen., 415; Halleck, § 157; Kent. Comm. iv, 420; *Jefferson's Works*, iii, 365; *Dana's Wheaton*, § 82 and note 47.

<sup>60</sup> 2 Cf. *The Origin and Growth of the Eng. Const.*, vol. ii, pp. 229, 424.

<sup>61</sup> *Udny v. Udny*, L. R. 1 Sc. App. 441; *Bumel v. Bumel*, L. R. 12 Eq. 298; *Dacey, Conflict of Laws*, p. 111.

<sup>62</sup> *Bell v. Kennedy*, L. R. 1 Sc. App. 307, 319, per Lord Cranworth.

constitute domicil. There must be not only the physical fact of residence but the mental fact of purpose or intention to reside (*animus manendi*). "We are all agreed that to constitute a domicil there must be the fact of residence. \* \* and also a purpose on the part of [D] to have continued that residence. While I say that both must concur, I say it with equal confidence that nothing else is necessary."<sup>63</sup> International law recognizes two kinds of domicil: (1) domicil of origin, such as children, legitimate or illegitimate, acquired by an absolute rule or fiction of law at the time of birth by reason of the domicil at that time of the person upon whom they are dependent, usually the father or mother;<sup>64</sup> (2) domicil of choice, such as every independent person may acquire through the proper combination of the fact of residence with the intention of a permanent or indefinite prolongation of it.<sup>65</sup> "Every man's domicil of origin must be presumed to continue, until he has acquired another sole domicil by actual residence, with the intention of abandoning his domicil of origin. This change must be *animo et facto*, and the burden of proof unquestionably lies on the party who asserts that change."<sup>66</sup> As dependent persons, such as minors and married women, lack the power of legal volition, their domicils are the same as, and change, if at all, with the domicil of those upon whom they are legally dependent. A person on attaining his majority retains the last domicil which he had during his minority until he changes it by some independent act of his own.<sup>67</sup> In determining the nature of domicil so far as it depends upon choice the main difficulty is to ascertain the necessary intention or *animus*. As Lord Westbury has expressed it, "Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time."<sup>68</sup> While no person can be without a domicil, no one can, *for the same purpose*, have at the same time more

<sup>63</sup> Arnott v. Groom, Court of Udny, L. R. 1 Sc. App. 441, 575. Session Cases, 9 D. 142, 149-52.

<sup>65</sup> Cf. Westlake, Private Int. Law, §§ 243, 253.

<sup>64</sup> "It is a settled principle that no man shall be without a domicil, and to secure this result the law attributes to every individual as soon as he is born the domicil of his father, if the child be legitimate, and the domicil of the mother, if illegitimate." Udny v.

<sup>66</sup> Aikman v. Aikman, 3 Macq. 854, 877.

<sup>67</sup> Dicey, Conflict of Laws, pp. 120-130. See also Somerville v. Somerville, 5 Ves. 749a, 787.

<sup>68</sup> Udny v. Udny, L. R. 1 Sc. App. 441, 458.

than one domicil. It is contended, however, by high authorities that a person may have different domicils for different purposes.<sup>69</sup>

§ 203. **General rights and duties of aliens—Kosztá's case.**—Leaving out of view those questions of private right and obligation arising out of the *lex domicilii* which belong solely to the domain of international private law, and such as arise out of the war-burdens, personal and pecuniary, a domiciled alien may be called upon to bear, and such as arise out of the adoption of a belligerent domicil by a neutral, the general statement may be made that the law of nations considers an alien while domiciled in a country entitled to the protection of its laws,<sup>70</sup> in return for which he owes a temporary and local allegiance which continues during the period of his residence.<sup>71</sup> He is so far subject to the laws of the land as to crime that he may be guilty of treason in giving aid and comfort to the enemies of the country in which he resides.<sup>71a</sup> On the other hand if he be domiciled in the United States he is entitled "to our care and consideration, and in most circumstances may be regarded as under our protection," because, as stated in the case of Kosztá,<sup>72</sup> "it is a maxim of international law that domicil confers a national character. International law looks only to the national character in determining what country has the right to protect." Therefore "every foreigner born, residing in a country, owes to that country allegiance and obedience to the laws as long as he remains in it, as a duty imposed upon him by the mere fact of residence, and the temporary protection which he enjoys, and is as much bound to obey its laws as native subjects or citizens. This is the universal understanding of all civilized nations, and nowhere a more established doctrine than in this country."<sup>73</sup>

<sup>69</sup> "I apprehend," says Pollock, C. Luke v. Calhoun County, 52 Ala. B., "that a peer of England who is also a peer of Scotland, and has estates in both countries, who comes to parliament to discharge a public duty, and returns to Scotland to enjoy the country, is domiciled both in England and Scotland." 115.

<sup>71</sup> 1 East P. C., c. 2, § 4; 1 Hale P. C., c. 10; Thrasher's Case, 6 Webster's Works, 526.

<sup>71a</sup> Carlisle v. U. S., 16 Wallace, 147; Foster's Crown Law, Discourse, i, § 2.

<sup>72</sup> Mr. Hülsemann's letter to Mr. Marcy, and his reply in Senate documents, 33d Congress, 1st Sess., vol. i.

<sup>73</sup> Mr. Webster, Sec. of State, re- Sidgreaves v. Myatt, 22 Ala. 617;

§ 204. Letters of denization in England.—The sovereign still has the power in England to grant letters of denization whereby a domiciled alien, *ex donatio regis*, may be made a British subject. “A denizen is in a kind of middle state between an alien and a natural born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may not; but cannot take by inheritance, for his parent, through whom he must claim, being an alien, had no inheritable blood, and therefore could convey none to the son. \* \* \* A denizen is not excused from paying the alien’s duty and some other mercantile burdens. And no denizen can be of the privy council, or either house of parliament, or have any office of trust, etc.”<sup>74</sup>

§ 205. Extradition—nature and origin of existing system.—The doctrine is undoubtedly ancient that it is the duty of every state to refuse an asylum to fugitives from justice from other states, not only for its own peace and security but for that of society as a whole; and in order to discharge that duty every state has the undoubted right of its own motion to expel such persons from its limits through agencies provided by its own municipal laws.<sup>75</sup> As to the nature of the obligation of a state to deliver up a person accused of the commission of a crime in another upon the demand of its government, there has always been a difference of opinion among publicists,—one class holding that such an obligation is positively imposed by the law and usage of nations;<sup>76</sup> the other, that it is so imperfect as to depend purely upon comity and convenience, in the absence of express compact.<sup>77</sup> The existing system of extradi-

port to the President, Dec. 23, 1851. 6 Webster’s Works, 524.

<sup>74</sup> Blackst. Comm. 374. See also *Fong Yue Ting v. U. S.*, 149 U. S. 698, 736; *Craw v. Ramsey*, 2 Vent. 6.

<sup>75</sup> “The power of expelling obnoxious foreigners is one incident to sovereignty.” Mr. Fish, Sec. of State, to Mr. Foster, Oct. 17, 1873. Mss. Inst., Mex.

<sup>76</sup> Chief among the first class may be mentioned Grotius, *De Jur. Bel. ac. Pae.* lib. ii, cap. xi, §§ 3-5; Heineccius, *Praelect. in Grot. pt. Burlamaqui*, tom. ii. Part iv, ch. 3, §§ 23-29; Vattel, liv. ii, ch. 6,

§§ 76-77; Rutherforth, *Int. of Nat. Law*, ii, ch. 9, p. 12; Schmelzing, *systematischer Grundriss des praktischen europäischen Völkerrechts*, § 61; Kent’s Comm., i, 36, 37, 5th ed.

<sup>77</sup> Chief among the second, may be mentioned Puffendorf, *Elementa*, lib. viii, cap. 3, § 23, 24; Martens, *Droit des Gens*, liv. iii, ch. 3, § 101; Klüber, *Droit des Gens*, Part ii, tit. 1, ch. 2, § 66; Saalfeld, *Handluch des positiven Völkerrechts*, § 40; Heffter, *Europäische Völkerrecht*, § 63; Sir R. Phillimore, i, § ccclxiv, Bluntschli, § 395; Fiore, *Trattato di*

tion is the outcome of the greatly increased intercourse that has grown up among nations in very recent times,—by far the greater part of the numberless treaties in which it is embodied dating from the nineteenth century or rather from the last half of it.<sup>78</sup> While various writers upon international law have expressed their views as to the principles involved, no two nations have followed the same practice, and for that reason it has been found necessary to regulate the entire subject by treaty. It is certainly the opinion of a majority of modern publicists that a state is under no absolute obligation to surrender fugitive criminals unless it has expressly contracted to do so. While France has held the contrary view, England and the United States have from the beginning maintained that doctrine.

§ 206. **Extradition treaties between Great Britain, France and U. S.**—There are only two English cases at all old in which the right of extradition was asserted, and in neither of them was it decided that the crown possesses, by virtue of the common law, the power to deliver to a foreign nation a person accused by it of the commission of crime.<sup>79</sup> Upon the contrary it is maintained that the common law gives the executive no right to arrest an alien and deliver him to a foreign state.<sup>80</sup> While Great Britain made the first extradition treaty with the United States in 1794, and an agreement of the same kind with France in the treaty of Amiens in 1802, Mr. Clarke says, in view no doubt of the fact that both were of limited duration, that “The history of the subject in England begins with the treaties made with the United States in October, 1842, and with France in 1843.”<sup>81</sup> As British extradition treaties can only be put into effect through statutory regulations, 6 and 7 Vic., c. 75, was passed to enforce the treaty with France; and

*Diritto Internazionale Pubblico*, § 611; Hall, § 13; Wheaton, Elements, § 13. For a more complete list of the chief authorities on either side, see Fœlix, *Droit International Privé*, liv. ii, tit. ix, ch. vii, and Von Bar, *Des Internationale Privat-und-Strafrecht*, § 148.

<sup>78</sup> Mittermaier wisely concludes that the existence of so many special treaties upon the subject is conclusive of the fact that there is no general usage recognized

among nations. *Deutsches Strafverfahren*, Theil i, § 59, pp. 314-319. For a full account of the treaties, and of the practice independently of them, see Calvo, liv. xv, Sect. ii.

<sup>79</sup> *East India Co. v. Campbell*, 1 Ves. Sen. 246; *Mure v. Kays*, 4 Taunt. 34. Cf. Sir J. F. Stephen, *Hist. of the Crim. Law*, vol. ii, p. 66.

<sup>80</sup> Clarke, *Extradition*, ch. v.

<sup>81</sup> *Ibid.*, p. 109, 2d ed.

6 and 7 Vic., 76, to enforce that with the United States; and when both proved ineffectual in practice<sup>82</sup> the existing law was substituted which is embodied in two acts known as the Extradition Acts, 1870 and 1873.<sup>83</sup>

§ 207. **Cases of Winslow and Rauscher.**—A serious controversy arose between the governments of Great Britain and the United States in 1876 when the former refused to surrender the forger Winslow and other fugitives, unless the latter would make an express stipulation that they should not be tried for any offense other than that for which their extradition was demanded.<sup>84</sup> While no such condition or limitation was contained in the treaty of 1842 such a provision had been inserted in the British Extradition Act of 1870, and that provision the British government attempted to enforce just as if it had been written in the treaty itself. After the government of the United States refused to make stipulations that of Great Britain receded from its position; whereupon the former clearly indicated its unwillingness to try offenders for any crime except that for which they are extradited,<sup>85</sup> a rule embodied in a clear and final form in the convention entered into between the two countries in 1890.<sup>86</sup> There is every reason why the United States should make such a rule an element in all of its extradition engagements in view of the decision of the Supreme Court in the case of Rauscher,<sup>87</sup> an officer of an American vessel who was extradited under the treaty with Great Britain of 1842 upon a charge of murder on the high seas of one of his ship's crew. The court held that a man extradited under such circumstances could not be tried upon

<sup>82</sup> "Between 1843 and 1865 the French obtained the extradition of one prisoner only, though they made upwards of twenty demands, for the most part during the earlier years of the period. Extraditions to America were a little less uncommon." Sir J. F. Stephen, *Hist. of the Crim. Law*, vol. ii, p. 67.

<sup>83</sup> 33 and 34 Vic., c. 52, and 36 and 37 Vic., c. 60.

<sup>84</sup> For a full statement of the case, see Wharton, *Int. Law Dig.*, § 270.

<sup>85</sup> The following authorities maintain that rule as a matter of

international law. W. B. Lawrence, 14 *Alb. Law Journal*, 96; 19 *Ibid.* 329; Cairns, Chancellor, as quoted in *U. S. For. Rel.*, 1876, 286, 296; Spear on Extrad., chap. vi; Lowell, J., in 10 *Am. Law Journal*, 617, 620. *U. S. v. Watts*, 8 Sawyer, 370, 14 *Fed. Rep.* 130; *Com. v. Hawes*, 13 Bush, 697; *State v. Vanderpool*, 39 *Ohio St.* 273; *Compton v. Wilder*, 40 *Ohio St.* 130.

<sup>86</sup> *Treaties of the United States*, p. 437; *British State Papers*, United States, No. 1 (1890).

<sup>87</sup> *U. S. v. Rauscher*, 119 *U. S.* 407.

an indictment charging him with cruel and unusual punishment of the deceased, although such punishment resulted from the identical acts proved in the extradition proceeding. He could not be tried, the court said, for a minor offense not included in the treaty of extradition.

§ 208. U. S. recognizes no obligation to surrender in absence of treaty.—It has been the settled law of the United States from the outset, through a consensus of opinion between the executive and judicial departments of the government, that, in the absence of treaties, there is no obligation upon a state to surrender to another upon its demand persons who, after having committed offenses within the former, have sought an asylum in the latter.<sup>88</sup> “The law of nations embraces no provision for the surrender of persons who are fugitives from the offended laws of one country to the territory of another. It is only by treaty that such surrender can take place.”<sup>89</sup> “The practice of nations tolerates no right of extradition. Whatever elementary authors may say to the contrary, one nation is not bound to deliver up persons accused of crimes who have escaped into its territories on the demand of another nation against whose laws the alleged crime was committed. The government of the United States has from the beginning acted on this principle.”<sup>90</sup> While there is a decision to the contrary,<sup>91</sup> the better doctrine is that in the absence of legislative authority the President has no right to surrender a fugitive upon the authority of a treaty alone.<sup>92</sup>

**Exceptional case of Arguelles.**—And yet in defiance of all precedent, and in the absence of treaties and statutes, Mr. Seward, with the sanction of the President, ordered in 1864 as a purely executive act, the arrest and delivery to Spain of

<sup>88</sup> Mr. Rush, Sec. of State, to Mr. Hyde de Neuville, April 9, 1817; Mss. Notes For. Leg. Cf. Wharton, Conflict of Laws, § 941.

<sup>89</sup> “Apart from the provisions of treaties on the subject, there exists no well-defined obligation on one independent nation to deliver to another fugitives from its justice; and though such delivery has often been made, it was upon the principle of comity. The right to demand it has not been recognized as among the duties of one govern-

ment to another which rest upon established principles of international law.” U. S. v. Rauscher, 119 U. S. 407.

<sup>90</sup> Mr. Buchanan, Sec. of State, to Mr. Wise, Sept. 27, 1845. Mss. Inst., Brazil.

<sup>91</sup> In re Sheazle, 1 Woodb. & M. 66.

<sup>92</sup> In re Metzger, 1 Edw. Sel. Cas. (N. Y.) 399; 5 Howard, 176; 1 Barb. 248; Spear on Extradition (2d ed.), 57.

Argüelles, a governor of a district of Cuba who had escaped to New York, after having sold into slavery, while in his charge, a cargo of Africans landed from a slave-ship in that island and declared to be free by the proper authorities. When the President was called upon by the Senate to explain under what law or treaty he had acted, he presented the report of Mr. Seward, who said that "there being no treaty of extradition between the United States and Spain, nor any act of Congress directing how fugitives from justice in Spanish dominions shall be delivered, the extradition in this case is understood by this department to have been made in virtue of the law of nations and the Constitution of the United States.

\* \* \* Although it may be conceded that there is no national obligation to make such a surrender upon a demand thereof, unless it is acknowledged by treaty or statute, yet a nation is never bound to furnish asylum to dangerous criminals who are offenders against the human race; and yet it is believed that if in any case the comity could with propriety be practiced, the one which is understood to have called forth the resolution furnished a just occasion for its exercise."<sup>93</sup> This illegal transaction was never subjected to judicial review, as the accused was delivered by the marshal to the Cuban agents of Spain before a petition could be filed for *habeas corpus*.<sup>94</sup> However, when the notorious Tweed escaped to Spain an exact return was made of our illegal courtesy;<sup>95</sup> and in 1877 an extradition treaty was entered into with that country, which was amended in 1882.

§ 209. A state may impose conditions of surrender.—While there may be differences of view as to the real character of the obligation binding one state to deliver fugitive criminals to another, and disputes as to the limits of executive authority in particular cases, it seems to be generally admitted that

<sup>93</sup> For a full statement of the case, see Wharton Int. Law Dig., § 268.

<sup>94</sup> "There is no doubt, we believe, of the high criminality of the man, and as little that no law or exigency authorized the transaction." Woolsey, § 78, note. The "high criminality of the man" has, however, induced one authority to applaud the grossly illegal proceeding through which he was de-

livered up. "A splendid example of such a recognition of international obligation was afforded by the action of the U. S. Government in the case of the scoundrel Argüelles in 1864, U. S. Diplomatic Correspondence, 1864, Part ii, pp. 60-74." Walker, Science of Int. Law, 236, note 1.

<sup>95</sup> See Wharton, Conflict of Laws, § 835, note.



every state has the right to define the conditions upon which the surrender shall be made. As to what those conditions should be something like a consensus of opinion has been brought about through the making of the mass of extradition treaties by which the subject is now actually regulated.

§ 210. Demand should be limited to treaty offenses.—It is generally understood that the demand must be confined to treaty offenses,—as to extradition treaties the rule *expressio unius est exclusio alterius* is in full force.<sup>96</sup> If an extraordinary case arises, not within the list of enumerated offenses, the only hope is an appeal not to the treaty but to that courtesy or comity which a state may extend, beyond the domain of law, wherever it is to its interest to do so.<sup>97</sup> In order to obviate that necessity, the tendency is steadily to increase the list of crimes for which surrender may be demanded. To the seven offenses of that kind described in the extradition clauses of the treaty of 1842 between the United States and Great Britain twenty more were added by the convention of 1890.

§ 211. Fugitive must be tried only for offense specified.—It is firmly settled, certainly so far as Great Britain and the United States are concerned, that the fugitive is not to be tried for an offense other than that for which he is extradited, until a reasonable time and opportunity has been given him after his release or trial to return to the country from which he was taken. It has been held that a person extradited upon a particular charge cannot be convicted on a lesser charge included in it.<sup>98</sup> Some treaties expressly provide that they shall not apply to crimes committed before their date, while others either include all anterior crimes or certain ones expressly designated.<sup>99</sup> The better opinion seems to be that a subject charged with the commission of an offense within the “jurisdiction” of the demanding state cannot properly be tried for a crime committed within the territory of a third independent state from which he has escaped to the state upon which the

<sup>96</sup> See Mr. Jefferson’s reasons, in instructions of March 22, 1792, in 1 Am. St. Papers (For. Rel.), 258; 12 Am. and Eng. Enc. of Law, p. 594.

<sup>97</sup> Ex parte Foss, 102 Cal. 347, 41 Am. St. Rep. 182.

<sup>98</sup> See above, p. 254.

<sup>99</sup> It has been held that prior crimes are included within the operation of a treaty where its language will admit of such a construction, unless they are expressly excepted. Cf. In re De Giacomo, 12 Blatch. 391; In re Stupp, Ibid. 501.

demand is made.<sup>1</sup> And no state can be expected to deliver up a fugitive criminal while he is in custody on account of an offense committed therein, until the pending charge has been disposed of, or until punishment has been duly inflicted.<sup>2</sup>

§ 212. **Political offenses—how distinguished from ordinary crimes.**—It is generally provided that no surrender will be made if the offense with which the accused is charged is of a political character. Grave and difficult questions continually arise out of the construction of that exception because neither statesmen nor jurists have yet been able to agree upon a definition that will clearly distinguish political offenses from ordinary crimes. In some cases the motive has been held to be the chief ingredient. When that has been purely political it has been permitted to stamp that character upon an act which otherwise would have been private assassination. The sounder view, however, is that to give to an act a political character it must be incidental to or form a part of a political movement or disturbance. Such was the ground upon which the Court of Queen's Bench refused, in 1890, to deliver up<sup>3</sup> Castioni, a Swiss engaged in an insurrection against the authorities of the canton of Ticino, who, during the progress of such disturbance, shot a fellow-citizen in the attack upon the town hall at Bellinzona. As it is necessary, however, in order to constitute such a political movement or disturbance as the law of nations contemplates that there shall be two parties in the state, each striving to impose its own government upon the other, it has been held that a mere explosion caused by an anarchist in the absence of such conditions does not constitute a political offense.<sup>4</sup> And yet the fact remains that the tentative efforts so far made to define offenses "of a political character" for which extradition will not be granted are both

<sup>1</sup> The accepted doctrine seems to be that the provisions of an extradition treaty do not extend to such a case. *Allsop's Case*, *Forsyth's Cas.* 368; 12 *Am. and Eng. Enc. of Law*, p. 595.

<sup>2</sup> *Taylor v. Taintor*, 16 *Wallace*, 366; *In re Briscoe*, 51 *How. Pr.* (N. Y. Supreme Ct.) 422; *In re Troutman*, 24 *N. J. L.* 634; *State v. Allen*, 2 *Hump.* (Tenn.) 258.

<sup>3</sup> *Ex parte Castioni*, *Law Reports, Queen's Bench Division*,

1891, pp. 149-168. "Great Britain will decline to deliver up to justice the excited politician who, in the course of a revolutionary émeute, shoots down a defenseless statesman of the ruling party." *Walker, Science of Int. Law*, p. 237.

<sup>4</sup> *In re Meunier* [1894], 2 *Q. B.* 415, 71 *L. T. N. S.* 403, 18 *Cox C. C.* 15. As an example of a political offense, see *In re Ezeta*, 62 *Fed. Rep.* 972.

vague and inadequate. Sir J. F. Stephen paved the way for a rational and practical definition when he suggested that the character of the act should be made to depend chiefly upon the belligerent or non-belligerent condition of the doer.<sup>5</sup> Guided by that suggestion,<sup>6</sup> Prof. T. J. Lawrence has well said that, "if political offenses were defined as acts done for political objects, which would be allowed by the laws of war were the relation of belligerency established between the doers of them and the state against which they are done, we should be able to distinguish between those crimes which shock the conscience of humanity, though the perpetrators of them are actuated by political motives, and acts which bring down upon the doers no strong moral condemnation, though we may think them violent and foolish."

§ 213. Responsibility of a state for due execution of its laws.—The fiction that a state is a person subject to obligations, both moral and legal, is vividly illustrated by the rule which provides that if from a lack of due diligence in the enforcement of its legal machinery it fails to protect another state against breaches of international law, it becomes itself responsible to the injured state or to its citizens for the direct results of its default. Every state possesses the inherent right as a sovereign to choose whatever form of constitution it deems best, and to enforce it through whatever kind of a code it chooses to enact, provided only that such constitution and code are collectively adequate to the discharge of its international obligations.<sup>7</sup> One state cannot dictate to another as to the form of its internal polity, but it has the right to demand that it shall be adequate to the end in view, and that it shall be enforced with due diligence when its interests are involved. Because the doctrine of territorial sovereignty gives to every state the right, with a few exceptions, to enforce its laws, civil and criminal, against all persons and property within its jurisdiction, the rule is a just one that, "*prima facie* a state is, of

<sup>5</sup> Hist. of the Criminal Law, pp. 70, 71.

<sup>6</sup> Principles of Int. Law, pp. 238-239.

<sup>7</sup> The best expositions of the subject of state responsibility which has not yet been perfectly defined, are to be found in Blunt-schli, §§ 466-469; Halleck, i, 397;

Phillimore, i, § cexviii, and preface to 2d ed., pp. xxi-ii; Reasons of Sir A. Cockburn for dissenting from the Award of the Tribunal of Arb. at Geneva, Parl. Papers, North Am. No. 2, 1873, pp. 31-8; Hansard, cci, 1123; Calvo, §§ 357-8, 3d ed.; Fiore, §§ 390-4 and §§ 646-64, 2d ed.; Hall, § 65.

course, responsible for all acts or omissions taking place within its territory by which another state or the subjects of the latter are injuriously affected." <sup>8</sup> When acts of omission or commission are chargeable to the administrative, naval or military agents of a state while under the direct control of its executive, whereby another state or its citizens are injured, the duty of the offending state to disavow such acts, or in a case sufficiently grave to make prompt reparation by the infliction of adequate punishment, is too obvious for special consideration.

§ 214. **No responsibility for erroneous judicial decisions.**—The responsibility of a state for the conduct of its judicial officers rests upon an entirely different basis. In all highly organized modern state-systems such officers are placed in positions of greater or less independence so as to protect them, except in the case of high misdemeanors, from all responsibility to the other departments of power. International law presupposes that the tribunals of every state are open for the impartial administration of justice between natives and foreigners, and only when there has been a palpable denial of it, after the foreigner has made an adequate appeal to such tribunals, does the occasion arise for diplomatic intervention. "It is not necessary to affirm that a government is not responsible in any case to a foreign government for an alleged erroneous judicial decision rendered to the prejudice of a subject of said foreign government. But it may be safely asserted that this responsibility can only arise in a proceeding when the foreigner, being duly notified, shall have made a full and *bona fide*, though unavailing defense, and, if necessary, shall have carried his case to the tribunal of last resort. If, after having made such defense and prosecuted such appeal, he shall have been unable to obtain justice, then, and then only, can a demand be with propriety made upon the government." <sup>9</sup> Redress must be denied on some palpably unjust ground,<sup>10</sup> such as discrimination on account of alienage,<sup>11</sup> or there must be arbitrary acts of oppression or deprivation of property as contradistinguished from penalties and the punishments incurred through the ordinary infraction of law,<sup>12</sup> before the administration of a state's justice can be subjected to diplomatic inquisition.

<sup>8</sup> Hall, § 65.

<sup>9</sup> Mr. Clay, Sec. of State, to Mr. Tacon, Feb. 5, 1828. Mss. Notes, For. Leg.

<sup>11</sup> Mr. Bayard, Sec. of State, to Mr. Phelps, June 4, 1885. Mss. Inst., Peru.

<sup>12</sup> Mr. Marcy, Sec. of State, to

<sup>10</sup> 1 Opinions Atty-General, 53.

§ 215. **Duty to prevent mob violence and invasion of neighboring states.**—Of far more practical importance, however, is the duty imposed upon a state so to administer its laws in time of peace as to prevent private persons from inflicting injuries upon foreigners within its limits through mob violence; and also to prevent private persons from organizing and arming upon its soil for the purpose of invading neighboring states. There can be no question that a state is liable internationally for damages done to alien residents by a mob which it could, by due diligence, have repressed.<sup>13</sup> While the government of the United States frankly admits that rule, it qualifies it with the proviso that when a remedy is given in the judicial tribunals against the individuals by whom such violence is inflicted it must be exhausted, if possible, before the state as such can be called upon for redress.<sup>14</sup> Whenever border raiders gather upon the frontiers of a country with the view of making incursions into a neighboring friendly state, it is the plain duty of the former to use due diligence for their apprehension; or, in default of it, to answer for the damages the marauders inflict. Such was the position assumed by the government of the United States when, in 1870, it said, that “the accountability of the Mexican government for the losses sustained by citizens of the United States from the robbery and exactions committed at Guaymas, in May last, by the armed force under the command of Fortino Viscaïno, seems to be unquestionable;”<sup>15</sup> and nine years later when a body of Indians under Sitting Bull, who had taken refuge in Canada, were about to make hostile incursions into the United States the government of Great Britain was notified of the fact and requested to “recognize the importance of being prepared upon the frontier with a sufficient force either to compel their surrender to our forces as prisoners of war, or to disarm and disable them from further hostilities, and subject them to such constraints of surveillance and subjection as will preclude any further disturbance of the peace on the frontier.”<sup>16</sup>

§ 216. **Responsibility suspended by civil war.**—The obli-

Mr. Jackson, Jan. 10, 1854. Mss. Inst., Austria.  
Nelson, Nov. 16, 1870. Mss. Inst., Mex., For. Rel., 1871.

<sup>13</sup> Mr. Evarts, Sec. of State, to Mr. Gibbs, May 28, 1878. Mss. Inst., Peru.  
<sup>16</sup> Mr. Evarts, Sec. of State, to Sir E. Thornton, May 27, 1879. Mss. Notes, Gr. Brit. For. Rel., 1879.

<sup>14</sup> See above, p. 170.

<sup>15</sup> Mr. Fish, Sec. of State, to Mr.

gation thus imposed upon a state in time of peace to protect other states and their citizens from injuries resulting from a failure upon its part to insure a diligent execution of its laws ceases when the normal operation of such laws is temporarily suspended by insurrections or civil commotions beyond its control.<sup>17</sup> As a foreigner cannot expect better treatment than a state guarantees to its own citizens he must accept its hospitality subject to all the contingencies resulting not only from intestine but from international war.<sup>18</sup> As no state is expected to compensate its own citizens for losses sustained through civil commotion beyond its control, a foreigner cannot claim indemnity for injuries inflicted either upon himself or property during the progress thereof, either through acts of insurgents recognized as belligerents, or through measures necessarily taken by the state itself to re-establish its authority. Upon that ground Great Britain, during the American Civil War, refused to demand compensation for injuries inflicted on the property of her subjects by the military forces of the United States. The claimants were informed that they must be content with such remedies as were provided for its citizens.<sup>19</sup>

The famous case of the *Alabama*, involving the most recent discussion of the obligations of a neutral to a belligerent for a diligent execution of its laws, will be duly considered in that part of the work to be specially devoted to the rights and duties of neutral states.

<sup>17</sup> Les gouvernements sont-ils ou non responsables des pertes et des préjudices éprouvés par des étrangers en temps de troubles intérieurs ou de guerres civiles? Cette question a été longuement discutée et finalement résolué par la négative. Calvo, § 292. See also Bluntschli, § 380.

<sup>18</sup> "It is believed that it is a received principle of public law that the subjects of foreign powers domiciled in a country in a state of war are not entitled to greater privileges or immunities than the other inhabitants of the insurrectionary district." Mr. Seward, Sec. of State, to Mr. Wydenbruck, Nov. 16, 1865. Mss. Notes, Austria.

<sup>19</sup> "That the British loyalists who suffered pecuniary loss through the casualties of war during the American Revolution had no claim on the United States, under the law of nations, for redress, was admitted by Mr. Pitt, June 3, 1785, in the House of Commons (27 Hansard's Parl. Hist., 610, 618). The same point was determined by the British American Claims Commission. (See House Rep. 262, 43d Cong., 1st Sess.)" Wharton, Int. Law Dig., § 224. As to the obligation of aliens to submit to martial law, see 1 Halleck, Int. Law (Baker's ed.) 351; 2 id., 455.

## CHAPTER III.

### SOVEREIGNTY AND JURISDICTION IN RELATION TO PROPERTY.

§ 217. State property, territorial and non-territorial—Servitudes.—A state as a corporate person may possess property, movable and immovable, either within its own limits or beyond them. The territorial property of a state consists of all the land and water within its geographical boundaries, including all rivers, lakes, bays, gulfs and straits lying wholly within them. As incidents to such territorial possessions must be added a state's jurisdiction over its marginal waters when its territory abuts upon the sea, and the right of its people to navigate such rivers as form boundaries between two or more states, or such as rising within one state traverse the territories of others on their way to the sea. The legal title to such territorial property may rest either upon (1) prescription, (2) conquest, (3) occupation, (4) accretion, or (5) cession. The non-territorial property of a state consists of such possessions as it may hold in its public capacity beyond its own limits, whether within or without the jurisdiction of other states; of such as it may hold as a private individual within the jurisdiction of another state; of its public vessels; of its private vessels, covered by the national flag; and of the goods of its subjects embarked in foreign ships. From their very nature and situation the right to use and enjoy certain classes of state property depends exclusively upon municipal law, while for a like reason the right to use and enjoy certain other classes depends entirely upon international law. A state may limit or qualify its sovereignty and jurisdiction over its territorial property by permitting a foreign state to perform within its bounds certain acts otherwise prohibited; or by surrendering the right to exercise certain parts of its domestic jurisdiction as a protection to others. Restrictions thus imposed upon the sovereignty of a state are known as servitudes<sup>1</sup> which may be either positive or negative.

<sup>1</sup> The term servitude is borrowed from Roman law wherein it signifies an *innocent use* as distinguished from a *right*. In order to convert the former into the latter some kind of contract or stipulation was necessary. *Si quis velit vicino aliquod jus constituere, pac-*

§ 218. Title by prescription founded on Roman law.—The original group of European states, out of whose assent modern international law grew, could, as a general rule, put forward no higher title than prescription to the territories of which they had been immemorially possessed. It is not strange therefore that Grotius should have found authority for it in Roman jurisprudence,<sup>2</sup> and that Heineccius, Wolff, Bynkershoek, Mably, Vattel, Rutherford and Burke should have accepted his conclusions.<sup>3</sup> Under the *jus civile* one of the means by which property could be acquired was the efflux of time (*usucapione, prescriptio*<sup>4</sup>). Vattel says that “after having shown that usucapion and prescription are founded on the law of nature, it is easy to prove that they are equally a part of the law of nations, and ought to take place between different states. \* \* \* And so far is the nature of the parties from affording them an exemption in the case, that usucapion and prescription are much more necessary between sovereign states, than between individuals. Their quarrels are of much greater consequence; their disputes are usually terminated only by bloody wars; and consequently the peace and happiness of mankind much more powerfully require that possession on the part of sovereigns should not be easily disturbed.”<sup>5</sup>

Its application to possessions of states—Case of Poland.—In order to impart additional force to the presumption arising out of lapse of time English jurists invented the legal fiction that a title so established originally rested on a grant.<sup>6</sup> Disregarding that narrow assumption Burke founded the right to all territory “on the solid rock of prescription; the soundest, the most general, the most recognized title between man and

tionibus atque stipulationibus id officere debet. Justinian Inst. II, tit. ii. *De Servitutibus*.

<sup>2</sup> Sic qui rem suam ab alio teneri scit, nec quicquam contradicit multo tempore, is nisi causa alia manifeste appareat, non videtur id alio fecisse animo, quam quod rem illam in suam rerum numero esse nollit. *De Jure Belli ac Pacis*, II, cap. 4.

<sup>3</sup> Cf. Phillimore (i, §§ 255-260), who considers the question at great length. See also Heffter, § 12; Bluntschli, § 290; Riquelme, i, 28; Calvo, § 212; Wheaton, Elements, § 164.

<sup>4</sup> Muirhead, Roman Law, pp. 138, 251, 393.

<sup>5</sup> *Droit des Gens*, II, § 147.

<sup>6</sup> In English law prescription is used in a comparatively narrow sense, and a title thus acquired is limited to incorporeal hereditaments. It may, however, have borne at one time a wider meaning. A title by prescription to land is mentioned in 32 Hen. VIII, C. 2; and it seems that tenants in common may still make title to land by prescription. Littleton's Tenures, § 310. See also Williams, Rights of Common, 3.



man that is known in municipal or in public jurisprudence; a title in which not arbitrary institutions but the eternal order of things gives judgment; a title which is not the creature, but the master of positive law; a title which, though not fixed in its term, is rooted in its principles in the law of nature itself, and is, indeed, the original ground of all known property; for all property in soil will always be traced back to that source, and will rest there.”<sup>7</sup> The doctrine of prescription incorporated in every municipal code in order to quiet the title of individuals is applied, subject to certain modifications, to the possessions of states<sup>8</sup> in order to secure stability in international affairs and that freedom from strife which would be perpetual, if every nation could rise in arms to assert obsolete legal rights. From the very necessity of the case the quieting influence of prescription has been extended not only to cases of long-continued possession where no original source of property right can be shown to have existed, but also to cases in which the rightful proprietor, wrongfully dispossessed, has been unable or unwilling to re-establish his possession. In the notable case of the dismemberment of Poland titles to the appropriated territory, based upon acts generally admitted to have been immoral, have through the lapse of time and general acquiescence become permanent simply because it is as necessary to end disputes between nations as to territory as it is to cut off litigation between individuals. But as the rule does not extend beyond its reason, a title thus acquired by prescription is only good internationally, and does not bar any right which the inhabitants of appropriated territory may have to free themselves from a foreign yoke. Lampredi,<sup>9</sup> Martens<sup>10</sup> and Klüber<sup>11</sup> have even denied that the doctrine has any place whatever in the law of nations, because it is not a principle of what is called natural law; and some color has recently been given to their contention by the mildness of the

<sup>7</sup> Works, ix, 449, letter to R. Burke, Esq.

<sup>8</sup> Prescription is applicable to the title to national property. Rhode Island v. Massachusetts, 4 Howard, 639.

<sup>9</sup> *Jur. Pub. Univ. Theorem*, p. iii, cap. VIII.

<sup>10</sup> *Précis*, § 70-1.

<sup>11</sup> §§ 6, 125. “Mamiani (p. 24)

denies the existence of international prescription, because it cannot exist ‘in faccia ai diritti essenziali ed irremovibili della persona umana,’ but, as the words quoted may suggest, he is thinking only of the relations of a dominant state to a subject population.” Hall, p. 125, note.

protest made against the annexation in 1871 of Alsace and Lorraine by Germany, acting under the influence of the growing sense of nationality which in that particular is clearly retrogressive.

§ 219. **Time necessary to establish international prescription.**—As there is no common law giver to enforce his authority upon all states it is impossible to fix the time necessary to establish international prescription with that exactness with which it is defined in municipal codes. In the absence of a general rule nothing more definite exists than the statement that a reasonable time must elapse before an adverse possession based upon prescription can ripen into a perfect title. As Vattel expressed it: “It is impossible to determine by the law of nature the number of years required to found prescription: this depends on the nature of the property in dispute and the circumstances of the case.”<sup>12</sup> In his outlines of an international code (§ 52) Field has proposed a positive rule requiring fifty years as the necessary period of a national prescription. In the absence of such a rule the lapse of time necessary for a generation to be born, educated and to come into possession of the powers and duties of the state has been suggested as a negative limit.

§ 220. **Title by conquest—Case of electorate of Hesse-Cassel.**—As title by prescription rests upon the single fact of long continued possession, so title by conquest rests upon the single fact that conquest in the military sense has ripened into conquest in the legal sense, without the aid of cession or transfer from the vanquished state. Conquest in the first sense is complete when the armies of one of the belligerent states, after having subdued those of the other, establish a control based on actual force. Conquest in the last sense is complete when the victorious state proclaims in a formal way the fact that it intends to add the conquered territory to its own dominions, and then for a sufficient length of time continues to exercise all the powers of sovereignty over it. As title by conquest thus consists in the appropriation of property through one act or a series of continuous acts, it is often difficult to determine when conquest in the legal sense has become so complete as to give to the doings of the new sovereign international validity. That difficulty, which the career of Napoleon presented in various forms, was fully discussed by the learned

<sup>12</sup> *Droit des Gens*, II, § 142.

in the famous case of the Electorate of Hesse-Cassel occupied by his troops in 1806, and transferred, after having been governed by him directly for about a year, to the newly formed kingdom of Westphalia that lasted until 1813, after having been expressly recognized by Prussia and Russia in the treaty of Tilsit, in 1807. Before the transfer Napoleon as sovereign confiscated the private property of the elector who, having taken service in the Prussian army, was proceeded against as a person in arms against the legitimate ruler of the state. In a suit subsequently brought by him in order to contest the validity of a discharge given by Napoleon of a certain debt due to him by mortgage, the question arose whether, at the date of the confiscation, Napoleon had in fact effected such a conquest as would uphold the exercise of that sovereign right. After the case, which began in the courts of Mecklenburg, had been appealed first to the University of Breslau, and then to two other German universities, it was finally held, (1) that the restored government of the elector could not be considered as a continuation of his former government because the kingdom of Westphalia had been recognized as its successor, and the electorate as politically extinct; (2) that the confiscation was legal because Napoleon had in fact effected such a conquest as authorized that sovereign act; (3) that even if the elector's property did revert with the conclusion of peace, as a restored owner, "according to the letter of Roman law," he had only the right to take it as he found it without compensation for damages suffered in the interval.<sup>13</sup> The government of the United States holds that a mere military conquest does not enlarge its boundaries;<sup>14</sup> such a possession of conquered territory is a purely military occupation until determined by treaty;<sup>15</sup> and not until its confirmation does the acquisition made under it become a part of the national domain.<sup>16</sup>

§ 221. Title by occupation—Effect of recent experience in Africa.—An effort has been made heretofore to explain the process through which the European nations attempted to reg-

<sup>13</sup> Schweickart, *Napoleon und die Kurh.*, pp. 8-104; Heffter, *Europ. Völker.*, §§ 186-188; Pfeiffer, *Das Recht der Kriegseroberung*, pp. 240-252; Rotteck und Welcker, *Staat's Lexikon*, tit., *Domainen-Käufer*; Zachariae, *ueber die Verpflichtung*; Phillimore, vol. iii, § 568-572; Halleck, *Int. Law*, p. 842. <sup>14</sup> Fleming v. Page, 9 Howard, 603. <sup>15</sup> American Ins. Co. v. Canter, 1 Peters, 542. <sup>16</sup> Ibid. 542; Leitersdorfer v. Webb, 20 Howard, 176.

ulate the partition of the New World through the application to their conflicting claims of the meagre and inadequate rules provided by Roman law for the acquisition of *res nullius* through *occupatio*. The conclusion reached was that the fatal defect inherent in the old doctrine of discovery and settlement consisted of its inability to provide any adequate or practical rule by which the extent of territory, constructively incident to actual settlements, could be precisely determined. The absence of any generally admitted criterion by which the area appropriated by an act of occupation could be defined necessarily precipitated boundary disputes which assumed gigantic proportions.<sup>17</sup> With the results of American experience clearly before their eyes the nations now participating in the partition of the continent of Africa have made a novel and far-reaching addition to the law of occupation which promises to remove its greatest defect. As the undiscovered portions of the earth's surface have become more and more circumscribed, the ancient contention that the discovery of previously unknown lands confers an absolute title upon the state under whose authority it is made has dwindled down into the doctrine, that, while discovery alone confers no proprietary right, it does confer upon the discoverer for a reasonable time an exclusive right of occupancy, and the inchoate title thus acquired is strengthened by the fact that it is based upon prior discovery.<sup>18</sup> According to modern practice the corner stones of effective international occupation are settlement and annexation;<sup>19</sup> and the questions of paramount importance concerning them are those involving the definitions of boundaries and the right of political incorporation.

§ 222. Chartered companies as colonizing agents.—There was nothing novel in the means employed for the appropriation and

<sup>17</sup> See above, p. 127 seq.

<sup>18</sup> "In the early days of European exploration it was held, or at least every state maintained with respect to territories discovered by itself, that the discovery of previously unknown land conferred an absolute title to it upon the state by whose agents the discovery was made. But it has now been long settled that the bare fact of discovery is an insufficient ground of proprietary right. It is only so

far useful that it gives additional value to acts in themselves doubtful or inadequate." Hall, § 32.

<sup>19</sup> "The best modern practice, and the views of the most acute and thoughtful publicists, give authority to the doctrine that effective international occupation is made up of two inseparable elements — annexation and settlement." Lawrence, Principles of Int. Law, § 93.

settlement of African soil. "Under the last of the Tudors and the first of the Stuarts, two trading charters were issued to two companies of English adventurers. One of these charters is the root of English title to the East, and the other to the West. One of these companies has grown into the Empire of India; the other into the United States of North America."<sup>20</sup> Just as Great Britain sent out the Virginia and East India companies in the early days of discovery and settlement, she has recently sent to Africa on a like mission the British East Africa Company, the British South Africa Company, and the Royal Niger Company. In the same way went forth the German East Africa Company, and the International Association of the Congo, which, under the direction of the king of the Belgians, undertook the philanthropic task of introducing commerce and abolishing the slave trade in the vast basin of that river. These *quasi* political bodies, to which their creators have delegated powers but little removed from those of sovereignty, are to a certain extent subjects of international law, (1) because vast areas of territory are committed to their control within which all forms of legislation and administration are carried on with only a nominal supervision from the parent state; (2) because to a limited extent they are permitted by the parent state to have certain "dealings" with foreign states. As an illustration, in 1889 the Queen in Council granted a royal charter of incorporation to the British South Africa Company conferring upon it—subject to the approval of the Secretary of State for the colonies, and the requirements of the High Commissioner in those parts—large powers of administration, with the right to promote emigration and colonization, trade and commerce, and to acquire by grant from the native inhabitants "any rights, interests, authorities, jurisdictions, and powers of any kind or nature whatever, including powers necessary for the purposes of government."<sup>21</sup> While the Colonial Secretary possesses the right to disapprove of "any of the dealings of the company with any foreign power," and to compel it to perform under his direction all obligations contracted by the Imperial Government with foreign powers, so far as they relate to its territory and activities, such safeguards have not always been sufficient to save the Imperial Government from the necessity of sending its own agents into

<sup>20</sup> Bryce, *The American Commonwealth*, vol. i, p. 416. *Statesman's Year Book for 1894*, pp. 193-195.

<sup>21</sup> *London Gazette*, Dec. 20, 1889;

the country to restore peace and order through the assumption of a large measure of control over the affairs of such companies.<sup>22</sup>

§ 223. **Protectorates—Extent of internal control and external obligation.**—In order to insure to appropriated and uncivilized regions a degree of peace and order which chartered companies can hardly be expected permanently to supply many governments have supplemented or superseded their control by the establishment of protectorates, a rather vague and indefinite form of political organization which differs from a colony in that the protected community neither becomes an integral part of the protecting state nor surrenders, except to a certain extent, the right to exercise internal sovereignty. As a general rule the power establishing a protectorate strives to secure such a limited right of control over the internal affairs of the dependent community as will enable it to discharge the external obligations assumed to foreign states. How far such obligations should extend is a matter of serious controversy. If the protecting state is under obligation to answer to other states for injuries inflicted upon their citizens by those under its protection, it certainly seems reasonable that it should be armed with jurisdiction to administer justice over all, whether subjects of other civilized states or not. That general right, believed to have been affirmed by all the states represented at the Berlin Conference of 1884-5 except Great Britain, and recognized, certainly by implication, in the General Act of the Brussels Conference of July, 1890, was expressly affirmed by imperial decree in 1888,<sup>23</sup> so far as the

<sup>22</sup> It has, therefore, been well said, by one who has done most to make this subject clear, that such a company, like Janus of old, has two faces. "On that which looks towards the native tribes all the lineaments and attributes of sovereignty are majestically outlined. On that which is turned towards the United Kingdom is written subordination and submission. We may extend the simile and make it apply to all the other chartered companies of which we spoke. They are sovereign in relation to the barbarous or semi-barbarous inhabitants of the dis-

tricts in which they bear sway. They are subject as regards the governments of their own states." Lawrence, *Principles of Int. Law*, p. 82. See also pp. 80-81; 166-167.

<sup>23</sup> *Reichs-Gesetzblatt* of March 15, 1888. From a decision of the Court of Cassation made Oct. 27th, 1893 (*Affaire Magny. et autres*), it may be inferred that that jurisdiction will be exercised as a matter of course in all French protectorates. "In all protectorates which are covered by the Africa Order in Council of 1889 jurisdiction can be taken over subjects of the powers which adhered to the

German protectorates are concerned, and by the Pacific Order in Council of 1893, and the South African Orders in Council of 1891 and 1894 in the districts to which they relate. As a compensation for the burden thus imposed upon the protecting state to guard other states against acts of hostility and depredation upon the part of its wards, and to secure to foreign subjects and their property a reasonable degree of security within the protected territory, it has the right to demand that all states which feel aggrieved by acts committed by those under its protection must appeal to it for redress and not attempt to exact it by force from the native rulers or peoples. Over the territorial waters of the protected state the protecting power has as between itself and foreign countries the right to exercise a control commensurate with the general scope of its jurisdiction and responsibility. It has been said that there is now a tendency to regard the inhabitants of protected districts as subjects of the protecting state for international purposes; and that when that point is reached protectorates will differ in no wise from ordinary provinces or colonies. During the intervening period of transition they certainly may be regarded as training schools for those who, if they fail to establish complete political independence, must expect to submit to complete political incorporation.

§ 224. **Spheres of influence—Prevention of conflicts as to boundaries.**—The one new and hopeful expedient in the interest of peace which the partition of Africa has added to the law of occupation is embodied in the device recently agreed upon in various forms by Great Britain, Germany, France, Italy, Portugal and other nations for the prevention of future conflicts as to boundaries. With the history of such conflicts in America to guide them a systematic effort has been made by many powers to prevent their recurrence in Africa through international treaties of delimitation which define in advance the "sphere of influence" through which the growing settlements of any given state may extend. From the sphere thus defined the dominant state has the right to exclude other European states through their own consent, thus leaving the field clear for the free development of its chartered companies and protectorates. The power thus conferred over a given area is an excluding power and not one of entire and direct

control over the affairs of the sphere, either internal or external. The foundations of the new system were outlined when the states represented<sup>24</sup> in the West African Conference at Berlin declared in 1885 that "any power which henceforth takes possession of a tract of land on the coasts of the African continent outside of its present possessions, or which being hitherto without such possessions shall acquire them, as well as the Power which assumes a Protectorate there, shall accompany the respective act with a notification thereof, addressed to the other Signatory Powers of the present act, in order to enable them, if need be, to make good any claims of their own;" and "the Signatory Powers of the present Act recognize the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African continent sufficient to protect existing rights, and as the case may be, freedom of trade and transit under the conditions agreed upon."<sup>25</sup> In the next year conventions were concluded between Portugal and Germany and Portugal and France; and in July, 1890, when Great Britain and Germany entered into important agreements as to the extent of their respective possessions it was expressly stipulated, that "one power will not in the sphere of the other make acquisitions, conclude treaties, accept sovereign rights or protectorates, nor hinder the extension of the influence of the other." In 1891 like arrangements were concluded between Great Britain and Portugal and between Great Britain and Italy, and in 1893 between Great Britain and Germany.<sup>26</sup> The nations colonizing on the coasts of Africa,<sup>27</sup> which have thus reduced to a minimum the chances of conflicts as to boundaries, when the growing populations

<sup>24</sup> Austria, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden and Norway, Turkey and the United States.

<sup>25</sup> General Act of the Berlin Conference, Arts. 34, 35; Parl. Papers, Africa, No. 4, 1885.

<sup>26</sup> Cf. Lawrence, Principles of Int. Law, § 95, and also Walker, Science of Int. Law, p. 161.

<sup>27</sup> As the treaty stipulations in question apply only to the African coasts, questions as to the extent of interior occupations, even on

that continent, will have to be determined by the customary law of nations as heretofore. "Prince Bismarck's conception of the customary law is shown by an expression of wish uttered by him at the opening of the Berlin Conference. 'Pour qu'une occupation soit considérée comme effective, il est à désirer que l'acquéreur manifeste, dans un délai raisonnable, par des institutions positives, la volonté et le pouvoir d'y exercer ses droits et de remplir les devoirs qui en résultent.' (Parl. Papers, Africa, No. 4, 1885, p. 3.)"



within their respective spheres shall eventually touch each other, have of course no power to bind those states that have not made themselves parties to such stipulations. And yet the new rule thus established by all who have actually participated in the partition of Africa possesses a growing moral force which will no doubt develop it there, as the Monroe doctrine has been developed here, into a positive canon of international law.<sup>28</sup>

**Status of native African races.**—In dealing with the native races of Africa, the European nations have, in one respect, simply repeated the history of their dealings with like races in this hemisphere. In their partition treaties with each other the natives are ignored as persons whose rights are entirely subordinate to those of the Christian invaders. Despite the assumption, however, that undeveloped communities possess no status which international law can recognize, the states now colonizing Africa are generally careful to make treaties with the native states or tribes, or to obtain concessions from their chiefs before entering into possession of their territories. When technical rules fail, considerations of morality and justice suggest that the new paternal regime shall not only be founded on some show of right but shall be conducted with fairness and consideration.

§ 225. **Title by accretions—Case of the Anna.**—When the territory of a state abuts upon the sea, or when it is bounded by a river, the action of water may create new formations the titles to which are determined by rules drawn in the main from Roman jurisprudence.<sup>29</sup> Where islands are formed off the coast of a state by alluvion, volcanic action or other cause, they become a part of the state to which the coast belongs, although formed outside of prior territorial limits. The coast line is thus moved out into the sea, and from the limits of the new formation the extent of territorial waters must be esti-

<sup>28</sup> Hall, p. 120, note 1. He is clearly right in characterizing as premature Holtzendorff's statement (1887, *Handbuch*, ii, § 55) that "Der grundsätzlich entscheidende Gesichtspunkt ist dieser: Kein Staat kann durch einen Occupationsact mehr Gebiet ergreifen, als er mit seinen effectiven Herrschaftsmitteln an

Ort und Stelle ständig in Friedenszeiten zu regieren vermag." The strict application of that principle, Hall says, would deprive Germany of the larger part of the territory which she claims in Southwest Africa and New Guinea.

<sup>29</sup> Justinian, *Inst.*, II., i, 20-24; *Digest*, XLI., i., 7, 29, 65.

mated. Such was the judgment of Lord Stowell in the famous case of the *Anna*,<sup>30</sup> seized off the mouth of the Mississippi, within three miles of certain low mud islands formed from the alluvial wash and debris of that river, which were uninhabited and uninhabitable, but more than three miles from the Belize, the extreme point of the main land. "It is argued that the line of territory is to be taken only from the Belize, which is a fort raised on made land by the former Spanish possessors. I am of a different opinion. I think that the protection of territory is to be reckoned from these islands, and that they are the natural appendages of the coast on which they border, and from which, indeed, they are formed." One of the main reasons given for the conclusion reached was that if the islands in question "do not belong to the United States of America, any other power might occupy them; they might be embanked and fortified." That line of reasoning gives great cogency to the suggestion that the same rule should be employed in determining the limits of territorial waters off the coasts of Florida, among the Bahamas, along the shores of Cuba, and in the Pacific where "are to be found groups of numerous islands and islets rising out of vast banks, which are covered with very shoal water, and either form a line more or less parallel with land or compose systems of their own, in both cases enclosing considerable sheets of water, which are sometimes also shoal and sometimes relatively deep. \* \* \* There can be little doubt that the whole Archipiélago de los Canarios is a mere salt water lake, and that the boundary of the land of Cuba runs along the exterior edge of the banks."<sup>31</sup>

§ 226. **Right to new formations when rivers are boundaries.**—Where a river constitutes the boundary between two states questions may arise as to the right to new formations either when deposits are made upon the banks or in the bed of the river, or when it entirely changes its course. In such cases the just rules of Roman law defining the effect of such changes upon private riparian ownership have been adopted as rules of public law applicable to states. If lands of two riparian owners, no matter whether states or private individuals, lie upon opposite sides of a stream their ownership extends to the mid-channel or thalweg.<sup>32</sup> All gradual alluvial deposits on either

<sup>30</sup> 5 C. Rob. Adm. 373. See also *lacs frontières, dont la rive opposée est également occupée, leur* Snow, Cases, p. 393.

<sup>31</sup> Hall, pp. 129-30.

<sup>32</sup> "Pour ce qui est des fleuves et *milieu, y compris les îles que traverse la ligne du milieu, sépare ordi-*

bank belong to its owner; and if a mass of one river bank be violently torn away the original proprietor does not lose his right to it unless it is immovably fixed to the bank on the other side. If a river forming a boundary between two states gradually and silently changes its course its bed<sup>33</sup> continues to mark the dividing line, the exposed soil accruing to the owner of the bank to which it is annexed. If such a river suddenly changes its course and forms a new channel wholly within the territory of one of the states, no change of ownership occurs because the deserted bed is apportioned equally between the former riparian owners. And the same thing is true of a lake belonging wholly to one state which suddenly overflows into the lowlands belonging to another. The new land belongs to the nearest state regardless of the nature of its soil, as the right to dominion does not depend upon that fact. Where the bed of a river belongs equally to bordering states, an island formed wholly on one side of the deepest channel belongs to the state owning the nearest shore. If it arises in the middle of the stream, it is divided between the two proprietors by a line of separation following the original center of the channel. When a fixed line constitutes the boundary between two states each is entitled to the accretions made on its side of such line.<sup>34</sup>

§ 227. Title by cession—Just compensation for conquered territory.—No matter whether territory of a state is acquired

naiement les territoires. Au lieu de cette ligne ou a nouvellement choisi pour frontièr le *thalweg*, c' est à dire le chemin variable que prennent les bateliers, quand ils vont aval, ou plutôt le milieu de ce chemin." Kluber, *Droit des Gens*, § 133. The more accurate and more equitable boundary of the *midchannel* or *thalweg* employed by modern publicists is to be preferred as a line of demarcation to that described by the older writers as the *middle of the river*. See Grotius, II. c. 3, § 18; Vattel, I. c. 22, § 266.

<sup>33</sup> In the disputed boundary case of the State of Alabama v. State of Georgia (23 Howard, 505), in which a State was held to have ownership of soil and jurisdiction

in the bed of a river, such bed was so defined as to include "that portion of its soil which is alternately covered and left bare as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn." It was also held that "in such places on the river where the western bank is not defined, it must be continued up the river on the line of its bed, as that is made by the average and mean stage of the water," as defined above.

<sup>34</sup> Grotius, II. c. 3, § 16; Vattel, I. c. 22, § 268-269; Phillimore, I. §§

by prescription, conquest, occupation or accretion it may be given away, sold or exchanged by means of a treaty of cession in which is usually embodied all of the special stipulations and conditions incident to the transfer. While such cessions are not common, nations anxious to conciliate others have sometimes made gifts of territory as manifestations of good will. In that way the colony of Louisiana was ceded by France to Spain in 1762 as indemnity for the loss of Florida transferred to England by the treaty of Paris;<sup>35</sup> and in 1850 Great Britain ceded to the United States a part of the Horseshoe reef in Lake Erie for lighthouse purposes.<sup>36</sup> As instances of cessions for valuable considerations reference may be made to the transfers to the United States of Louisiana from France in 1803; of Florida from Spain in 1819; and of Alaska from Russia in 1867.<sup>37</sup> In the treaty of Berlin, 1878, Roumania returned to Russia that portion of Bessarabia secured at her expense through the treaty of Paris, 1856, in exchange for the Dobrontcha taken from Turkey.<sup>38</sup> It is far more usual, however, for cessions of territory to be made from one state to

238-40; Halleck, I, 146; Calvo, § 294; Bluntschli, §§ 295-299; Creasy Int. Law, 241, 249; Martens, *Précis*, § 39; Twiss, I, § 147; 8 Opinions of Atty. Gen'l, 175.

<sup>35</sup> See above, p. 109.

<sup>36</sup> Treaties of the United States, p. 444.

<sup>37</sup> The Supreme Court of the United States has laid down the following rules for the construction and interpretation of treaties of cession:

The laws applicable to treaties of cession do not apply to treaties for the recognition of independence, such as that of 1783, with Great Britain. *Harcourt v. Gaillard*, 12 Wheaton, 523.

The stipulation in the treaty of cession of Louisiana for the protection of the inhabitants of the ceded territory in the enforcement of their liberty, property, and religion ceased when Louisiana became a member of the Union and its inhabitants were "admitted to the enjoyment of all the rights,

advantages and immunities of citizens of the United States." *City of New Orleans v. Armas*, 9 Peters, 224.

A treaty of cession is to be construed in accordance with the state of things existing at the time. *Strother v. Lucas*, 12 Peters, 410.

A treaty of cession is a deed or grant by one sovereign to another, which transfers nothing to which he had no right of property, and only such right as he owned and could convey to the grantee. *Mitchel v. U. S.*, 9 Peters, 711.

A guarantee in a treaty of cession of vested rights in the ceded territory covers only rights which emanated from a prior rightful sovereign. *U. S. v. Pillerin*, 13 Howard, 9. Such a guarantee covers inchoate as well as matured rights. *Delassus v. U. S.* 9 Peters, 117; *Strother v. Lucas*, 12 Peters, 410.

<sup>38</sup> Holland, *European Concert in the Eastern Question*, p. 302. For a more extended list of cessions

another at the end of a war in which the victor profits at the expense of the vanquished. Such was the nature of the cession in 1871 of Alsace and part of Lorraine by France to Germany.<sup>39</sup> At the close of the Mexican war, in 1847, the government of the United States inaugurated a new policy which should certainly commend itself to all humane and justice-loving nations. The sum of fifteen millions of dollars was voluntarily paid to the conquered state as fair compensation for the cession of territory exacted of it.<sup>40</sup> The stipulations contained in treaties of cession vary of course with each particular case, but in such arrangements it is usual to provide for the transfer along with the ceded district of its proportionate share of the public debt of the dismembered state; and also for such guarantees as can be obtained in favor of the rights to be enjoyed by the inhabitants under the new regime to which they are committed.<sup>41</sup>

§ 228. Territorial waters—Exclusive right to use great rivers.—The public domain of every state is made up in part of its territorial waters, a term used to describe such rivers, bays, gulfs and straits as are wholly within its limits and subject to its exclusive jurisdiction. A notable instance of the assertion of the right of a state to enjoy the exclusive use of a great river entirely within its bounds, and to prohibit such use to all other states, is that embodied in the claims of the United States over the Mississippi after the cessions of Louisiana and Florida had placed it in the midst of the territory of

by sale, gift, exchange and will, see Phillimore, i, § cclxviii-lxx and cclxxv; Calvo, §§ 225-8.

<sup>39</sup> Treaty of Frankfurt, Hertslet, Map of Europe by Treaty, III., 1955. Treaties of the U. S., p. 681.

<sup>40</sup> Art. XII of the Treaty of Guadalupe Hidalgo, proclaimed July 4, 1848, provides that "in consideration of the extension acquired by the boundaries of the United States, as defined in the fifth article of the present treaty, the government of the United States engages to pay to that of the Mexican Republic the sum of fifteen millions of dollars."

and in some of the old ones (e. g., those of Ryswick and Utrecht), to secure to the inhabitants of the ceded territory liberty to keep their nationality of origin, coupled with the condition that within a certain time adequate for the settlement of their affairs they shall retire within the territory remaining to their state of origin. See Treaties of Vienna in 1809 (Martens (N. R.) i, 214), of Paris in 1814 (id. ii, 9), of Vienna in 1864 (N. R. G. xvii, ii), of Zurich in 1859 (id. xxvi, ii), of Turin in 1860 (id. 540), and of Frankfort in 1871 (id. xix, 689). The limits of time range from one to six years.

<sup>41</sup> It is usual in modern treaties,

the Union. "Since then the exclusive control of the river by the United States, so far as concerns foreign states, has been conceded internationally; though, subject to police supervision and to the right to impose pilotage and quarantine regulations, the free navigation of this and of other navigable rivers within the United States is, by the law of nations, accepted by the United States, open to all ships of foreign sovereigns."<sup>42</sup>

§ 229. Bays, gulfs or recesses in coast line—Curtailement of unreasonable claims.—In the absence of any generally acknowledged standard as to their size and conformation it is difficult to determine in any given case whether or no a bay, gulf, or recess in a coast line can be justly regarded as territorial water. England once claimed the inclosed parts of the sea along her coasts known as the King's Chambers, including the waters within lines drawn from headland to headland;<sup>43</sup> the entire Bristol Channel between Somerset and Glamorgan is probably considered British territory;<sup>44</sup> and the Privy Council has lately held that the Bay of Conception, which is fifteen miles wide and which penetrates forty miles into the interior, is a part of the territorial waters of Newfoundland.<sup>45</sup> Germany and France are inclined to limit their claims to such bays, gulfs and recesses as are not more than ten miles wide at their entrance, measured in a straight line from headland to headland. The latter claims, however, the whole of the oyster-beds in the Bay of Cancale, the entrance to which is seventeen miles wide,—the cultivation of such beds by local French fishermen making the case exceptional. At an earlier day the United States was inclined to claim dominion over a wide extent of the adjacent ocean. "Considering," says Chancellor Kent, "the great extent of the line of the American

<sup>42</sup> Wharton, *Int. Law Dig.*, § 30. See also Lawrence's *Wheaton*, n. 114, p. 361; Twiss, i, § 141.

<sup>43</sup> James I made a proclamation as to these chambers in 1604, and their limits, including considerable areas, were "arrived at by a jury of twelve sworn for the purpose, and their finding was presented to Sir Julius Cæsar, Judge of the Admiralty, on March 4, 1604." Walker, *Science of Int. Law*, p. 170, note 3. While the ancient claim of Great

Britain within such limits has been forgotten, it has never been formally withdrawn.

<sup>44</sup> Such seems to have been the decision in *Reg. v. Cunningham*, *Bell's Crown Cases*, 86. "Possibly, however, the court intended to refer only to that portion of the channel which lies within Steepholm and Flatholm." Hall, p. 162, note 2.

<sup>45</sup> *Direct U. S. Cable Co. v. Anglo-American Tel. Co.*, 2 *App. Cas.* 394.

coasts, we have a right to claim for fiscal and defensive regulations a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume for domestic purposes connected with our safety and welfare the control of waters on our coasts, though included within lines stretching from quite distant headlands,—as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of Florida to the Mississippi.”<sup>46</sup> While Chesapeake and Delaware bays and other inlets of a like character are still considered as territorial waters,<sup>47</sup> the general policy of this government, conforming itself to the opinion of the civilized world, clearly tends towards the curtailment of any unreasonable claim to jurisdiction outside of the marine league.<sup>48</sup>

§ 230. Straits less than six miles wide an exception.—There is a general disposition to regard all straits only or less than six miles wide as wholly within the territory of the state or states to which their shores belong. When they have more than that width the space in the center outside of the marine league limits is considered as open sea. As a notable exception, however, to the general rule that territorial rights cannot be extended over straits more than six miles wide reference may be made to the final settlement of the northwest boundary line between Great Britain and the United States originally provided for in the treaty of 1846,<sup>49</sup> which declared that such line should follow the forty-ninth parallel of latitude to the middle of the strait separating Vancouver’s Island from the continent, and thence down the middle of the Strait of Fuca to the Pacific. When disputes as to the title to certain islands arose the boundary question was submitted under the treaty of 1871<sup>50</sup> to the arbitration of the German emperor; and in 1873 a protocol, signed for the purpose of carrying out his decision, extended the line for fifty miles to the Pacific through the middle of a strait fifteen miles wide, after passing it across a body of water thirty-five miles long and twenty miles wide.<sup>51</sup>

<sup>46</sup> Comm, i, 30.

<sup>47</sup> Wharton, Int. Law Dig., §§ 27, 28. When in 1793 the English ship *Grange* was captured by a French vessel, in Delaware Bay, it was restored upon the ground of the territoriality of its waters. Am. State Papers, i, 73.

<sup>48</sup> See above, p. 137.

<sup>49</sup> Treaties of the U. S., p. 438.

<sup>50</sup> Treaties of the U. S., p. 478.

<sup>51</sup> For the award and protocol, see *Compilation of Treaties in force*, 1899, pp. 255-258. See also, *Parl. Papers, North Am.*, No. 10, 1873.

§ 231. Territorial waters connecting parts of high seas—Denmark's "Sound dues."—When the territorial waters of a state, no matter whether an appropriated strait or marginal waters, form a channel of communication between two parts of the high seas, they are subject to the right of innocent passage in favor of all mankind for the purposes of necessary or convenient commercial navigation. In the days when the principle was admitted that the sea was subject to appropriation certain powers that owned narrow waterways claimed the right to exact tolls from foreign vessels passing up and down the straits. The most ancient and the most notable of such claims was that of Denmark, which enforced the prescriptive right to collect what were known as "Sound dues" upon the vessels of other powers passing to and fro from the North Sea to the Baltic through the Sound or the two Belts.<sup>52</sup> During the Middle Ages those who were subjected to such exactions often negotiated treaties with her to regulate their amount, and when they were increased to an excessive point, Sweden, Holland and the Hanse Towns went to war on that account.<sup>53</sup> Finally, under the growing pressure for free passage through all territorial waters that are channels of communication, Denmark, despite her prescription of five centuries, was forced in 1857 to surrender the Sound dues through the treaty of Copenhagen, in exchange for which the leading maritime states of Europe paid her a large pecuniary indemnity, received in the form of compensation for the future maintenance of buoys and lights.<sup>53a</sup> In the same year the United States, by a separate

<sup>52</sup> As early as 1319 a charter regulated the dues to be paid by the Dutch; in a treaty made in 1490 with Henry VII English vessels were forbidden to pass the Great Belt as well as the Sound, except in case of necessity, and then only upon the payment of certain dues; and in the treaty concluded in 1544 with the Emperor Charles V it was stipulated that merchants of the low countries visiting Danish ports should pay the same dues as formerly.

<sup>53</sup> The result was that in 1645, through the treaty of Christianstadt, Sweden was exempted from the tolls, the amount of which

was for the first time definitely ascertained for the benefit of those who remained liable to them. In another treaty made between Denmark and the United Provinces of the Netherlands in 1701 all remaining obscurities were removed. These two treaties of 1645 and 1701 continued as the standards by which the rates due from privileged and non-privileged nations were measured. Wheaton, *Hist. Law of Nations*, 158-161; Schlegel, *Staats-Recht des Königreichs Dänemark*, 1 Th. Kap. 7, §§ 27-29.

<sup>53a</sup> Martens (N. R. G.) xvi, 331-345.



convention, became a party to the general settlement by agreeing to pay three hundred and ninety-three thousand and eleven dollars in consideration of Denmark's declaration that the Baltic should be open to American ships.<sup>54</sup>

§ 232. **Rights of war vessels in territorial waters.**—There seems to be no good reason to doubt that the right of innocent passage, when claimed by vessels of states at peace with the territorial power, extends as well to vessels of war as to merchantmen, when the former are content to abstain from all illegal acts and to observe all reasonable regulations. The same principle that regulates the treatment of ambassadors applies to the reception of foreign men-of-war within territorial waters. No state has the right to forbid their passage through its straits from sea to sea even when they purpose to attack an enemy's vessel, or to bombard or blockade his ports. It has been held that the passage of a belligerent man-of-war over neutral territorial waters in nowise vitiates a capture subsequently made on the high seas or in seas under belligerent control. So long as they commit no hostile acts within territorial waters, or so near them as to endanger the peace and security of the people of the state to which they belong, their passage is "innocent,"—since that word, as used in the phrase "right of innocent passage," refers to the character of the passage and not to the nature of the ship.

§ 233. **Free riverain navigation—Rights of upper states.**—The tendency to relieve modern commerce from all restrictions upon the right to free navigation of the seas, which forced the abolition of the Sound dues, has been for a long time steadily demanding the free navigation of all rivers separating or passing through different states. One extreme school denies that the right of riverain navigation ever existed at all upon the general principle that a state possesses such absolute proprietary rights over its own territory that it may exclude the vessels of all other powers from its own section of a waterway.<sup>55</sup> Another declares that in time of peace all

<sup>54</sup> Treaties of the U. S., p. 238. The government of the U. S. refused to become a party to the general convention signed by the five powers on the Baltic and North Sea (1) because it did not care to recognize the right of Denmark to levy the Sound dues; (2) because

it did not care to involve itself in a question of purely European policy, a question involving "the balance of power among the governments of Europe."

<sup>55</sup> e. g. Twiss, I, § 141. When the river is wholly within the territory of a single state undoubt-

navigable rivers in communication with the sea are open to the navies of all nations.<sup>56</sup> Between the two stands a third, which holds that when a navigable river flows in part of its course through the territory of one state and in part through that of another, those who live upon its upper waters have an imperfect or moral right to use that portion of it beyond their own bounds.<sup>57</sup> In other words no matter how great the wants or necessities of the upper state, or how moral its action might be, international law, from the standpoint of strict legal right, is forced to regard any attempt upon its part to force a passage to the sea across the territory of another state as a trespass because that other has the legal right to open or close its part of the river at will, or to tax or otherwise regulate transit over it as its policy may dictate.

§ 234. How the Great European rivers were emancipated—the Rhine.—Upon that theory the navigation of all the great European rivers, running through the territories of more than one state, was subjected to tolls and other dues down to the beginning of the present century. Such were the conditions under which the attempt was made to regulate the use of the navigable rivers of the continent through the establishment of a conventional law by which all tolls and dues were either to be abolished or reduced by common consent to a uniform system.<sup>58</sup> At the very beginning of modern international law

edly "il est considéré comme se trouvant sous la souveraineté exclusive de ce même état." Calvo, § 229. See also Holtzendorff, Enc., 1223, citing Wurm, *Briefe über die Freiheit der Flusschiffahrt*, 1858; Caratheodory, *Du droit int. concernant les grands cours d'eau*, 1861; Engelhard, *Du regime conventional des fleuves*, 1870.

<sup>56</sup> e. g. Bluntschli, who says (§ 314) "les fleuves et rivières navigables qui sont en communication avec une mer libre sont ouverts en temps de paix aux navires de toutes les nations."

<sup>57</sup> Grotius, *De Jure Bcl. ac Pac.*, II, cap. 2, §§ 12, 14; cap. 3, §§ 7-12; Vattel, *Droit des Gens*, II, cap. 9, §§ 126-130; Puffendorf, *De Jur. Naturae et Gentium*, III, cap. 3. § 8; Martens, *Précis*, § 84; Heffter, §

77; Calvo, § 230; Fiore, §§ 758, 768; Wheaton, § 193.

<sup>58</sup> It seems to be generally admitted that the common right of navigation, even if it exists, is subject to certain rights in the local proprietor: "sauf entente amiable entre eux, par voie de stipulations conventionnelles, pour l'exercice de ce même droit, qui peut, suivant les circonstances, affecter la sécurité du pays en possession des deux rives de l'embouchure." Calvo, § 230. Halleck says that the common right of commercial navigation is subject to such provisions as are necessary to secure "the safety and convenience" of the several states interested, i, 147-8. See also "Conventional Law of Europe as to the Great Rivers," Twiss, I, § 145.

the fact was recognized that all such matters should be made the subject of convention, and for that reason in the treaty of Westphalia, 1648, the navigation of the river Scheldt was closed to the Spanish Netherlands in favor of the Dutch, and so remained until it was forcibly opened upon the occupation of Belgium by the French in 1792.<sup>59</sup> At the instance of the French government it was that the first step towards the freeing of river traffic was taken when, in 1804, the various Rhine tolls were abolished at the Congress of Rastatt by the convention. The good work thus begun was greatly advanced by a declaration in the treaty of Paris, 1814, that the navigation of the Rhine should be free to all the world, and that the then approaching congress to be held at Vienna should examine and determine how the navigation of other rivers should be opened and regulated.

§ 235. Final act of Vienna Congress—Commercial use of Danube.—Thus it was that, by an Annexé (xvi) to the Final Act of that congress, the free navigation of the Rhine was confirmed “in its whole course, from the point where it becomes navigable to the sea, ascending or descending;” and like provisions were made for the navigation of the Neckar, the Moselle, the Main, the Scheldt, and the Meuse, subject only to police rules and such moderate dues as would compensate the several riparian states for their expenditures upon such waterways.<sup>60</sup> Beyond such conventional arrangements the Congress of Vienna did not go; no general declaration was made in favor of the abstract right of free navigation of all rivers separating or traversing the territories of different states.<sup>61</sup> Through the efforts of a mixed commission, which completed its work in 1821, the free navigation of the Elbe was established among

<sup>59</sup> For the subsequent arrangements for the free navigation of the Scheldt made in the treaties of Vienna, and in the treaty of 1831 for the separation of Holland from Belgium, see Wheaton, *Hist. Law of Nations*, 282-285, 552.

<sup>60</sup> For a list of conventions regulating the navigation of rivers separating or passing through different states, see Heffter, *Appendix viii*.

<sup>61</sup> Neither was the principle of

free navigation applied to rivers lying wholly within one state. Martens (R.) viii, 261 and (N. R.) ii, 427, 434. For the real intention of the treaties of Paris and Vienna as to the freedom of river navigation, see M. Englehardt, in the *Revue de Droit International* (xi. 363-81), who says “les libertés fluviales, telles qu’on les pratique aujourd’hui, sont essentiellement conventionnelles.”

the states interested in the commerce of that river.<sup>62</sup> By the treaty of Bucharest, 1812, and that of Adrianople, 1829, it was provided that the commercial use of the Danube should be enjoyed in common by the subjects of Russia and Turkey; and, in 1856, by the treaty of Paris, this, the last of the great European rivers to be emancipated, was brought under the general system established by the Congress of Vienna, and a commission established for the execution of necessary engineering works at its mouth, the expense of which was to be paid out of a levy of tolls to be imposed for that purpose.<sup>63</sup>

§ 236. **Navigation of Mississippi as regulated by treaties of Paris and San Lorenzo.**—The navigation of the greatest arterial river of the North American continent was made the subject of conventional regulation in the treaty of Paris, 1763, wherein the province of Canada was ceded to Great Britain by France, and that of Florida to the same power by Spain, and the boundary between the British and French possessions declared to be a line drawn through the channel of the Mississippi from its source to the Iberville, and thence through the latter and the lakes Maurepas and Ponchartrain to the sea. In that treaty the right to navigate the border river from its source to the sea through the passages at its mouth was secured to British subjects free from the right of visit or the payment of any dues whatsoever. That condition of things was entirely changed when, in 1769, Spain took possession of Louisiana and New Orleans, ceded to her by France in the secret treaty of November 3, 1762, and of Florida retroceded to her by Great Britain in the treaty of Versailles, 1783.<sup>64</sup> Spain thus possessed of both banks of the Mississippi for some distance above its mouth set up in full force against the United States after its independence the European doctrine that the upper inhabitants of a river have no perfect legal right to insist upon a passage to the sea if the state in entire possession of the intervening district sees fit to withhold it. In order to answer that contention American publicists were forced to fall back upon the abstract reasoning by which Grotius<sup>65</sup> and some of his successors had attempted to

<sup>62</sup> Neumann, iv, 613; Martens (N. R.), v, 714.

<sup>63</sup> Holland, *European Concert in the Eastern Question*, 248-250, 308.

<sup>64</sup> See above, pp. 109, 111. See also Calvo, *Recueil complet des traités*,

II, p. 363; Ch. de Martens (R.), I, p. 33.

<sup>65</sup> *De Jur. Bel. ac Pacis*, II, cap. 2, §§ 11-13; cap. 3, §§ 7-12; Puffendorf, III, cap. 3, §§ 3-6; Wolf, *Just.*, §§ 310-312; Vattel, I, § 292; II, §§

establish the right of passage over territory, whether by land or water, as one of the natural rights reserved for the general advantage of all mankind when separate property was originally established. While that cogent argument had never received positive sanction in European experience, either medieval or modern, it proved effective; and in 1795 the treaty of San Lorenzo el Real<sup>66</sup> was concluded wherein Spain conceded the free navigation of the Mississippi from its source to the ocean to the citizens of the United States, who were permitted to deposit their goods at the port of New Orleans, and to export them subject to no other duty or demand except the hire of warehouses.

§ 237. **Navigation of St. Lawrence as regulated by treaties of 1854 and 1871.**—A second radical change of conditions occurred when, through the acquisition of Louisiana in 1803 and Florida in 1819, the United States became possessed of both banks of the Mississippi, thus transferred to that class of rivers over which a single state may exercise exclusive control. So nearly was that result reached by the purchase of Louisiana alone that the treaty of Ghent,<sup>67</sup> 1814, omitted all reference to the right of British subjects to navigate it,—a right which article 8 of the treaty of Versailles, 1783, had secured for the equal benefit of “the subjects of Great Britain and the citizens of the United States.” Despite the fact that the former power, when she possessed only a small district in which the Mississippi took its rise, had claimed the right to navigate its entire course to the sea, she contended when the right to navigate the St. Lawrence was in question that although the United States was in possession of the southern shores of the great lakes and the river to the point at which the boundary line intersects the same, it had no right to navigate its lower waters embraced entirely within its territory. “On the ground that she possessed both banks of the St.

123-139. The Roman jurists considered certain things incapable of appropriation by their very nature. Et quidem naturali jure communia sunt omnium hæc, aer, aqua profluens, et mare, et per hoc litora maris. Justinian, Inst. II. tit. 1, § 1.

<sup>66</sup> Martens (R.), VI, p. 561. La libre navigation du Mississippi est un fait consommé depuis 1795;

cependant les débats auxquels elle a donné lieu entre le gouvernement de l'Espagne et celui des Etats-Unis constituent un des précédents les plus précieux relatifs à la navigation des fleuves.” Calvo, *Le Droit Int.*, § 223.

<sup>67</sup> Hertslet, Map of Europe by Treaty, II, p. 378; Martens (N. R.) II, p. 76.

Lawrence where it disembogues itself into the sea, she denied to the United States the right to navigation, though about one-half of the waters of Lakes Ontario, Erie, Huron and Superior, and the whole of Lake Michigan, through which the river flows, were the property of the United States.”<sup>68</sup> Thus did Great Britain change places with Spain by the assertion of an exclusive right over the lower waters of the St. Lawrence against the immediate interests of a growing population inhabiting at least eight states of the American Union, and the territory of Michigan besides. The pressure of such great interests gave a fresh force to the argument that the claim of exclusive control over lower waters was opposed to natural right; and in that way the controversy, actively in progress in 1826, was adjusted by the reciprocity treaty<sup>69</sup> of 1854, which opened the navigation of the river, as well as the canals of Canada, to the United States on the same conditions imposed on British subjects, in exchange for a concession in favor of such subjects to navigate Lake Michigan. Although that treaty ceased to exist March 17, 1866, under resolution of Congress of January 18, 1865, Great Britain did not, after that time, insist on the exclusive right of navigation, and finally by treaty of Washington,<sup>70</sup> 1871 (art. xxxi), that right, so far as the British portion of the river is concerned, was secured “forever” to citizens of the United States.

§ 238. **Opening of South American rivers.**—The South American rivers, which as a general rule were subject to the old principle of exclusion, have been gradually opened to navigation through conventions. The La Plata river system, closed to foreign ships until 1853, was opened as to the Parana and Paraguay, in so far as they lie in Argentine territory, to the ships of all nations by treaties made in that year with England, France, and the United States; and by another treaty made in 1855 the free navigation of the Parana and Uruguay was conceded “to the merchant vessels of all nations”—a declaration repeated as to all three rivers, from their entrance into the La Plata to interior ports, in a convention made with Brazil, 1857. In 1853 Uruguay opened its rivers to all nations, and granted to England and France the free navigation of the Paraguay as far as Assumption,—stipulations repeated

<sup>68</sup> President Grant's second annual message, 1870. See also Philimore, *Int. Law*, 3d ed., 245. p. 448; Hertslet, IX, p. 998; Martens-Samiver, III, pt. 1, p. 498.

<sup>70</sup> Treaties of the United States,

<sup>69</sup> Treaties of the United States, 478.

by Paraguay in treaties made in the same year with the same powers, and in 1859 with the United States. Before the opening of the La Plata river system began Brazil agreed, in a treaty with Peru in 1851, to extend to the navigation of the Amazon the principles of river regulation laid down by the Congress of Vienna. But even that limited arrangement was suspended for some years, and the great river remained closed not only to non-riparian states but to Ecuador down to 1867 when, under a decree made by the emperor of Brazil, the Amazon, the Tocantins and the San Francisco, so far as he had power to regulate the subject, were opened to the merchant vessels of all nations.<sup>71</sup>

§ 239. **Opening of Alaskan and African rivers.**—By the treaty of Washington, 1871, the rivers of Alaska, rising in British territory and running into our own, were opened to both nations;<sup>72</sup> and by the Final Act of the West African Conference, 1884-85, it was provided that the Congo and Niger and their tributaries should be free to all, under an international commission, without exception or discrimination.<sup>73</sup> So completely has the narrow doctrine of earlier times given way during the present century to the necessities of commerce and free intercourse that Field has been able to state the rule for the future as follows: “A nation and its members, through the territories of which runs a navigable river, have the right to navigate the river to and from the high seas, even though passing through the territory of another nation, subject, however, to the right of the latter nation, to make necessary or reasonable police regulations for its own peace and safety.”<sup>74</sup>

§ 240. **Incidental right to use river banks.**—The right to navigate a river carries with it as an incident the right to use the shores, so far as that may be necessary to the enjoyment of

<sup>71</sup> Hertslet, Map of Europe by Treaty, IX, p. 191, 601; De Clercq., IV, p. 303; Martens-Samiver, IV, pt. 1, p. 249; Calvo, §§ 227, 228, 229; Wharton, Int. Law Dig., §§ 30, 40, 157, 321. In the authorities cited are contained the details as to like conventions made about the same time by Bolivia and Peru. See also Dip. Corresp. of the U. S. for 1867, 1868, ii, 256. The Tapajos, the Madeira and the Rio Grande, tributaries of the Amazon, were

also opened, but not through the upper part of their course, where only one bank belongs to Brazil.

<sup>72</sup> Treaties of U. S., p. 478. See Art. XXVI as to Yukon, Porcupine and Stikine.

<sup>73</sup> British State Papers, Africa, No. 4 (1885), pp. 308, 311.

<sup>74</sup> Outlines of an International Code, § 55, citing message of President Grant to Congress of the U. S., Dec., 1870, and treaties therein enumerated.

the primary right, in obedience to that principle of Roman law which, assuming that navigable streams are public or common property, gave a free passage over them, with the incidental right to use the banks to lade or unlade cargoes, to moor vessels and the like.<sup>75</sup> As the primary right is itself limited so is the incidental, whose exercise must be enjoyed subject to the mutual convenience of both parties.<sup>76</sup> That principle of Roman municipal law declaring the use of rivers and their shores to be vested, according to the abstract principles of national right, in all Roman citizens, was applied by the publicists to like interests between nations.<sup>77</sup>

§ 241. Ownership of an entire river. Burden of proof on claimant.—When a river forms the boundary between two states one of them may, through prescription or convention, be possessed of the entire channel without the opposite bank,<sup>78</sup> or it may possess the entire river and both banks.<sup>79</sup> As Grotius has expressed it: “But though, as I have said in case of any doubt, the jurisdictions on each side reach to the middle of the river that runs between them, yet it may be, and in some places it has actually happened, that the river belongs wholly to one party, either because the other nation had not yet possession of the other bank till later, when their neighbors were already in possession of the whole river, or else because matters were so stipulated by some treaty.”<sup>80</sup> In the treaty of St. Germain en Lay, 1679, the king of Sweden ceded to the elector of Brandenburg the right bank of the river Oder, without the right to erect fortifications upon it, the grantor retaining jurisdiction over the entire channel together with the left bank.<sup>81</sup> After Sweden had received from the emperor of

<sup>75</sup> As to the *jus littoris*, see Justinian Inst. II, tit. 1, §§ 1-5; Grotius, II, cap. 2, § 15; Vattel, II, cap. 9, § 129; Puffendorf, V, cap. 3, § 8; Caratheodory, *Du droit international concernant les grands cours d'eau*, p. 59. Phillimore, I, §§ 157-161; Polson, sec. 5; Wheaton, Hist. of the Law of Nat., 510.

<sup>76</sup> “The great weight of authority since Vattel is that the state through which a river flows is to be the sole judge of the right of foreigners to the use of the river. Wheat. Int. Law, i, 229; Vattel I,

1, § 292.” Wharton, Int. Law Dig., § 30.

<sup>77</sup> Calvo, § 234.

<sup>78</sup> Wolf, *Jus Gentium*, § 106; Vattel, I, § 266.

<sup>79</sup> “A nation having physical possession of both banks of a river is held to be in juridical possession of the stream of water contained within its banks.” 1. Phillimore, § 170.

<sup>80</sup> *De Jur. Bel. ac Pac.*, II, cap. 3, § 18.

<sup>81</sup> Dumont, *Corps Diplomatique*, XIII, p. 408.



Germany under the treaty of Osnabrück, 1648, a cession of the entire river Oder it was held that she had acquired possession of a margin on the further bank of two German miles as an incident inseparable from the grant. On that principle of construction Prussia, after she had received from Poland under the treaty of Warsaw, 1773, a cession of the entire river Netze, maintained the contention that such a cession carries with it the entire stream and both its banks.<sup>82</sup> The burden of proof is, however, upon the state claiming to own an entire stream or lake; and, if a title so set up cannot be maintained either by prescription or convention, the rule is that the use is in common, the boundary in the case of non-navigable rivers being the middle of the stream, and in the case of navigable ones, the 'thalweg' or center of the deepest channel.<sup>83</sup> In the treaty<sup>84</sup> concluded in 1808 between the Grand Duchy of Baden and the Helvetic Canton of Argovie, the water-frontier line or thalweg was defined to be "the line drawn along the greatest depth of the stream," and so far as bridges are concerned, "the line across the middle of each bridge."

§ 242. Emancipation of high seas—Early freedom theoretical.—The process through which the navigable rivers of the world have finally been opened to the commerce of all nations is simply the consummation of that wider movement through which the high seas have likewise been emancipated from the ancient claim that they, too, were subject to appropriation. Ulpian and other classic jurists of his school, ignoring the actual practice of antiquity, contended that the sea was free and open to all; and in the Institutes the doctrine is clearly defined that air, running water and the sea cannot be appropriated because they are not susceptible of detention,<sup>85</sup> of physical possession, without which there can be no basis for the permanent relation involved in the juridical conception of property. According to Roman theory the seas were *res communes*; navigable rivers, *res publica*.<sup>86</sup> There can be no doubt, however, that from the earliest times the theoretical

<sup>82</sup> Twiss, I, § 144, citing Gunther (II, § 14), who held that Prussia's claim to all such portions of the opposite bank as the waters of the river in a state of inundation overflowed, as well as the marshes caused by such inundations, was in conformity to usage.

<sup>83</sup> 8 Opinions Attys. Genl., 175.

<sup>84</sup> Martens (N. R.) I, p. 140.

<sup>85</sup> See above, p. 284, note.

<sup>86</sup> The same distinction was recognized by Grotius, II, cap. ii, § 12. Cf. Wharton, Com. Am. Law, § 191; Hadley, Int. to Roman Law, pp. 156-57.

freedom of the seas could only be enjoyed subject to the perils imposed by the nests of pirates that infested all of them.<sup>87</sup> After the northern rovers had reduced piracy to a system, the maritime nations were forced to police the seas, and to preserve peace and security upon them, through the exercise of territorial sovereignty over such portions as were adjacent to their coasts,—or, to use a very modern term, specially within their sphere of influence.<sup>88</sup>

§ 243. **Doctrine of mare clausum. Right to exact tolls and dues.**—Out of that condition of things the doctrine of *mare clausum* had necessarily emerged prior to the advent of modern international law, which was forced to recognize the fact that property could be acquired in seas, for the obvious reason that most of them had been actually appropriated. The control that arose out of such appropriations did not involve, however, the right to exclude vessels of other nations from protected waters, but only the right to exact of them tolls and dues as compensation for the security guaranteed to them.<sup>89</sup> Upon that general basis rested the claim of Venice to the Adriatic; the claim of Genoa to the Ligurian sea; the claim of France to an indefinite extent of waters stretching outwardly from the coast; the claim of England to seas surrounding her shores and extending from Stadland in Norway to Cape Finisterre in Spain; and the claim of Denmark, on the one hand, to the entire space between Iceland and Norway, and, on the other, to the Baltic in joint sovereignty with Sweden.<sup>90</sup>

<sup>87</sup> "Piratical leagues flourished for ages in every corner of the Mediterranean, and even the merchant princes of Tyre and Sidon were not too proud to blend a little piracy with more legitimate operations." Walker, *Science of Int. Law*, p. 164.

<sup>88</sup> "In the thirteenth and fourteenth centuries a rich vessel was never secure from attack; and neither restitution nor punishment of the criminals was to be obtained from governments, who sometimes feared the plunderer, and sometimes connived at the offense." Hallam, *M. A. II*, p. 397.

<sup>89</sup> Venice, which in 1269 began to exact heavy tolls from all vessels

navigating the Northern Adriatic, based her claim to dominion over that sea upon an asserted grant of Alexander IV made in recognition of her sacrifices in ridding the gulf of pirates and Saracens. Guicc. IV, p. 360.

<sup>90</sup> Selden, *Mare Clausum*, II, c. 30-2; Daru, *Hist. de Venise*, V, § 21; Loccenius, *De Jure Marit.* I, c. 4. "In 1485 it was agreed in a treaty between John II of Denmark and Henry VII that English vessels should fish in and sail over the seas between Norway and Iceland on taking out licenses, which required to be renewed every seven years." Hall, § 40, citing *Mare Clausum*, II, c. 32.

There were, of course, special territorial reasons why the Baltic should be considered as a *mare clausum*, reasons that applied equally to the Black Sea so long as it was entirely encircled by Turkish territory.

§ 244. **Claims of Spain and Portugal to newly discovered seas.**—It is not therefore strange that when Spain and Portugal took the lead in the great work of discovery and conquest in two hemispheres that the former should have attempted to appropriate the Pacific and the Gulf of Mexico and the latter the Indian Ocean and the newly discovered route around the Cape of Good Hope. It was the preposterous claim thus asserted by these powers, involving no less than the exclusion of the ships of other nations from what they were pleased to call their waters, just at the moment when the discovery of America gave a fresh impetus to trade and commerce, that provoked the counter blast, in the form of a protest from the excluded, denying the whole theory upon which the right of appropriation rested.<sup>91</sup> When Mendoza, the envoy of Spain at the English court, complained to Elizabeth of the intrusion of English vessels into the waters of the Indies, she admonished him that “the use of the sea and air is common to all; neither can a title to the ocean belong to any people or private persons, for as much as neither nature nor public use and custom permitted any possession thereof.”<sup>92</sup>

§ 245. **Grotius's *Mare Liberum*.**—When Grotius was called upon, a short time thereafter, to deal with the theoretical side of the question, he gave sanction to Elizabeth's declaration by reviving in his *Mare Liberum* (c. 5), published in 1609, the old doctrine of Roman law that there can be no property in anything without occupation, to which the vagrant waters of the ocean cannot be subjected.<sup>93</sup> Upon that ground he asserted the common right of mankind to the free navigation, commerce, and fisheries of the Pacific and Atlantic oceans, against the exclusive claims of Spain and Portugal whether founded on prior discovery or the grant of Pope Alexander VI. The broad statement that the sea could not be made the subject of property he qualified at a later day by the necessary admission that such limited portions of it may be as gulfs and marginal waters when bearing the proper relation to the adjacent

<sup>91</sup> See above, p. 128.

<sup>93</sup> See also *De Jure Belli ac Pacis*,

<sup>92</sup> Camden, *Hist. of Eliz.*, year II, c. 2, §§ 2, 3.

land.<sup>94</sup> As thus modified the Grotian doctrine has become the rule of modern international law. But that result was not reached without a struggle in favor of the prescriptive right of appropriation. Even the countrymen of Grotius resisted the right of the Spaniards to go to the Philippines by the way of the cape of Good Hope, while the claims of the sovereigns of England over the British seas were brought forward by Gentilis in his *Advocatio Hispanica* in 1613.

§ 246. **Selden's Mare Clausum.** Gradual extinction of the doctrine.—A wider importance was given to that contention by Selden's *Mare Clausum*, first published in 1635, as stated heretofore,<sup>95</sup> as a kind of state paper in which the sovereignty of Great Britain over the surrounding seas was so asserted as to deny the right of the Dutch to fish off the coasts.<sup>96</sup> The first successful resistance to these wide pretensions of Great Britain came from the rising power of that maritime people. And yet despite all opposition she clung to them so persistently that when the negotiation for the settlement of the right of search, which had nearly reached a successful conclusion in 1803, was about to be consummated with the United States, it was broken off at the last moment because her government could not be induced to concede freedom from it within the British seas.<sup>97</sup> As a general rule, however, such claims to dominion began to dwindle from the middle of the seventeenth century, and by the beginning of the nineteenth they had practically disappeared. Great Britain, long after she had given up the substance of what she claimed as her rights, contented herself with a shadow in the form of ceremonial honors to her flag within certain areas; while Denmark, after reducing her pretensions to an attempt to retain a wide belt around Iceland and Greenland for the exclusive use of her fishermen, finally gave up the struggle in 1872, and voluntarily accepted the three-mile limit. The special jurisdiction for so long a time asserted by Spain over the waters surrounding Cuba disappeared, of course, if it ever existed, with her loss of dominion in that quarter.<sup>98</sup> The last important attempt to assert exclusive claims over a portion of the open sea was that made by

<sup>94</sup> *De Jure Belli ac Pacis*, II, c. 3, § 8.

<sup>95</sup> See above, p. 62.

<sup>96</sup> Sir John Borroughs, *The Sovereignty of the British Seas* (London, 1651), p. 115 seq.; *Mare Clausum*, p. 472 seq.

<sup>97</sup> Mr. King to Mr. Madison, British and Foreign State Papers, 1812-14, p. 1404.

<sup>98</sup> The last formal discussion of Spain's claim to a special jurisdiction over the waters surrounding

the United States, as the assignee of Russia, in the matter of the Bering Sea, a controversy settled by an arbitration to which reference has been made already.<sup>1</sup> Even in that case "the proprietary or territorial claim was tacitly dropped at an early stage of the proceedings," and another "to jurisdictional rights of control for certain purposes, resting on a totally different basis, was substituted for it, or was at least insisted upon in its place."<sup>2</sup>

§ 247. **The marine league. Grotius, Vattel and Bynkershoek.**—Under the Grotian doctrine of free navigation special claims of dominion over whole seas have vanished, leaving as survivals only the jurisdiction over bays, gulfs, mouths of rivers, parts of sea inclosed by headlands, and certain straits heretofore described as territorial waters. When to such waters are added, under the general usage of nations, the marine league, once the distance measured by a cannon shot from the shore, a definite and complete idea may be formed of the entire extent of a state's maritime territorial jurisdiction. The attempt has been made to establish the fact that the jurisdiction which each state possesses over its marginal waters (leaving out of view the exact width of the zone) is a creation of international and not municipal law. It is a right flowing from a general rule to which all nations are supposed to have given either an express or implied assent.<sup>3</sup> As to the right itself there can be neither cavil nor question, (1) because each state must possess it for the protection of the lives and property of its citizens on land against the violent acts of others whose states could not be held responsible without the recognition of the right of pursuit and capture; (2) because it is necessary to each state as an indispensable means for the effective execution of its revenue laws; (3) because without it no state can retain and protect the natural products of the sea for the exclusive benefit of its own citizens. And yet cogent as such reasons are the right was not defined in Roman law; and Grotius himself

the island of Cuba took place at Madrid in March, 1895, between the Duke of Tetuan, one of the noblest and wisest of Spanish statesmen, and the author, then United States minister to Spain, in the matter of the U. S. mail steamer, *Alliança*, fired on by a Spanish gunboat off Cape Maysi, six miles

from the Cuban coast. See *Foreign Relations of the U. S.*, 1895, pt. II, pp. 1177-1185. As to the nature and extent of Spain's claim, see Wharton, *Int. Law Dig.*, § 327.

<sup>1</sup> See above, p. 44.

<sup>2</sup> Hall, p. 155. That statement must stand upon its own merits.

<sup>3</sup> See above, p. 88 seq.

recognized it only in a vague and general way in the statement, relating evidently to gulfs and bays, in which he admits that a state possessing the land on either side should possess a portion of the sea, provided it is not such a portion "as is too large to appear part of the land."<sup>4</sup> Vattel,<sup>5</sup> in discussing the same subject, only ventured to say that "the dominion of the state over the neighboring sea extends as far as her safety renders it necessary and her power is able to assert it; since, on the one hand, she cannot appropriate to herself a thing that is common to all mankind, such as the sea, except so far as she has need of it for some lawful end, and, on the other, it would be a vain and ridiculous pretension to claim a right which she was wholly unable to assert." In order to reduce such general statements to a definite and usable basis the practical Bynkershoek<sup>6</sup> defined the marginal water necessary for the safety of a state to be such a space as could be covered by a cannon shot from the coast, that being considered in his day as substantially equivalent to the zone within a marine league of low-water mark.

**Necessity for widening the zone.**—With the substitution of the long-range guns now in use the conviction is growing that the old rule, so far as the width of the zone is concerned, should cease with its reason. In 1894 the Institut de Droit International indulged in an exhaustive discussion of the question, and there was no division of opinion as to the necessity of giving a greater breadth to the zone,—a decided majority favoring a zone six marine miles from low-water mark as territorial for all purposes, with the right in a neutral state to extend it in time of war for all the purposes of neutrality, after due notice, to a distance from shore equal to the longest range of modern guns. It is idle, however, to talk of the substitution of a new rule without some kind of international concert.<sup>7</sup>

§ 248. **State legislation extending limit for health and revenue purposes. Its validity.**—The conviction that the three-mile limit is too narrow for health and revenue purposes prompted Great Britain to enact 26 Geo. II, providing that all vessels

<sup>4</sup> *De Jure Belli ac Pacis*, ii, c. 3, § 8.

<sup>5</sup> *Droit des Gens*, I, c. xxxiii, § 289.

<sup>6</sup> His maxim was, "Terræ potestas finitur ubi finitur armorum

vis." *De Domin. Mar.* c. 2. See also Ortolan, *Diplom. de la Mer*, i, c. 8; Phillimore, i, c. 8; Twiss 1. § 172; Heffter, § 75; Martens, *Précis*, § 158.

<sup>7</sup> See above, p. 138.

liable to quarantine shall be required to make signals to other ships within four leagues under a penalty; and 9 Geo. II, c. 35, and 24 Geo. III, c. 47 (Hovering Acts), assuming for certain revenue purposes a jurisdiction of four leagues from the coasts. The Congress of the United States by acts passed in 1797, 1799 and 1807 has authorized in the same way the seizure of vessels laden with certain cargoes within four leagues of the American coasts;<sup>8</sup> and many other maritime nations have made like enactments. Are such statutes, so far as they exceed the generally recognized limit, valid under the laws of nations? Wheaton contended that they were; but his annotator, Dana, after a careful review of the authorities cited to support that statement, concludes that "it may be said that the principle is settled, that municipal seizures cannot be made, for any purpose, beyond the territorial waters. It is also settled, that the limit of these waters is, in the absence of treaty, the marine league or the cannon-shot. It cannot now be successfully maintained, either that municipal visits and search may be made beyond the territorial waters for special purposes, or that there are different bounds of that territory for different objects."<sup>9</sup> Dana's assumption that the text of his principal is not sustained by the decisions of the Supreme Court of the United States is clearly untenable. Leaving out of view *Church v. Hubbard*<sup>10</sup> as inconclusive, and admitting that *Rose v. Himely*<sup>11</sup> is in conflict with the text, there is no good reason to doubt that that case was overruled by *Hudson v. Guestier*,<sup>12</sup> in which it was held that "a seizure, beyond the limits of the territorial jurisdiction, for breach of a municipal regulation, is warranted by the law of nations." It does not follow, however, that the conclusion reached by Dana is untenable. No matter what the view taken by the highest court of any one nation may be, the fact remains that a rule to bind all must have the assent of all or nearly all. If the powers to which they belong object, upon what ground can any state, in matters of trade and health, "venture to enforce any portion of her civil law against foreign vessels which have not as yet come within the limits of her maritime jurisdiction? A state exercises in matters of trade for the protection of her marine

<sup>8</sup> Cf. Wharton, *Int. Law Dig.*, § 32.

<sup>10</sup> 2 Cranch, 187.

<sup>11</sup> 4 Cranch, 241.

<sup>9</sup> Note No. 108 entitled "Municipal seizures beyond the marine league or cannon-shot."

<sup>12</sup> 6 Cranch, pp. 282-285. The quotation in the text is the language of the head note.

revenue, and in matters of health for the protection of the lives of her people, a permissive jurisdiction, the extent of which does not appear to be limited within any certain marked boundaries, further than that it cannot be exercised within the jurisdictional waters of any other state, and that it can only be exercised over her own vessels and over such foreign vessels as are bound to her ports."<sup>13</sup>

§ 249. **Right to fish within marine league. Conflicts between Great Britain and U. S.**—While the people of all nations have an equal right to fish in the high seas and on banks and shoal places in them, the state that owns the shore has the exclusive right of fishing within the three-mile marine belt following the sinuosities and indentations of the coast. The application of that rule to the littoral conformation of North America has from the outset given rise to conflicts between the governments of Great Britain and the United States which have been composed from time to time by special conventions. The conclusion of the treaty of 1783, in which the independence of the latter was recognized, was delayed by discussions resulting at last in concessions to its citizens of the right to continue the enjoyment of fishing privileges on the banks of Newfoundland without that of drying and curing on that island.<sup>14</sup> To that was added the liberty to fish enjoyed by British seamen along the coasts of Newfoundland, in the Gulf of St. Lawrence, and on the coasts, bays and creeks of all other British dominions in America, with the privilege of curing and drying fish in any of the unsettled harbors, bays, and creeks of Nova Scotia, the Magdalen Islands, and Labrador so long as they should remain in that condition. After the war of 1812 it became a grave question whether such privileges, as to which the treaty of Ghent was silent, had been merely suspended by that event or entirely abrogated. The United States rested the first contention upon the theory that the articles in question were only regulations of fishing privileges enjoyed in common by all the subjects of the British possessions prior to the separation which, it was claimed, did not take from the inhabitants of the territory of the new state their local rights of property within the territory remaining to the old. Great Britain<sup>15</sup> rested the

<sup>13</sup> Twiss, 1, § 181, citing *The Apollo*, 9 Wheaton, 371; Kent's *Comm.* tit. 1, § 31.

<sup>14</sup> *Treaties of the U. S.*, p. 377. See above, p. 111.

<sup>15</sup> "In other words, it was denied that the separation of a new state from an old one involves the loss, on the part of the inhabitants of the territory of the new state, of



second on the assumption that "the claim of an independent state to occupy and use at its discretion any part of the territory of another without compensation or corresponding indulgence, cannot rest on any other foundation than conventional stipulation."<sup>16</sup>

§ 250. **Settlements of 1818, 1854, 1871, and 1885.**—In the settlement of the matter made for a time in the treaty of 1818<sup>17</sup> perpetual fishing rights were guaranteed to the United States on the basis of contract,<sup>18</sup> this government renouncing forever the right "to take, dry or cure fish on, or within three marine miles of any of the *coasts, bays, creeks or harbors* of his Britannic Majesty's dominions" in America not included within the limits specified. When a controversy subsequently arose as to the meaning of the terms in italics it was held by the Mixed Commission under the convention of 1853 that the Bay of Fundy, over sixty miles wide and about a hundred and forty long, with one of its headlands in the United States, was not an exclusively British bay within the meaning of the treaty. Consequently the "coast" of Great Britain could not be measured from its headlands.<sup>19</sup> By the Reciprocity Treaty<sup>20</sup> of 1854 the whole subject of the northeastern fisheries was readjusted upon the basis of the right of the United States to take all kinds of fish, except shell-fish, "on the sea-coast and shores, and in the bays, harbors, and creeks of Canada, Nova Scotia, Prince Edward's Island, and of the several islands thereto adjacent, without being restricted to any distance from the shore, with permission to land upon the coasts and shores of those colonies and the islands thereof, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish;" in exchange for a concession

local rights of property within the territory remaining to the old state." Hall, p. 100.

<sup>16</sup> British and Foreign Papers, vii, 79-97.

<sup>17</sup> Such was the admission of Mr. Dana, as agent for the U. S., before the Halifax Fishery Commission in 1878. Parl. Papers, North America, No. 1, 1878, p. 183. If Mr. Dana did not in fact make such an admission, as Hall (p. 100, note 2) claims he did, he should have made it.

<sup>18</sup> Treaties of the U. S., pp. 415, 416.

<sup>19</sup> The case arose out of the forfeiture in a British port of the American fishing schooner Washington, seized while fishing in the Bay of Fundy, ten miles from the shore. Compensation was awarded the owners for an illegal condemnation. The Schooner Washington: Report of the commissioners under the convention of 1853, pp. 170-186.

<sup>20</sup> Treaties of the U. S., p. 448-453.

of reciprocal rights to British fishermen on the eastern coasts of the United States from the 36th degree northwards. After that treaty, terminable in ten years, had been brought to an end in 1866<sup>21</sup> by the action of the United States, a new reciprocity agreement was embodied in the treaty of Washington,<sup>22</sup> 1871, conceding to the parties free trade in fish and free fishing with a stipulation that a cash balance should be struck between the values of the privileges thus granted;—a balance fixed in 1877 by the Halifax Commission at five and a half millions of dollars in favor of Great Britain. When the last reciprocity arrangement expired in 1885<sup>23</sup> a return was made to the basis of 1818, inadequate in itself to prevent constant friction between American fishermen and the Canadian authorities.<sup>24</sup> In dealing with questions growing out of the local laws of the maritime provinces, and the action of the provincial authorities deemed to be in derogation of the rights secured by treaties to its fishermen, the United States holds that Great Britain and not the provinces is the sovereign to be dealt with, and that British rights under such treaties may be restricted but not expanded by provincial legislation.<sup>25</sup>

§ 251. State boundaries—a summary of general rules—burden of proof.—In defining the elements of land and water that go to make up the territorial domain of a state it has been necessary to anticipate nearly all of the difficult questions involved in state boundaries, which consist either of such natural features as mountains, rivers, and lakes, or of arbitrary lines connecting natural or artificial points. Where there is real doubt or ignorance as to a frontier, and no express agreement concerning it, certain general rules have been accepted which may be summarized as follows: Where two states are separated by ranges of mountains or hills the water-divide marks

<sup>21</sup> The two powers were thus thrown back for a time upon the treaty of 1818.

<sup>22</sup> *Treaties of the U. S.*, p. 478.

<sup>23</sup> In consequence of a notice given by the President of the U. S. in 1883.

<sup>24</sup> In the hope of terminating all differences plenipotentiaries of the two powers met in Washington, in 1887, and agreed upon a new fishery treaty, which the Senate of the U. S. failed to confirm. For the de-

tails agreed upon, see *British State Papers*, U. S. No. 1 (1888).

<sup>25</sup> "This government conceives that the fishery rights of the United States, conceded by the treaty of Washington, are to be exercised wholly free from the restraints and regulations of the statutes of Newfoundland." Mr. Evarts, Sec. of State, to Mr. Welsh, Feb. 17, 1879. *MSS. Inst.*, Gr. Britain. Cf. Wharton, *Int. Law Dig.*, §§ 299-308.

the boundary line or frontier. When the separation is made by a river, not the exclusive property of either of the riparian states, the boundary is the middle of the stream, if it is non-navigable; if it is so, the thalweg, or center of the deepest channel. When the separation is made by a lake, a line run through the middle of it constitutes the boundary, in the absence of another established by usage or treaty. Such normal and reasonable rules of equality must yield, however, when one state is able to establish its right to an entire lake or stream by prior occupation before the opposite bank is appropriated, or by a treaty made for the purpose of establishing a political frontier. When the whole of the bordering waters is thus acquired the title seems to carry with it not only the opposite banks of the river or lake, but also perhaps a sufficient margin besides for defensive or revenue purposes. The state that asserts such extensive claims, either by occupation or treaty, must so clearly prove them as to overcome the just and natural presumption in favor of equal rights. That presumption will prevail where opposite shores have been occupied at the same time by riparian states, or where neither can clearly prove the priority of its occupancy.<sup>26</sup> In the United States all conflicts as to boundaries with foreign states pertain to the political departments of the government, whose solutions of them will be accepted as final by the judiciary.<sup>27</sup>

§ 252. **Servitudes. Positive or negative; contractual or customary.**—At the beginning of this chapter the averment was made that a state may limit or qualify its sovereignty and jurisdiction over its territorial property by permitting a foreign state to perform within its bounds certain acts otherwise prohibited; or by surrendering the right to exercise certain parts of such sovereignty and jurisdiction as a protection to others.<sup>28</sup> Restrictions thus imposed are known as servitudes, a term borrowed from Roman law, which, in respect to their nature, are either positive or negative;<sup>29</sup> and in respect to their origin, are contractual or customary. The last named, resting on immemorial prescription, are embodied in the right

<sup>26</sup> See above, pp. 288-9, and authorities there cited.

<sup>27</sup> *Foster v. Neilson*, 2 Peters, 253; *Garcia v. Lee*, 12 id., 511; *Williams v. Suffolk Ins. Co.*, 13 id., 415; *U. S. v. Reynes*, 9 Howard, 127; *in re Cooper*, 143, U. S., 472.

<sup>28</sup> See above, p. 263.

<sup>29</sup> "Servitudes may be classified in various ways. They may be 'positive,' consisting '*in patiendo*,' or 'negative,' consisting '*in non faciendo*;' 'apparent' or non-apparent." Holland, *Elements of Juris-*

of innocent passage over territorial waters so situated as to render their free navigation convenient or necessary to the use of the open seas; in customary rights over waters, pastures and forests which seem to exist in some places for the benefit of persons living near a frontier; and in the right of military passage through a foreign state to outlying territory, if any such right has survived the rearrangement and simplification of the map of Central Europe.<sup>30</sup> While all of the customary servitudes are from their nature positive, other servitudes of that class may be created by treaty, such for example as the right of a state to occupy with its troops a part of the territory of another state under certain circumstances; the right to exercise police power or to collect taxes within certain parts of foreign territory; the right to there establish and maintain custom-houses, and to take the necessary steps for the discovery of smuggling and the like; and the right to organize and maintain postal services. Negative servitudes are from their nature invariably the results not of customary law but of contract. As they embody positive agreements not to exercise certain attributes of sovereignty, their existence must be proved by treaty or equivalent agreement. Such are the obligations of a state to abstain from all exercise of jurisdiction over those under the protection of another state; to maintain no more than a certain number of soldiers, or to construct no war vessels, except of a certain pattern, or to keep up only a certain number of fortified places; to embody certain exceptions in its laws concerning religious worship for the benefit of the citizens of foreign states; to exempt certain classes of foreigners and foreign corporations from taxation; and to refrain from the establishment of custom-houses along the frontier of a foreign state.<sup>31</sup> Familiar illustrations of such servitudes may be found in that part of the Peace of Utrecht, 1713-15, wherein France bound herself to England not to permit the Stuart pretenders to reside in French territory; in that part of the same Peace in which the possession of Gibraltar was confirmed to England on condition that she would not permit either Moors or Jews to reside there; and in that part of

prudence, pp. 195-96, citing Dig. viii, I, 1; Von Vangerow, *Pandekten*, iii, § 338.

<sup>30</sup> Hall (p. 166 n) says: "It is somewhat more than doubtful whether any instances of a right of

military passage have survived the simplification of the map of Central Europe." See also § 219.

<sup>31</sup> For a clear statement of negative and positive servitudes, see Bluntschli, §§ 356, 357.

the treaty of Paris, 1814, providing that Antwerp should always be maintained as an exclusively commercial port.<sup>32</sup> Such international servitudes may of course be brought to an end at any time by treaty to that effect between the dominant and servient state. They may also perish when the former waives its right to exercise the privilege within a reasonable time, or when the liability of the latter is no longer compatible with the development of international law or with the development of its internal constitution and the maintenance of public order.<sup>33</sup>

§ 253. **Non-territorial property. Public vessels. Fiction of extritoriality.**—The non-territorial property of a state may consist (1) of its public vessels; (2) of private vessels covered by the national flag; and (3) of goods owned by its citizens but embarked in the ships of other states. Such property may be held by a state in its corporate capacity beyond its own limits, within or without the jurisdiction of other states. Whether upon the high seas or in a foreign port the jurisdiction of a state over one of its public vessels is so complete that, in order to give intensity to the idea, the legal fiction has been invented that such vessel is simply a detached and floating portion of the state to which it belongs.<sup>34</sup> Like all other similes this one may in some particulars fail to present an exact parallel, and yet it is undoubtedly more forcible than the alternate phrase that a public vessel by virtue of its character is clothed with an immunity which exempts it to a certain extent from all foreign control. No matter in what form the idea of extritoriality may be expressed, the privileges with which it surrounds a public vessel are so important and so serious that such a definition should be given as will clearly distinguish such as are entitled to stand in that category.

§ 254. **Term "public vessel" defined.**—The general statement may be made that the term public vessel embraces not only such as are armed for war, but such unarmed craft as despatch

<sup>32</sup> See above, pp. 106, 114 seq.

<sup>33</sup> Bluntschli, § 359; Holland, *Elements of Jurisprudence*, pp. 197, 200.

<sup>34</sup> "Such vessels have been regarded by many writers, especially by French writers, as being invested with the character of what they have called 'ex territoriality.'

It has been said that a ship of war is a floating part of the nation to which it belongs, and that when in the harbor of a foreign state the law of that state does not extend to it." Sir J. F. Stephen, *Hist. of the Crim. Law*, vol. ii, p. 43. This doctrine that a ship is "a floating part of the nation," a "con-

boats, store ships, transports, and the like, employed temporarily for public purposes only, commanded by an officer holding such a commission as his state requires for vessels of that class, and satisfying such other conditions as may be required by law.<sup>35</sup> When a doubt arises as to the character of a public vessel, generally evidenced by the flag and pennant she carries, or by the firing of a gun, it is usual, as a matter of courtesy, to accept the word of honor of her commander as to the fact that she is public. The commission under which the commander acts must be accepted as conclusive,<sup>36a</sup> subject to the condition expressed below<sup>36</sup> and the declaration of the sovereign himself was held to be absolutely so by the English Court of Appeal in the case of a Belgian mail packet,—commanded by officers of the royal navy of that country, but carrying merchandise and passengers,—when, in a suit for damages, the king of the Belgians stated that the vessel was in his possession as sovereign, and was a public vessel of the state.<sup>37</sup>

§ 255. Immunities of public vessels.—The Supreme Court of Massachusetts has held that a vessel, owned and employed by the government of the United States, as an instrument for the performance of its public duties, cannot be proceeded against by a citizen, even for the enforcement of a lien that attached before she assumed that character.<sup>38</sup> Upon the high seas the jurisdiction of a state over its public commissioned vessels is absolute,—their entire immunity from the right of search in

tinuation or prolongation" of territory is no older, Hall avers (§ 76), than the "*Exposition des Motifs*," put forth by the Prussian government in 1752 in justification of its conduct in confiscating the funds payable to its English creditors in respect of the Silesian Loan. Cf. Martens, *Causes Cél.*, ii, 117.

<sup>35</sup> Ortolan, *Dip. de la Mer*, i, 181-86; Calvo, §§ 876-84.

<sup>36</sup> "It is true that when there is probable ground to believe that the flag is assumed for piratical purposes, this will excuse the arrest and search of the vessel. But unless there be such probable cause the vessel must be assumed by foreign cruisers to be entitled to the flag she flies." Wharton, *Int.*

Law Dig., § 408. There is, however, a presumption in favor of the innocence of a public vessel doing acts *prima facie* piratical, so long as it appears to act under the authority of the state to which it once belonged. Cf. Hall, pp. 275-76.

<sup>36a</sup> The *Santissima Trinidad*, 7 Wheaton, 283.

<sup>37</sup> The *Parlement Belge*, L. R. 5, P. D. 197. The court refused to consider whether or no her public character was affected by the fact that she was partly employed in the carrying of passengers and merchandise.

<sup>38</sup> *Briggs v. The Light-Ships*, 11 Allen, p. 157.

any form or for any purpose being generally conceded.<sup>39</sup> Not until such vessels pass into the territorial waters of a foreign state is there any abridgment whatever of that sweeping privilege. Unlike private vessels they have no absolute right to enter without notice or permission into the ports of friendly powers. "If, for reasons of state, the ports of a nation generally, or any particular ports be closed against vessels of war generally, or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace."<sup>40</sup>

§ 256. **Their slow growth. Expositions of the earlier doctrine.**—A great revolution in opinion has taken place since the beginning of the present century as to the extent to which the local sovereign waives jurisdiction over a public vessel admitted to his ports by his express or implied assent. So lightly was the immunity of such a vessel regarded in the seventeenth century that Bynkershoek<sup>41</sup> in his attempt to demonstrate that the property of a foreign sovereign is not distinguishable, by any legal exemption, from that of a private individual, refers to the case of Spanish ships of war seized in Flushing in 1668 by a private individual for a debt due from the king of Spain; and as late as 1794 Attorney-General Bradford,—in a case in which six American citizens were taken out of a British sloop of war by the local authorities while she was lying in the harbor of Newport, Rhode Island,—gave it as his opinion that "the laws of nations invest the commander of a foreign ship of war with no exemption from the jurisdiction of the country into which he comes."<sup>42</sup> Five years later a like declaration was made by Attorney-General Lee, who held, in the case of the British packet *Chesterfield*, that, "it is lawful to serve civil or criminal process upon a person on board a Brit-

<sup>39</sup> The only possible exception is in the case of piracy explained already.

<sup>40</sup> Marshall, C. J., in *The Schooner Exchange v. McFaddon et al.*, 7 Cranch, 141.

<sup>41</sup> *De Foro Legat.*, c iv. "In that case the States-General interposed; and there is reason to believe, from the manner in which the transaction is stated, that either by the interference of government,

or by the decision of the tribunal, the vessels were released." Wheaton, *Elements*, § 101.

<sup>42</sup> 1 *Opinions of Attys. Genl. U. S.*, p. 47. It was held "that a writ of *habeas corpus* might be legally awarded in such a case, although the respect due to the foreign sovereign may require that a clear case be made out before the writ may be directed to issue."

ish ship of war lying in the harbor of New York.”<sup>43</sup> Such views, in full favor on the other side of the Atlantic, received still more emphatic expression in 1820 from Lord Stowell himself when he was asked by his government for an opinion in the case of Brown, a British subject who, after escaping from a Spanish prison, took refuge on a British ship of war lying in the harbor of Callao. After saying that the British captain had no right to protect Brown, he added: “I am led to think that the Spaniards would not have been chargeable with illegal violence, if they had thought proper to employ force in taking this person out of the vessel.”<sup>44</sup>

§ 257. **New doctrine as defined by Marshall, Cushing and Ortolan.**—The opposing tide of opinion which finally overthrew such dangerous and untenable doctrine found emphatic and authoritative expression in 1812 in the case of the *Exchange*, a vessel belonging originally to an American citizen which, after having been seized and confiscated at San Sebastian, in Spain, was converted into a public armed vessel by Napoleon in 1810. When her original owner attempted to reclaim her after her peaceful entry into the port of Philadelphia as a public vessel of the Emperor of the French, the Supreme Court of the United States, speaking through Chief Justice Marshall, held that a warship of a foreign sovereign at peace with the United States coming into our ports, and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country. It was held that “the implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed, and it seems to the court ought to be construed, as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rights of hospitality.”<sup>45</sup> That sound doctrines repeated by Attorney-General Cushing,<sup>46</sup> in the case of the *Sitka*,—a Rus-

<sup>43</sup> 1 Opinions of Attys. Genl. U. S., p. 87. See as to these cases Report of the Royal Commission on Fugitive Slaves, 1876, pp. lxxiii, lxxv. Also Phillimore, i, § cccxvi.

<sup>44</sup> Report of Royal Commission on Fugitive Slaves, p. lxxvi. See Halleck, 1, 188, Baker ed. Lawrence, p. 224.

<sup>45</sup> The Schooner *Exchange* v. McFaddon et al., 7 Cranch. 144.

<sup>46</sup> 7 Opinions of Attys. Genl. U. S.,

p. 122. Mr. Cushing declared that the courts of the U. S. have “adopted unequivocally the doctrine that a public ship of war of a foreign sovereign, at peace with the United States, coming into our ports and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country. She remains a part of the territory of her sovereign.”



sian vessel captured by a British cruiser during the Crimean war and brought into the harbor of San Francisco with a prize crew on board,—and specially emphasized by Ortolan<sup>47</sup> and by the publicists of Europe and America generally, was re-defined by the arbitral tribunal at Geneva in the following form: “The privilege of extritoriality, 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 principles of courtesy and mutual deference between different nations.”<sup>48</sup>

§ 258. Certain duties and exemptions of public vessels defined.

—It would be folly to contend that the immunity from local jurisdiction thus granted a public vessel in a foreign port is absolute. It is universally admitted that such a vessel must observe all reasonable health regulations, local revenue laws, and the administrative rules of the port as to lights, anchorage and harbor police.<sup>49</sup> If she is a belligerent, the local authorities, in enforcing the observance of neutrality laws, may even detain and try any prizes brought in where there is good reason to believe that the captures were made in violation of the neutrality of the state they represent.<sup>50</sup> The primary object of the immunity is to exempt as far as possible the discipline and internal government of the ship, her officers and crew from interference from local law. “The essence of the privilege of ships of war in foreign territorial waters is, that the commanding officer is permitted to exercise freely, and without interference on board his ship, the authority which, by the law of his own country, he has over the ship’s company.”<sup>51</sup> In order to secure that result public vessels in foreign waters are exempt from all forms of process in private suits;<sup>52</sup> and from all judicial proceedings or seizures in the name of a foreign state for the punishment of violations of public law. If such state feels aggrieved it must apply for

<sup>47</sup> *Dip. de la Mer*, II, c. x. See also Foelix, II, tit. ix, c. i, § 544; Hautefeuille, tit. vi, c. i, § 1; Heffter, § 79; Bluntschli, § 321; Negrin, tit. i, c. iv; Riquelme, i, 228.

<sup>48</sup> For a review of the practice of the U. S., see Wharton, *Int. Law Dig.* § 36.

<sup>49</sup> Hall, § 55; Lawrence, *Principles of Int. Law*, § 129.

<sup>50</sup> The *Santissima Trinidad*, 7 Wheaton, 285.

<sup>51</sup> Sir J. F. Stephen, *Hist. of the Crim. Law*, vol. ii, p. 49.

<sup>52</sup> In January, 1879, the U. S. frigate *Constitution*, when returning from France laden with machinery taken to the Paris Exposition, at the expense of this government, went aground on the English coast near Swanage where it became necessary to secure the assistance of a tug, as to the value of whose services a dispute arose

redress directly to the sovereign to whom such vessel belongs.

§ 259. **Must not harbor criminals and fugitive slaves.**—A public vessel clothed with immunity in a foreign port must not commit any acts of aggression against the peace and security of the state whose hospitality is asked by bringing in conspirators intent upon civil war, or by harboring criminals or persons charged with non-political crimes. Custom seems, however, to have established the right of such a vessel to grant simple hospitality to a political refugee if he appears at the side of the ship without invitation and seeks protection. Asylum conceded under such circumstances gives to the territorial power neither the right to demand the surrender of such refugee nor to expel the ship on account of his retention aboard of her. It is, however, undoubtedly the duty of the commander of a public ship to surrender to the local authorities all persons charged with ordinary crimes. In 1876 a serious discussion arose whether or no an exception should be made to that rule when a slave contrives to get on board a British ship of war in a foreign harbor, belonging to a country where slavery is recognized by law. A very able commission<sup>53</sup> was appointed to examine the question, and six of its members concluded that in such a case international law required that the fugitive slave should be surrendered, but that “a rigid adherence to that theory by the commanding officers of British ships in foreign territorial waters in all cases whatever would be neither practical nor desirable.” Sir James F. Stephen was honest enough, however, to admit in his separate opinion that whenever such an exception to the general rule shall be made, “it should be done openly and avowedly as an act of power, as an invasion on moral grounds of the sovereignty of independent nations.”<sup>54</sup>

between the owners of the tug and the representatives of the ship. When application was made for the issuance of a warrant for the arrest of the ship and her cargo, objection was made not only on behalf of the American government, but on behalf of the crown, and the writ was refused on the ground that the vessel, “being a war frigate of the United States navy, and having on board a cargo for national purposes, was not amenable

to the civil jurisdiction of this country.” L. R. 4, P. D., 156.

<sup>53</sup> Composed of the duke of Somerset, Lord Chief Justice Cockburn, Sir Robert Phillimore, Sir James F. Stephen, Mr. Montague Bernard, Mr. Justice Archibald, Mr. (afterwards Lord Justice) Thesiger, Sir Henry Holland, Admiral Sir Leopold Heath, Sir Henry Maine, Sir George Campbell, and Mr. Rothery.

<sup>54</sup> Sir J. F. Stephen, *Hist. of the Crim. Law*, vol. ii, p. 55.

§ 260. **When a diplomatic appeal must be made.**—When the commander of a public vessel wrongfully refuses to surrender either a political refugee or an ordinary criminal to the authorities of the territorial state, it can look for redress only through a direct diplomatic appeal to the sovereign to whom the vessel belongs. No invasion of the ship can be made for any purpose. To that general rule no exception can be recognized except, perhaps, in an extreme case requiring the prompt expulsion of the vessel; such, for instance, as would arise if she should be made a focus of intrigue, or an instrument of conspiracy against the territorial power through the harboring by her captain of political refugees in communication with the shore.

§ 261. **Immunities attach to public vessels as complete organisms.**—Immunities attaching to public vessels belong to them only as complete organisms, composite wholes made up of ship and crew combined. Therefore, when such a vessel is found at sea without a crew the abandoned hulk is mere property and nothing more. And in the same way when the crew go ashore the privilege of extraterritoriality no longer protects them. Officers and crew, including the captain, when he is not acting in his official capacity as the agent of his state, are then subject to the local law; and when crimes are committed on shore the local tribunals may assume jurisdiction of them or they may be made the subject of diplomatic complaint to the government of the state to which the ship belongs.

§ 262. **State's jurisdiction over merchant vessels on high seas.**—The jurisdiction of a state over all of its vessels, public and private, when on the high seas outside the territorial waters of any other state is complete.<sup>55</sup> As applied to merchant vessels it extends to all persons and things aboard, including foreigners, whether passengers or seamen. On its criminal and administrative side such jurisdiction embraces all acts that may be classed under either head whether committed by citizens or foreigners; and the same may be punished in state tribunals, if in violation of the system of discipline established by state law. On its civil side it embraces all matters of that character affecting subjects on board; or foreigners, not par-

<sup>55</sup> "The ocean is the sphere of laws of her own nation, and may the law of nations, and any merchant vessel on the seas is, by that law, under the protection of the claim immunity unless in cases in which the law allows her to be entered or visited." Mr. Webster,

tially exempted by the municipal law of the state while in transit, to the extent and for the purposes for which they are subject to such civil jurisdiction when on land. On its protective side it involves the guarding of all merchant craft from any kind of interference from other powers, except when the vessel of the protecting state has given such powers the right to deal with it, either by reason of some act of hostility against one or more of them, or against all mankind; or by the commission in time of war of some act that belligerents have the right to punish; or by an escape to the high seas after an infraction by such vessel, or by some one on board, of the laws of a foreign state while within its territorial waters. By reason of such control over its merchant vessels a state is subjected to a corresponding responsibility which renders it liable for all hostile acts committed by them on the high seas against other states; and requires it to open its courts for redress to foreigners who have suffered by reason of wrongful acts committed by such vessels or by those on board of them.

§ 263. **Fiction of extritoriality scarcely exists as to merchant vessels.**—If a state owning merchant vessels possessed the exclusive jurisdiction to administer redress in every case in which foreign states or their subjects could ask it, the fiction of extritoriality as applied to them would be complete. It can hardly be said to exist,<sup>56</sup> however, (1) because all states claim the right to enforce their jurisdiction to a certain extent over the merchant vessels of all other states even upon the high seas; (2) because every state into whose territorial waters a foreign ship comes claims the right to subject it almost absolutely to the local jurisdiction, both civil and criminal. Only after the immunity to which a merchant vessel is entitled, upon the theory that it is merely an extension of the territory of the state to which it belongs, has been reduced by the subtraction of those counter claims to jurisdiction asserted by all other states, is it possible to understand how little privilege really remains.

§ 264. **How the nationality of a merchant vessel may be established.**—Before attempting to define the extent to which a merchant vessel may be subjected on the high seas to the jurisdiction of a foreign state, it will be necessary to explain

Sec. of State, to Lord Ashburton, Aug. 8, 1842. MSS. Notes, Great Britain; 6 Webster's Works, 317.

upon this subject by M. Hautefeuille has been ably opposed by M. Ortolan in his *Diplomatie de la Mer*.

<sup>56</sup> The extreme view expressed

what constitutes such a vessel, and the means by which her nationality may be established. As the property of a private owner the apparent sign of her nationality is her flag, the right to fly which depends upon the law of the state to which she claims to belong; and that law may confer the right by reason of the place of construction, ownership, the nationality of the captain, or the composition of the crew. A vessel owned by a citizen of the United States may carry its flag and enjoy the protection of its government on the high seas, although from the fact that she is foreign built or for some other cause she cannot become a registered vessel of this country. Protection thus given to non-registered vessels is analogous to that given to persons of foreign birth not naturalized but domiciled in the United States.<sup>57</sup>

§ 265. When a merchant vessel must show her papers—Case of *Virginus*.—When the nationality of a private vessel is challenged her commander, who is not the agent of the state to which she belongs, cannot offer his word of honor in proof of the fact. He must strengthen the *prima facie* presumption raised by the flag he carries by showing his papers, which should prove his right to carry it under the law of the state represented by such flag. When a state has the right to inquire, in war or peace, into the national character of a merchant vessel claiming to belong to another state, it cannot be concluded by the flags or papers used. It can pass behind both to the actual facts upon which national character depends. If the inquiring state finds it to its advantage to accept the fact as established by such flags and papers it may do so, and use it, in war or peace, as an estoppel against the parties in interest. On the other hand, if it elects to press the inquiry, and finds that such papers have been fraudulently issued in order to give a spurious national character to the vessel possessing them, it may, as between itself and the owner, ascertain the real nationality and act accordingly.<sup>58</sup> In that event, if the state issuing the papers sees fit to intervene, the question of their validity becomes a political one between the two powers thus involved. In the matter of the *Virginus* the government of the United States took the position that ship's papers, certifying under its authority that the vessel holding them is entitled to its protection, cannot be tested as to alleged fraudulency by foreign powers. This gov-

<sup>57</sup> Wharton, Int. Law Dig., § 410.

<sup>58</sup> Dana's Wheaton, Note 163.

ernment thus assumed to be the sole judge of the validity of such papers, so far as proceedings on the high seas are concerned; and at the same time recognized its duty to punish all parties forging or wrongfully using them, and to see that they should not be employed as the basis of claims against foreign states.<sup>59</sup>

§ 266. **Right of visitation in time of peace.**—No state can effectively inquire into the nationality of a merchant vessel carrying the flag of another on the high seas without exercising at least the right of visitation, in the absence of which neither the sufficiency or regularity of her papers, nor the legality of the undertaking in which she is engaged can be ascertained. To justify the exercise of that right the inquiring state must employ it to enforce some kind of jurisdiction lawfully belonging to it. For instance, as the crime of piracy is an offense against all nations, every state has jurisdiction to punish it. And yet even in that case the right to search on suspicion of piracy is like a right to arrest a suspected felon, and carries with it a liability for damages if the charge is not substantiated, provided there was no probable ground to believe that the flag was assumed for piratical purposes. “The right of visitation is by the law of nature an intercourse of mutual benefit, like that of strangers meeting in the wilderness. The right of search is for pirates in peace and for enemies in war.”<sup>60</sup>

§ 267. **Certain exceptions in favor of the right.**—Apart from the case of piracy the right to visit merchant vessels in time of peace is confined to the execution of revenue laws, when asserted within the territorial waters of the offended state; and to a proper case of self-defense.<sup>61</sup> In the exercise of the latter, it is claimed that a state may visit and capture a vessel on the high seas, or in its own waters, when it has a reasonable ground to believe that it is engaged in a hostile expedition against it. In the same way a state, in whose territorial waters a private vessel, or some one on board of her, has committed an offense against its laws, may pursue her into

<sup>59</sup> For a complete statement, see Wharton, *Int. Law Dig.*, §§ 315, 337.

<sup>60</sup> 11 J. Q. Adams' Mem., 142.

<sup>61</sup> Subject to these exceptions the right of visit in time of peace may

be said to have ended when in 1858 Great Britain abandoned it even when there was a necessity to discover the real nationality of vessels suspected of being engaged in the slave trade. See above, p. 239.

the open sea and there arrest her, provided the pursuit was begun while the vessel was still in such waters, or just after her escape from them.<sup>62</sup> The right of visit and search is, however, primarily a war right, and by the common law of nations belongs to belligerents only.<sup>63</sup> Therefore not until that branch of the subject is reached will it be made the subject of special consideration.

§ 268. Immunity of private vessels in territorial waters—Views of Webster and Marshall.—When a private merchant vessel passes into the territorial waters of a foreign state immunity from local jurisdiction, as an incident of the doctrine of extritoriality, is reduced to a minimum by reason of the fact that the jurisdiction of the state to which the vessel belongs is forced to yield in a greater or less degree to that of the local sovereign. And yet as experience has demonstrated long ago that it is beneficial to commerce for the former to regulate everywhere the internal discipline of the ship, and the rights and duties of the officers and crew towards the vessel or among themselves, the tendency is for the latter to abstain as far as possible from interfering with such internal concerns.<sup>64</sup> It is clear that the ship's company is not a mere collection of isolated strangers, but an organized body of men governed internally by the laws of the country to which the ship belongs. As Mr. Webster said in the case of the *Creole*, "the rule of law and the comity and practice of nations allow a merchant vessel coming into any open port of another country voluntarily, for the purpose of lawful trade, to bring with her and keep over her to a very considerable extent the jurisdiction and authority of the laws of her own country. A ship, say the publicists, though at anchor in a foreign harbor, possesses its jurisdiction and its laws. \* \* \* It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We

<sup>62</sup> Bluntschli, § 342; Woolsey, § 58; Hall, §§ 77, 80.

<sup>63</sup> As Judge Story expressed it in the case of *The Marianna Flora* (11 Wheaton, p. 42), "this right is strictly a belligerent right, allowed by the general consent of nations in time of war, and limited to those occasions." The qualification then follows "that American

ships offending against our laws, and foreign ships, in like manner, offending within our jurisdictions may, afterwards, be pursued and seized upon the ocean, and rightfully brought into our ports for adjudication."

<sup>64</sup> Cf. Ortolan, *Diplomatie de la Mer*, liv, ii, ch. xiii, as to the tendency in France.

do not consider, or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or owners, she and they must doubtless be answerable to the laws of the place. Nor if the master and crew while on board in such port break the peace of the community by the commission of crimes can exemption be claimed for them."<sup>65</sup> As Chief Justice Marshall said in *The Exchange* case, "when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country."<sup>66</sup>

§ 269. **Efforts to secure exemptions through treaties. Cases of Sally and Newton.**—The general statement may therefore be made that merchant vessels entering a foreign port for purposes of trade, if not exempted by treaty, are subject while they remain to the local law.<sup>67</sup> To obviate inconveniences necessarily arising out of conflicting jurisdictions, an effort has long been in progress to secure through conventions in favor of such vessels a certain and clearly defined degree of exemption from such law. The first of such conventions so entered into by the United States was with France, 1788, "for the purpose of defining and establishing the functions and privileges of their respective consuls and vice-consuls;"<sup>68</sup> and while it was in force the cases of *The Sally* and *The Newton*<sup>69</sup> arose, in each of which the proper consul of the United States claimed exclusive jurisdiction of the offense, and so did the local authorities of the port. The French Council of State, to which the matter was referred, pronounced against the local tribunals, "considering that one of these cases was that of an assault committed in the boat of the American ship *Newton*, by one of the crew upon another, and the other was that of a severe wound inflicted by the mate of the American ship *Sally* upon one of the seamen, for having made use of the boat

<sup>65</sup> Mr. Webster to Lord Ashburton, Aug. 1st, 1842. State Papers, 1843, lxi, 35; 6 Webster's Works, pp. 303-318.

<sup>66</sup> *The Schooner Exchange v. McFaddon*, et al., 7 Cranch, 144.

<sup>67</sup> A merchant vessel, except under some treaty stipulation, has no

exemption from the territorial jurisdiction of the harbor in which she is lying. 15 Opinions of Attys. Genl. U. S., p. 178.

<sup>68</sup> 8 Stat. at Large, p. 106.

<sup>69</sup> See the accounts given in 1 Phillimore (3d ed.), 484, and (2d ed.), 407; Dana's *Wheaton*, § 103.



without leave.”<sup>70</sup> In speaking of these cases M. Massé, after referring to crimes by which the peace of the port is broken, says: “It is otherwise in case of offenses committed on board of the foreign vessel by a man of the crew against another man of the same crew because it concerns the internal discipline of the vessel—[parce qu’ il s’agit alors de la discipline intérieure du vaisseau]—in which the local authority should not interfere when its assistance is not called for, or the tranquillity of the port is not broken.”<sup>71</sup>

§ 270. **Cases of Jally and Wildenhus.**—After another convention had been concluded with France (1853) there arose in 1859 the case of Jally, the mate of an American merchantman who had killed one of the crew and severely wounded another on board ship in the port of Havre. In that case the Court of Cassation held that merchant vessels are fully under the local jurisdiction whenever the state sees fit to exercise it, and that it should be exercised “whenever the act is of a nature to compromise the tranquillity of the port, or the intervention of the local authority is invoked, or the act constitutes a crime by common law, the gravity of which does not permit any nation to leave it unpunished, without impugning the rights of jurisdiction and territorial sovereignty.”<sup>72</sup> After a treaty had been proclaimed on this subject between the United States and Belgium<sup>73</sup> (1881), in which it was provided that “the local authorities shall not interfere, except when the disorder that has arisen is of such a nature as to disturb tranquillity and public order on shore, or in the port,” arose the case of Wildenhus,<sup>74</sup> involving an affray in which one member of the crew of the Belgian steamship Noordland stabbed another between decks, while the vessel was moored at the dock in the port of Jersey City, state of New Jersey. Although exclusive jurisdiction was claimed for the king of Belgium (1) under the general rules of international law, to which the practice of the United States conforms; and (2) by virtue of treaties

<sup>70</sup> Upon that state of facts the Council was of “opinion that the jurisdiction claimed by the American consuls ought to be allowed, and the French tribunals prohibited from taking cognizance of these cases.” Ortolan, *Règles Internationales de la Mer*, tom. i, pp. 293-298. Appendice, Annexe H, p. 441.

<sup>71</sup> *Droit Commercial*, 421, 423.

<sup>72</sup> Case of the Tempest, Dalloz, *Jurisprudence Générale, Année* 1859, p. 92. See also 1 Ortolan, *Diplomatie de la Mer* (4th ed.), pp. 455, 456; Sirey (N. S.), 1859, p. 189.

<sup>73</sup> 21 Stat. 776, 781.

<sup>74</sup> 120 U. S., 1.

between the two countries, the Supreme Court of the United States upheld the local jurisdiction in accordance with the general doctrine recognized by the French government and courts that there is a distinction between acts relating solely to the internal discipline of the vessel, or even crimes and lesser offenses committed by one of the crew against another, when the peace of the port is not affected, on the one hand, and, on the other, crimes or lesser offenses committed upon or by persons not belonging to the crew, or even by members of it upon each other, provided in the latter case that the peace of the port is compromised. Upon that wise and reasonable basis many nations have attempted to regulate this difficult subject by conventions, and these "numerous conventions, and the voluntary abstention from the exercise of jurisdiction which everywhere more or less prevails, point towards the proximate formation of a uniform custom which would be reasonable in the abstract and singularly little open to practical objections."<sup>75</sup>

§ 271. **No right of asylum in merchant vessels.**—As no discussion would be proper here of the extent to which a merchant vessel in a foreign port is subject in a private suit to ordinary admiralty jurisdiction, the fact need only be added that such a vessel has no right of asylum even for a political refugee in the ports of the refugee's country. Such was the doctrine clearly recognized in the case of Sotelo, a Spanish political refugee, surreptitiously embarked at Valencia on the French Packet boat *l'Ocean*, who was seized and imprisoned by the local authorities of Alicante after he had traversed the open sea on his way to that port;<sup>76</sup> and in the case of Gomez, a political refugee from Nicaragua, in regard to whose proposed arrest Mr. Bayard, in his instructions to Mr. Hall, March 12, 1885, conceded the jurisdiction of the local authorities over a merchant vessel so long as it remains in the ports of the country.<sup>77</sup>

<sup>75</sup> Hall, § 58.

<sup>76</sup> Calvo, § 470. "There is no stipulation in existing treaties between this country (Great Britain) and Spain which can be deemed sufficient to debar the Spanish government from exercising the right which, in his Lordship's opinion, appertains to that

government of claiming its own subjects when they may be found in a Spanish port as passengers on board vessels hired to convey the mails between this country and the peninsula." Rep. Fugitive Slave Commission, p. 154.

<sup>77</sup> MSS. Inst. Cent. Am. For. Rel., 1885. Mr. Bayard informed Mr.

§ 272. Goods owned by citizens of one state embarked in ships of another.—In the classification heretofore made of the non-territorial property of which a state may be possessed, was included goods owned by its citizens or subjects, but embarked in foreign ships. As it is only through the national character of the owners that such goods can be considered the property of the state, they can only remain such so long as such owners do not acquire a foreign character, which they may through domicile or services to another state, without ceasing to be citizens or subjects of the state of origin. As we shall see hereafter, when that branch of the subject is reached, enemy character may attach to the persons of neutrals and through them to their property as an effect of domicile, or to property owned by neutrals by reason of its origin, or of the use to which it is applied.

Hall that “any exemption or immunity from local jurisdiction must be derived from the consent of that country.” Such is the law as recognized by this government despite Mr. Blaine’s attempt to establish a contrary rule in instructions issued in 1890 concerning the case of *Barrundia*.

## CHAPTER IV.

### DIPLOMATIC INTERCOURSE.

§ 273. **Envoys, ancient, medieval and modern.**—The system of diplomatic intercourse that prevailed in the ancient world rested on three clearly defined conditions. In the first place, as such intercourse was limited and occasional, the intermediaries who were sent only on special errands were expected to return as soon as the business in hand was concluded; in the second, the heralds or ambassadors thus employed were not divided into different classes or orders; in the third, as a general rule, the persons of envoys were held to be sacred and inviolate even in the midst of hostilities. When there was a departure from that rule, as in the case of the slaughter of the Persian envoys by the Athenians and Spartans, the act was regarded as an outrage against “the laws of all mankind.”<sup>1</sup> Such continued to be the general sentiment of all civilized communities after the primitive system had passed from the ancient to the medieval world.<sup>2</sup> The Turks alone among the European nations were habitually careless of the general usage; and the ill fame thus acquired by Constantinople, by reason of the practice there existing of committing to prison diplomatic agents of the country with which war was imminent,<sup>3</sup> continued down to the early years of the present century, when the Porte gave formal notice to the ministers of Austria and Prussia that the Seven Towers no longer existed.

§ 274. **Effort to establish permanent embassies.**—Not until near the close of the fifteenth century did Louis XI of France attempt to supersede that part of the ancient practice permitting the sending of temporary agents for special occasions only by maintaining ambassadors at foreign courts as permanent residents.<sup>4</sup> The motive for the innovation thus made seems

<sup>1</sup> Herod. VIII, 136; cf. Thuc. I, 67.

<sup>2</sup> As to the lack of protection to ambassadors, during that period, in the states through which they passed on the way, see Bernard, Lectures on Diplomacy, pp. 121, 122.

<sup>3</sup> As late as 1806 the British min-

ister found it necessary to withdraw secretly from Constantinople to avoid torture and death which Turkish traditions rendered imminent. Rt. Hon. Charles Arbuthnot to Lord Howick, Feb. 3, 1807. Papers relating to the Expedition to the Dardanelles, 1807.

<sup>4</sup> “If they lie to you, lie still

to have commended itself "to Ferdinand the Catholic, whose policy led him to entertain [ambassadors] at various courts, as a kind of honorable spies."<sup>5</sup> Coke praises the cautious and suspicious Henry VII for having set his face against the practice. He was "a wise and politique king," because he "would not in his time, suffer lieger ambassadors of any foreign king or prince within his realm, or he with them, but upon occasion used ambassadours;"<sup>6</sup> and as late as 1660 a French envoy was given to understand by the Polish Diet that if he did not return home he would be treated as a spy.<sup>7</sup>

**Views of Grotius, Bynkershoek and Vattel.**—Even after the Peace of Westphalia, 1648, through which the modern international system was founded, had made permanent diplomatic missions a necessity, the prevailing prejudice against them was strong enough to prompt Grotius to declare that they could be rejected, without an infringement of right, because contrary to ancient practice. While he admitted that they are "now common," he claimed that they were not "necessary."<sup>8</sup> And nearly a century later Bynkershoek<sup>9</sup> manifested something of the same spirit when he defined ordinary legates as those who "are maintained at friendly courts not for special but for general purposes, even for the sake of what they can find out." But despite all such prejudices permanent legations had become a fixed institution by the middle of the seventeenth century, and from the pages of Bynkershoek and Vattel a very definite idea can be derived of their character. From the latter we learn that "several orders of ministers being established, more or less dignity was annexed to their character, and proportionate honors were required of them. \* \* Custom has established three principal degrees. What is, by way of pre-eminence, called the *representative character*, is the faculty possessed by the minister, of representing his master even in his very person and dignity."<sup>10</sup>

§ 275. **The several classes of diplomatic representatives.**—Only the right to represent the person and dignity of the sovereign

more to them," was the exhortation of Louis XI to his ambassadors. Flassan, *Diplomatie Française*, I, 247.

<sup>5</sup> Ward, *Hist. of the Law of Nations in Europe*, ii, p. 290; *ibid.*, ii, p. 484.

<sup>6</sup> Fourth Institute, Ch. xxvi.

<sup>7</sup> Ch. de Martens, *Guide Diplomatique*, § 23.

<sup>8</sup> *De Jure Belli ac Pacis*, II, c. xviii, § 3.

<sup>9</sup> *De For. Leg.*, § 1.

<sup>10</sup> *Droit des Gens*, iv, c. vi, §§ 69, 70.

conferred the representative character, and those who possessed it were of the first class and bore the title of ambassadors, ordinary or extraordinary. No matter which, they stood without question above the second class, who did not possess the representative character, because their functions related solely to the sovereign's affairs, as distinct from his person and dignity. Such agents of the second class were known as envoys, either ordinary or extraordinary. Since the beginning of the eighteenth century "the name of residents has been confined to ministers of a third order, to whose character general custom has annexed a lesser degree of respectability. \* \* His representation is in reality of the same nature as that of the envoy."<sup>11</sup> So bitter became the disputes as to precedence between the three classes of diplomats that it became necessary during the century last named to create a fourth, "called simply ministers, to indicate that they are invested with the general quality of a sovereign's mandatories, without any particular assignment of rank and character. \* \* In order to avoid all contest on certain occasions when there might be room to apprehend it, the expedient was adopted of sending ministers not invested with any of the three characters. Hence, they are not subjected to any settled ceremonial, and can pretend to no particular treatment."<sup>12</sup> In order to add to the dignity of such a minister, who took rank immediately after an ambassador, he was sometimes given the title of minister plenipotentiary,<sup>13</sup> an office gradually united with that of envoy extraordinary and placed in the same rank with it.<sup>14</sup>

§ 276. Growth of diplomatic immunities. Recent legislation. —While questions as to official precedence were thus giving rise to endless conflicts, the still graver question involving the inviolability conferred by the legatine character was still the subject of serious controversy. Coke, who opposed any wide immunity, held that an envoy who should commit in England any crime *contra jus gentium*, such as "treason, felony, adultery," should thereby forfeit his privilege and become

<sup>11</sup> Vattel, *Droit des Gens*, IV, c. vi, § 73.

<sup>12</sup> *Ibid.* IV, c. vi, § 74.

<sup>13</sup> Hertlet, *Map of Europe by Treaty*, I, 62, 63.

<sup>14</sup> "Ministers resident and minis-

ters *chargés d'affaires* shortly afterwards completed the catalogue, which we find in general acceptance at the commencement of the nineteenth century." Twiss, I, §

188.

liable to punishment like any other private foreigner,<sup>15</sup> and in 1708 an ambassador from Peter the Great was actually arrested and taken out of his coach in London for a debt of fifty pounds there contracted. As Queen Anne could not cut off the head of the sheriff of Middlesex, as the Czar demanded, she sent him instead an engrossed and illuminated copy of an act<sup>16</sup> passed to prevent such an outrage in the future by declaring according to English ideas the privileges to which diplomatic agents should be entitled under the laws of nations. In 1789 the inviolability of ambassadors was declared in France by an act of the Constituent Assembly; and in April, 1790, a declaratory act<sup>17</sup> was passed on the same subject by the Congress of the United States. Like legislation by the leading European nations either defines specifically the immunities which each recognizes, or declares generally that all members of foreign legations "shall enjoy the privileges conferred upon them by the principles of international law and public treaties."<sup>18</sup>

§ 277. Questions of precedence as settled at Vienna and Aix-la-Chapelle.—Such was the general nature of the advance that had been made when the powers assembled in the Congress of Vienna undertook to hush the endless controversies as to precedence by a common understanding establishing the three following classes of diplomatic agents:

1. Ambassadors, legates or nuncios.
2. Envoys, ministers, and others accredited to sovereigns.
3. *Chargés d'affaires* accredited to ministers of foreign affairs.

To that classification was annexed the conditions: First, that only ambassadors, legates or nuncios should possess the representative character; second, that diplomatic agents on an extraordinary mission should not by reason thereof (*à ce titre*) enjoy any superiority of rank; third, that within any class, precedence should depend upon priority in the date of the official notification of arrival.<sup>19</sup> As the latter condition made it possible for the ministers of the second class of the

<sup>15</sup> Institutes, c. 26, 152-157.

<sup>16</sup> Stat. 7 Anne, c. 12.

<sup>17</sup> Rev. St. U. S., § 4063. Cf. 1 Opinions of Attys. Genl. U. S., p. 26; Ex parte Cabrera, 1 Wash. C. C. 232; U. S. v. Lafontaine, 4 Cranch, C. C., 173.

<sup>18</sup> Phillimore, ii, pp. 228 sq.

<sup>19</sup> "Art. 1. Les employés diplomatiques sont partagés en trois classes:

Celle des ambassadeurs, légats ou nonces;

Celle des envoyés, ministres, ou autres accrédités auprès des souverains;

great continental powers to be outranked by ministers of the same class representing the minor powers of Germany, the Congress of Aix-la-Chapelle (November, 1818), was called upon to regulate the difficulty by interpolation between the second and third classes, as arranged at Vienna, another class known as ministers resident accredited to sovereigns.<sup>20</sup> The minor states could thus be represented by ministers without being forced to struggle for precedence over like representatives from the great powers. The acceptance of that modification completed the final arrangement dividing the diplomatic body into four distinct classes,—all in one class ranking before any of the class below it, with precedence in each class depending upon length of residence of each individual diplomat at the court to which he is accredited.

§ 278. **Envoys of the first class—the representative character.**—First in the hierarchy stands the ambassador, legate or nuncio, accredited from sovereign to sovereign, who is supposed to represent not only the personal dignity of his principal, but the public affairs of the state over which he presides. For that reason, to representatives of the first class only was given the representative character. Originally the superior importance accorded to ambassadors rested mainly upon their right to have personal audience of the sovereign to whom they were accredited, a right which has become a mere shadow with the growth of constitutional government, under which no important act can bind the state unless performed by a responsible minister. The rule ceasing with its reason the right of personal audience with the sovereign was gradually extended

Celle des chargés d'affaires accrédités auprès des ministres chargés des affaires étrangères.

Art. 2. Les ambassadeurs, légats ou nonces, ont seuls le caractère représentatif.

Art. 3. Les employés diplomatiques en mission extraordinaire, n'ont, à ce titre, aucune supériorité de rang.

Art. 4. Les employés diplomatiques prendront rang, entre eux, dans chaque classe, d'après la date de la notification officielle de leur arrivée." From the *recez* of the Congress of Vienna of the 19th of March, 1815.

<sup>20</sup> "Pour éviter les discussions désagréables qui pourraient avoir lieu à l'avenir sur un point d'étiquette diplomatique, que l'annexe du recez de Vienne, par lequel les questions de rang ont été réglées, ne parait pas avoir prévu, il est arrêté entre les cinq cours, que les ministres résidens, accrédités auprès d'elles formeront, par rapport à leur rang, une classe intermédiaire entre les ministres du second ordre et les chargés d'affaires."

Protocol of the Congress of Aix-la-Chapelle of the 21st November, 1818. See also Hertslet, *Map of Europe by Treaty*, I, 575.



on proper occasions to all diplomatic agents. In order further to obliterate all real distinctions between the higher classes of such agents the right of solemn entry, once enjoyed by ambassadors at the beginning of their missions, resulting sometimes in armed conflicts, has been permitted to become obsolete.<sup>21</sup>

§ 279. **Envoys of the second and third classes.**—To the second class of diplomatic agents belong envoys, envoys extraordinary, ministers plenipotentiary, envoys extraordinary and ministers plenipotentiary, and internuncios who, while accredited from sovereign to sovereign, represent only the affairs of the state to which they belong.<sup>22</sup> To the third class belong ministers, ministers resident, residents, and ministers *chargés d'affaires* accredited to sovereigns. Unless a *chargé* is thus accredited he cannot rank in the third class. His sovereign must accredit him as minister in the first instance, as in the case of the minister *chargé d'affaires* of the king of Sweden accredited to the Padischah of the Ottoman in 1784.<sup>23</sup>

§ 280. **Charges d'affaires ad hoc, and ad interim.**—To the fourth class belong *chargés d'affaires*, accredited to the minister of foreign affairs, who are either sent out originally with express credentials as such, or promoted temporarily to that position, as members of an embassy or legation, during the absence or inability of their chief. In the first case they are known as *chargés d'affaires ad hoc*; in the last, as *chargés d'affaires ad interim*.<sup>24</sup>

§ 281. **How diplomatic rank is usually determined.**—While

<sup>21</sup> For an account of the armed conflict that took place on Tower Hill, London, in 1661, between the retinues of the French and Spanish ambassadors by reason of the attempt of each to follow next to the king in the procession formed for the solemn entry of the representative of Sweden, see Ward, *Hist. of the Law of Nations*, ii, 458-462. The ceremonial is still observed on a small scale at Madrid, where the author has several times witnessed it.

<sup>22</sup> Martens, *Précis*, vii, c. 2, § 198. As to the position once taken by the Austrian Internuncio at Constantinople, by special treaty ar-

rangement, see Ch. de Martens, *Guide Diplomatique*, c. 10, § 65.

<sup>23</sup> Martens, *Précis*, vii, c. 2, § 194.

<sup>24</sup> Martens, *Guide Diplomatique*, c. I, § 11. Wheaton (*Elements*, p. III, c. I, § 6) cites an instance in which the Secretary of State of the U. S. formally notified the *chargé d'affaires* of an European power of the highest rank, that "he could hold official intercourse only with a department of state; that he had no right to converse with the President on matters of business, and might consider it a liberal courtesy if he was presented to him at all."

every state may determine for itself the character in which it will accredit its diplomatic representatives, it is usual for that matter to be settled by agreement that in any given case the agent received will be of the same rank as the one sent. The definite and final arrangement of the classes or orders in the diplomatic hierarchy by the Congresses of Vienna and Aix-la-Chapelle, and the definitions that have been given, either by the positive enactments or judicial decisions of particular states, of the immunities and exemptions belonging to diplomatic agents have finally placed the right of embassy or legation upon a basis so firm and so well understood that its several branches may now be defined almost with the accuracy and precision of municipal law.

§ 282. **Theory of equality between sovereign states. Precedence of pope and emperor.**—The corner stone of the existing international system is the idea of equality between sovereign states regardless of their relative geographical extent or physical power. Each has the same natural right to do any lawful act that may be rightfully performed by any other. "Power or weakness does not in this respect produce any difference. A dwarf is as much a man as is a giant; a small republic is no less a sovereign state than the most powerful kingdom."<sup>25</sup> And yet despite the theory of equality, powerful states, like powerful individuals, so assert their personality as to secure a precedence over the less powerful. In the family of nations the superior ranks, titles and other ceremonial distinctions thus secured by the greater states have either been tacitly recognized by constant usage, or by express compacts voluntarily entered into. As the spiritual head of the Holy Roman Empire the pope claimed for his ambassadors or nuncios precedence over the representatives of all temporal princes, and in the Catholic countries of France, Spain, Austria-Hungary, and Portugal such precedence is still conceded them.<sup>26</sup> As the temporal head of that empire the successor of Charlemagne and the Cæsars likewise claimed, as "emperor," precedence over all other temporal princes.<sup>27</sup> That title, once considered from its historical associations more eminent than all others, dwindled, however, with the importance of the

<sup>25</sup> Vattel, *Droit des Gens, Préliminaires*, § 18.

<sup>26</sup> The *recez* of the Congress of Vienna of March the 19th, 1815,

sent règlement n'apportera aucune innovation relativement aux représentans du Pape."

<sup>27</sup> Bryce, *Holy Roman Empire*, Ch. VII.

empire itself until it came to signify no more than that of "king."

§ 283. **Significance of royal honors.**—To the chiefs of certain states were conceded by the customary laws of Europe what were called *royal honors*, entitling their possessors not only to precedence over all princes not so endowed, but also to the exclusive privilege of accrediting ambassadors to other powers.<sup>28</sup> Such regulations originally made for the special benefit of monarchical states, at a time when the European republics were too feeble to maintain their equality, gave way at last when the republics of Venice and the United Provinces grew strong enough to assume the honors of crown heads, and Cromwell demanded that no mark of respect that had been paid to the envoys of the monarchy should be withheld from the representatives of the English commonwealth. The first French republic in its treaties with other European powers was careful to stipulate for the same ceremonial as to rank and etiquette that had been observed between them and France prior to the Revolution,<sup>29</sup> and that rule is now observed between the monarchical states of Europe and the present Republic of France, the United States of North America and Switzerland.

§ 284. **Right to regulate ceremonies. Courtesy on high seas.**—Every state has by virtue of its sovereignty the exclusive right to regulate all questions of precedence, and all ceremonies within its territorial jurisdiction,<sup>30</sup> including the ceremonies with which its forts and ships of war are to be approached or passed within its recognized sea-limits. The disputes that once arose out of the refusal of certain states to pay to the flags of certain territorial powers marks of homage within what were known as the narrow seas grew, as a general rule, out of a denial of the pretensions of such powers to supremacy within them. The real domain of international courtesy in this regard is to be found on the high seas<sup>31</sup> and in foreign

<sup>28</sup> Vattel, *Droit des Gens*, II, § 38; Klüber, *Droit des Gens Moderne*, Pt. II, tit. I, c. 3, §§ 91, 92; Heffter, § 28.

<sup>29</sup> See treaties of Campo Formio (Art. 23), and of Luneville (Art. 17), with Austria, and treaties of Basel with Prussia and Spain. Schoell, *Histoire des Traités de Paix*, i, p. 610, ed. Bruxelles.

<sup>30</sup> By the fifth article of the *re-chez* of the Congress of Vienna it was provided that "il sera déterminé dans chaque état un mode uniforme pour la réception des employés diplomatiques de chaque classe."

<sup>31</sup> "Inter ea refero, si quis minor dignitate majorem, in publico sibi obviam factum, salutet vel non

ports where the commanders of the vessels of all civilized nations are or should be instructed to perform certain ceremonial acts, "as honors paid to the independence of nations, as a public authorized recognition that the sovereignties of the world are entitled to mutual respect."<sup>32</sup> The tendency to assimilate all municipal laws and ordinances regulating salutes to a uniform standard, through international agreement, has resulted in certain rules upon that subject, which were put in force by various maritime powers July 1st, 1877.

§ 285. **Right to send and duty to receive envoys.**—Passing from form to substance, the statement may be made that the very essence of equality is embodied in the right of every sovereign power to communicate and negotiate on equal terms with every other. The right of embassy or legation is now a normal and necessary condition of international intercourse, and it is unnecessary to inquire whether it rests upon mere comity, or upon the positive rules of international law.<sup>33</sup> While no state is bound to send ambassadors to another, it may do so if it sees fit, and the state to whom they are accredited is bound under the existing usage to receive them, subject to the right to reject certain persons for good cause to be determined, not by an arbitrary discretion, but with reference to certain recognized standards. It cannot be doubted that every independent state has the right to send diplomatic agents to any other power through the action of that department of its government to which such power is committed by its own constitution. The form of such constitution it has the right to settle for itself, and after it is so settled foreign states must recognize it. The right to send envoys is an attribute of sovereignty, no matter whether the same is vested in a king, a president or in a senate or council acting in conjunction with such king or president.

§ 286. **Difficulties incident to contests for sovereignty.**—Grave diplomatic difficulties often arise during revolutions or civil wars involving contests for the sovereignty itself. In such a

salutet, et si qua minorum principum navis, in mari extero, navibus majorum principum, quaquam etiam dignitate sint, salutem dicat vel neget." Bynkershoek, *Quaest. J. P.*, II, § 24.

<sup>32</sup> Ortolan, *Diplom. de la Mer*, vol. i, bk. 2, c. 15.

<sup>33</sup> As to the general nature of the obligation of a state to send and receive envoys, see Grotius, *De Jure Belli ac Pacis*, II, c. 18, § 1; Vattel, *Droit des Gens*, iv, c. 5, §§ 55-65; Martens, *Précis*, vii, c. 1, §§ 187-190; Rutherford's *Inst.*, vol. ii, b. ii, c. 9, § 20; Hall, § 98.

case every prudent government is careful not to decide prematurely, by a formal reception of envoys from a *de facto* power, whether or no the real sovereignty has actually passed to such power.<sup>34</sup> In order to relieve the state to which such envoys are sent from making any formal or positive decision on that subject, they sometimes go in the anomolous character of agents clothed with the powers and immunities of ministers, without being invested with the representative character, or entitled to diplomatic honors.<sup>35</sup> In reference to such agents Mr. Seward said in memoranda of March 13 and July 17, 1865, touching the affairs of Mexico: "It is a fixed habit of this government to hold no official intercourse with agents of parties in any country which stand in an attitude of revolution antagonistic to the sovereign authority in the same country with which the United States are on terms of friendly diplomatic intercourse. It is equally a fixed habit of this government to hold no inofficial or private interviews with persons with whom it cannot hold official intercourse."<sup>36</sup>

#### § 287. Effect of revolutionary changes after reception of envoy.

—If, after a minister has been accredited to a country and received by it, a revolutionary change takes place in the government of the state from which he comes, his functions are rather suspended than terminated; and during such suspension he is entitled to the immunities and respect due to his station. And on the other hand if, after he has been duly received, the government to which he is accredited is forcibly overthrown and another substituted in its place, which his own fails to recognize, it is usual for him to continue to enjoy the immunities originally belonging to him, although it is a grave question whether his state could claim for him such immunities as a right, while it refuses to "invest him with the representative character," or to recognize the lawfulness of the government upon which such claim would have to be made.<sup>37</sup>

<sup>34</sup> As to the question of expediency involved, see Merlin, *Répertoire*, tit., *Ministre Publique*, Sect. ii, § 6.

<sup>35</sup> During the civil war in the United States the Confederate government sent such agents to Europe, who conferred in an unofficial manner with the Emperor of the French and with members of the

British government. The reception of such private agents can not be construed into an act of recognition.

<sup>36</sup> Ex. Doc. No. 20, 39th Cong., 1st Sess.

<sup>37</sup> En tout cas, malgré la cessation de sa mission pour l'une ou l'autre des causes que nous venons d'énumérer, le ministre conserve

§ 288. **Right of legation retained by certain part-sovereign states.**—The right of embassy or legation does not belong exclusively to such states as are absolutely sovereign and independent. It may be claimed by those classed as part-sovereign, provided that in partially surrendering their right to control their external affairs they have not lost the essence of nationality.<sup>38</sup> Whether the right has been entirely surrendered must depend in any given case upon the special relations existing between the dominant and dependent states. Convenient illustrations of such relations may be found in what has been said already as to such protected communities as have been permitted to retain an international existence, special reference being made to the Christian principalities of the Ottoman Empire.<sup>39</sup> Whether in the case of a federal union the several units composing it have retained the right of diplomatic representation on their own account, independently of the federal head, depends of course upon the terms of each particular compact. Such reservations made in the ancient constitutions of the Germanic and Swiss Confederations have practically disappeared from the present constitution of the German Empire and absolutely from the existing federal constitution of Switzerland.<sup>40</sup> In like manner the entire control of the foreign affairs of the United States is vested in a supreme federal government under a constitution which expressly forbids any state from entering without the consent of Congress into any agreement or compact with another state, or with a foreign power.<sup>41</sup> The right to send or receive public ministers, thus taken away from the states by implication, was withheld in express terms by the Articles of Confederation (§ 6), which provided that “no state, without the consent of the United States in Congress assembled, shall send any

jusqu’ au retour dans son pays toutes les immunités et tous les droits inhérents à son caractère public.” Calvo, § 466. See also Dana’s Wheaton, § 209, and Note 121; Martens, *Précis*, § 238; Vattel, *Droit des Gens*, iv, c. 9, §§ 123, 126; Heffter, § 223; Phillimore, ii, § 240; Klüber, § 228; Martens, *Guide*, § 56; Twiss, I, § 200.

<sup>38</sup> It can not be said, without qualification, that “this right belongs only to states which are independent, ‘qui summi imperii

sunt compotes inter se.’” Twiss, I, § 184.

<sup>39</sup> See above, pp. 179 seq. As to the right of Egypt to negotiate commercial and postal conventions with foreign powers under the Sultan’s Firmans of 1866 and 1867, provided they do not contain political arrangements, see Holland, *European Concert in the Eastern Question*, pp. 116-128.

<sup>40</sup> See above, pp. 168 seq.

<sup>41</sup> Art. 1, § 10.

embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty with any king, prince or state.”

§ 289. When a particular individual may be rejected without just cause of offense.—The fact that foreign governments are sometimes asked in advance whether or no a particular individual will be acceptable as an envoy is a clear and practical admission of the right of rejection when confined within the limits which usage has prescribed.<sup>42</sup> By the authority of such usage a state may, without giving a just cause of offense, refuse to receive a particular individual (1) when a recognition of the special character in which he comes would be a menace to the interests or dignity of the receiving power; or when such character conflicts with the constitution of such power. On the first ground Queen Elizabeth refused to receive the nuncio of Pius IV, sent to invite her to appear at the Council of Trent, because she feared that his mission might result in the creation of disaffection among her subjects;<sup>43</sup> on the second, the pope refused in 1875 to receive Prince Hohenlohe because, being a cardinal, he was *ex-officio* a member of the curia. The right to reject a particular individual may be justly exercised (2) when he is known to be politically hostile either to the state or its sovereign; or when he is of notoriously bad character or personally obnoxious to the sovereign or state to which he is sent. Francis I refused to receive Cardinal Pole as legate because he was an avowed enemy of his ally, Henry VIII; and Richelieu rejected the Duke of Buckingham as ambassador extraordinary from Charles I, because on a previous visit to France he had ventured to profess an ardent love for the queen herself.<sup>44</sup> “It must be borne in mind that an envoy is a *person* as well as the abstract representative of his government, and that it is the prerogative of every government to require that those with whom he deals be *personae gratae*, and to decide the question for itself.”<sup>45</sup> A state has also the right (3) to refuse to receive as an envoy one of its own citizens for the obvious reason that it is desirable to prevent a conflict between the

<sup>42</sup> It is not usual, however, to ask as to acceptability in advance. As to the practice of the government of the U. S. see Wharton, Int. Law Dig., § 82a.

<sup>43</sup> Green, Hist. of the Eng. People, ii, pp. 327-28.

<sup>44</sup> Gardiner, England Under the Duke of Buckingham and Charles I., i, pp. 182, 183, 329.

<sup>45</sup> Mr. Frelinghuysen, Sec. of State, to Mr. Morgan, Dec. 30, 1884. MSS. Inst., Mex.

international immunities of a minister and the civil liabilities of a native-born subject. For that reason it has become a maxim of government with many European states not to receive one of its own citizens as a permanent diplomatic representative of a foreign power.<sup>46</sup> It has, however, been held in several notable cases that the objection should not be insisted upon if the envoy comes as a naturalized citizen or subject of the state he represents.<sup>47</sup> In any event, if a sovereign sees fit to receive a natural-born subject as an envoy, without any express reservation of his jurisdiction over him, it seems to be clear that he thereby waives all authority he might otherwise exercise by reason of his origin, and clothes such envoy with the complete *jus legationis*.<sup>48</sup>

§ 290. **Envoy may be received conditionally. Mr. Keiley's case.**—As the duty to receive is not absolute, it may be coupled with conditions, provided they are expressed before or at the time of the reception, and are not derogatory to the dignity of the accrediting government. The United States held at an early day in its dealings with France that a conditional offer to accept a minister should not “be expressed in terms which may countenance the inadmissible pretension of a right to prescribe the qualifications which a minister from the United States should possess;”<sup>49</sup> and when in 1885 the government of Austria-Hungary intimated in advance that the usual honors could not be accorded to Mr. Keiley, because of his marriage to a lady of the Hebrew faith by civil contract only, the Secretary of State replied “that the ground upon which it is announced that the usual ceremonial courtesies and formal

<sup>46</sup> Such was the rule of the French and Swedish courts, and likewise of the United Provinces. Twiss, I, § 186. “This government objects to receiving a citizen of the United States as a diplomatic representative of a foreign power. Such citizens, however, are frequently recognized as consular officers of other nations, and this policy is not known to have hitherto occasioned any inconvenience.” Mr. Evarts, Sec. of State, to Mr. Logan, Sept. 19, 1879. MSS. Inst. Cent. Am.

<sup>47</sup> Ch. de Martens, *Guide Diplomatique*, I, c. II, § 6, referring to

the cases of Count Pozzo di Borgo and Count de Bray, two French subjects, received in their native country, the first as Minister of Russia, the second as Minister of Bavaria, after having been naturalized in the countries which they respectively represented.

<sup>48</sup> Phillimore, II, c. 135; Wheaton, *Elements*, pt. III, c. I, § 15. For Vattel's view, see *Droit des Gens*, iv, c. 8, § 112. For the English view, as affirmed by judicial decision, see *Macartney v. Garbutt*, L. R. 24, Q. B. D. 368.

<sup>49</sup> President John Adams, Second Annual Address, 1798.



respect are to be withheld from this envoy of the United States to your government, that is to say, because his wife is alleged or supposed by your government to entertain a certain religious faith, and to be a member of a certain religious sect, cannot be assented to by the executive of the government of the American people, but is and must be emphatically and promptly denied."<sup>50</sup> When an envoy has been once received unconditionally, he is of course entitled to all immunities and honors incident to his office free from the possibility of subsequent abridgment.

§ 291. **Letters of credence and additional full powers.**—After the rank of an envoy has been settled by the state appointing him, he must be armed with a letter of credence, in order that he may enjoy in the state to which he is sent the immunities and honors incident to the same. Such letter of credence, in the case of an ambassador or minister entitled to rank in either of the three first classes, is addressed by the sovereign or chief magistrate of the sending to the corresponding chief of the receiving state. Such letter, which usually states the general object of the mission and the official character of the agent bearing it, for whose acts full faith and credit is asked, is written either in the first person as a cabinet letter (*lettre de cabinet*); or in the third person as a letter of council (*lettre de chancellerie*).<sup>51</sup> In the case of a *chargé d'affaires* and other agents of that class the letter is addressed by the minister charged with foreign affairs to the corresponding minister of the other government. While letters of credence imply general full powers to transact all such political business as falls legitimately within the scope of the mission, it is, nevertheless, usual, if any special treaty or convention is to be negotiated, to arm the agent with an additional full power to negotiate, which may be inserted in the letter of credence or embodied

<sup>50</sup> Mr. Bayard, Sec. of State, to Baron Schaeffer, May 18, 1885. MSS. Notes, Austria. See also President Cleveland's First Annual Message, 1885; Senate Ex. Doc. No. 4, 49th Cong., 1st sess.; Geffcken in Holtzendorff's *Handbuch*, iii, 632. President Cleveland declined to cancel Mr. Keiley's appointment, intrusting the interests of the American government at Vienna to the care of a secretary of

legation, acting as *chargé d'affaires ad interim*.

<sup>51</sup> Martens, *Précis*, vii, c. 3, § 202; Wicquefort, *de l'Ambassadeur*, i, § 15. "Great Britain has, of late, set examples to other states of simplifying, as much as possible, the ceremonial of credentials, but several of the great European powers, Russia for instance, still continue to employ the *lettre de chancellerie* for the credentials of

separately in letters-patent. An additional full power thus given may be a mandate *ad hoc*, limited to the particular negotiation or treaty in question (*pouvoirs spéciaux*); or it may be a general mandate to treat with the ministers of all the powers within the dominion of the sovereign to whom the envoy is sent (*pouvoirs généraux*); or it may be an unlimited mandate to treat with all powers or states (*pouvoirs illimités*).

§ 292. **Limited full powers—Instructions.**—It is usual to provide envoys sent to congresses not with letters of credence, but with limited full powers<sup>52</sup> of the second class, as it is not always certain what powers or states will participate in the same. When the congress assembles, such envoys reciprocally exchange copies of their mandates with each other, or deposit them in the hands of the mediating power or presiding minister.<sup>53</sup> For his personal guidance in the conduct of the business intrusted to him, every diplomatic agent is furnished by his government with instructions, generally given in writing, which he must keep secret, unless he is specially authorized to divulge their contents either in whole or in part. If a proposition or overture is made to him beyond the scope of such instructions, he should only receive it *ad referendum*.

§ 293. **When right to innocent passage begins. Its extent defined.**—Although a permanent diplomatic mission does not commence until the credentials of the envoy have been acknowledged by the government to which he is sent, from the time of their reception he is so far under the protection of the law of nations as to be entitled to a right of innocent passage through a friendly third state, in going to and returning from that to which he is accredited.<sup>54</sup> Under such circumstances he need only be armed with a passport from his own government establishing his official character. At the outset this just privilege does not seem to have been recognized as

her diplomatic agents of the three first orders." Twiss, I, § 195.

<sup>52</sup> General full powers are extremely rare at the present day, if not entirely obsolete. "Il n'est plus d'usage de munir un ministre du plein pouvoir, qui l'autorisait à traiter avec toutes les puissances, et que l'on appelait 'actus ad omnes populos.'" Ch. de Martens, *Guide Diplomatique*, I, c.

4. Cf. also Phillimore, xi, § 230. And for instances in which full powers were actually granted, see Twiss, I, § 196.

<sup>53</sup> Wicquefort, *de l'Ambassadeur*, i, § 16; Ch. de Martens, *Guide Diplomatique*, II, § 17.

<sup>54</sup> Phillimore, ii, 210, 211 (2d ed.) holds that "in time of peace the ambassador is of right inviolable in his transit through a third

an absolute right, and instances are not wanting of seizures made in other days by third powers of ambassadors passing to and from friendly states. While from Grotius<sup>55</sup> we can only learn that "the law respecting the inviolability of ambassadors is to be understood as binding upon the nation to whom the embassy is sent," Bynkershoek rebuts the presumption that it is binding on any other by a positive declaration that the privilege is operative only within the state to which the envoy is accredited.<sup>56</sup> So rapid, however, was the growth of all immunities incident to the legatine character, after the establishment of permanent missions, that Vattel was able to say: "It is true that the prince alone to whom the minister is sent is obliged and specially engaged to secure to him the enjoyment of all the rights attached to his character; but the others, over whose territory he passes, cannot refuse him that to which the minister of a sovereign is entitled, and which nations owe reciprocally to one another. They owe to him above all things perfect personal security."

§ 294. Right of third state to prescribe route—Mr. Soule's case—Rule in U. S.—The immunity thus established is subject, however, to the right of the third state to prescribe the route to be traveled,<sup>57</sup> and to insist that there shall be no unnecessary delays on the way.<sup>58</sup> In 1854 the government of France refused to permit Mr. Soulé, the minister of the United States to Spain to make a stay (*séjour*) at Paris on his return to his post at Madrid from which he had been temporarily absent. The French minister of foreign affairs in defining the position of his government said that "the Emperor has not wished, as you appear to think, to prevent an envoy of the United States crossing the French territory to go to his post to acquit himself of the commission with which he was charged by his government; but between this simple passage and the sojourn of a foreigner whose antecedents have awakened, I regret to say, the attention of the authorities invested with the duty of securing the public order of the country, there exists a difference, which the minister of the interior had to appre-

country, but cannot claim the privileges of extritoriality as a matter of tacit compact."

<sup>55</sup> *De Jure Belli ac Pacis*, II, c. 18, § 5.

<sup>56</sup> *De Foro Legatorum*, ix, § 7. Citing in support of his position,

Gentilis, Zouch, Huber and Wicquefort.

<sup>57</sup> *Droit des Gens*, iv, c. vii, § 84.

<sup>58</sup> Phillimore ii, 186-189; Halleck, 234; *Holbrook v. Henderson*, 4 Sandford's (N. Y.) Rep., 631; Field's Code, Int. Law, § 136.

ciate. If Mr. Soulé was going immediately and direct to Madrid, the route of France was open to him; if he was about coming to Paris to sojourn there, that privilege was not accorded him."<sup>59</sup> In reaching that conclusion the French authorities were largely influenced, however, by the fact that Mr. Soulé, a native-born subject of France, was only a naturalized citizen of the United States. The point was made that it would have required "a special agreement to have enabled him to represent, in his native land, the country of his adoption." In an official opinion of Attorney-General Cushing the rule was laid down that "a person coming into the United States as the diplomatic representative of a foreign state, with credentials from governing powers not recognized by this government, is accorded diplomatic privileges merely of transit, and this of courtesy, not of right, and such privileges may be withdrawn whenever there shall be cause to believe that he is engaged in, or contemplates, any act not consonant with the laws, peace and public honor of the United States."<sup>60</sup>

§ 295. **Necessity for safe-conduct in time of war—Belleisle's case.**—In time of war an envoy has no right to enter the territory of a state hostile to his own without its safe-conduct,<sup>61</sup> a refusal to grant which is a virtual refusal to receive him. Even though accredited to a friendly state, if he is found upon the soil of another at war with his own without a safe-conduct, he can be seized without offense to the law of nations. Maréchal de Belleisle, an ambassador from the French to the Prussian court, did not complain when he was transferred to England as a prisoner of war, after his arrest on his way to Berlin, in an outlying possession of Hanover, that country being at the time engaged with England in war against his own. Envoys<sup>62</sup> assembled in a congress or conference, while not accredited to the government of the state in which it is held, are considered as directly representing their states, and

<sup>59</sup> The correspondence between Mr. Mason, U. S. Minister to Paris, and Mr. Drouyn de L'Huys, the French Minister of Foreign Affairs, as to the refusal of the French government to permit Mr. Soulé to enter France, is printed in Senate Ex. Doc. No. 1, 33d Congress, 2d sess. See also Lawrence's Wheaton (ed. 1863), 422.

<sup>60</sup> 8 Opinions of Attys. Genl. U. S. 1855.

<sup>61</sup> Vattel, *Droit des Gens*, iv, c. 7, § 85; Ch. de Marten's *Guide Diplomatique*, II, § 19.

<sup>62</sup> *Ibid.* *Droit des Gens*, iv, c. 7, § 85; Martens, *Précis*, § 247; Martens, *Causes Cél.*, ii, I; Heffter, § 207; Moser, *Versuch*, iv, 120; Car-

as such they are entitled to the usual immunity throughout.<sup>63</sup>

§ 296. **Inviolability of despatches of a neutral envoy in time of war.**—During the siege of Paris, 1870, when the German military authorities declined to permit a messenger with despatches from the United States minister at that capital to pass through their lines, except upon condition that the contents of the pouch should be left unsealed, a question arose as to the rights of legation of a neutral state under such circumstances. In complaining of the act as a discourteous one which the United States could not acquiesce in, Secretary Fish propounded this question: "When, however, the blockaded fortress happens to be the capital of the country where the diplomatic representative of a neutral state resides, has the blockading force a right to cut him off from all intercourse by letter with the outer world, and even with his own government? No such right is either expressly recognized by public law, or is even alluded to in any treatise on the subject. The right of legation, however, is fully acknowledged, and, as incident to that right, the privilege of sending and receiving messages. \* \* \* Indeed, the rights of legation under such circumstances must be regarded as paramount to any belligerent right. They ought not to be questioned or curtailed, unless the attacking party has good reason to believe that they will be abused, or unless some military necessity, which upon proper statement must be regarded as obvious, shall require the curtailment."<sup>64</sup> After an explanation from Count Bismarck that "the delay occurring now and then in the transmission of your dispatch-bag is not occasioned by any doubt as to the right of your government to correspond with you, but by obstacles it was out of my power to remove," Mr. Fish closed the incident by expressing the hope that the interruptions "were the unavoidable incidents of the then pending military strife. In the absence of any recurrence, we are content with the recognition so fully made by Count Bismarck of the right which we claim."<sup>65</sup>

lyle, History of Frederick the Great, iv, p. 60.

<sup>63</sup> Phillimore, ii, 210, 211; Hall, § 99.

<sup>64</sup> Mr. Fish, Sec. of State, to Mr. Bancroft, Nov. 11, 1870. MSS. Inst. Germ.; For. Rel., 1870.

<sup>65</sup> Mr. Fish, Sec. of State, to Mr.

Washburne, Feb. 24, 1871. MSS. Inst., France. Documents attached to President Hayes's message of Feb. 6, 1878. See also D'Angeberg, *Recueil des Traités*, etc., *concernant la guerre Franco-Allemande*, Nos. 756 and 783; Wharton, Int. Law Dig., § 97.

§ 297. **Ceremonials of arrival and reception.**—It is the duty of every envoy on his arrival at his post promptly to notify the minister of foreign affairs of the fact. If the former is of the first class the notification should be made through some official of the embassy or legation who should present to the latter his principal's letters of credence, asking for him at the same time an audience with the sovereign. When the envoy is of the second or third class he is expected to notify the minister of foreign affairs of his arrival by note, asking for a time to be fixed at which he himself may present his letters of credence to the sovereign. *Chargés d'affaires* and other agents of the fourth class, accredited to the minister of foreign affairs, notify him by letter of their arrival, asking at the same time an audience for the purpose of presenting to him their credentials.

§ 298. **Beginning of functions—Ceremonial *lex loci*.**—While the envoy's immunity commences with his entry into the territory of the state to which he is sent, he does not begin to exercise his functions until his reception by the sovereign has taken place;<sup>66</sup> and from that time he should be careful to remember that every court has its own etiquette and ceremonials regulated by rules which it has an exclusive right to make, and that generally there is a functionary known as an introducer of ambassadors, or by some equivalent title, whose duty it is to explain such rules and direct their application.<sup>67</sup> With the ceremonial *lex loci* the new comer should be most careful to conform, so far as instructions from his own state will permit.<sup>68</sup> If he has lived at another court he should be careful not to infer that rules with which he has long been familiar are of universal application; and, if he is an ambassador, he should not trust too implicitly to the statements generally contained in the text books that public audiences and solemn entries are everywhere obsolete.<sup>69</sup>

§ 299. **Diplomatic immunities not unlimited.**—It would be impossible for an envoy efficiently to discharge the duties of his mission if his liberty of action was restrained like that of any other foreign sojourner by obedience to the local jurisdic-

<sup>66</sup> As to the usual ceremonial attending the presentation of letters of credence, see Ch. de Martens, *Guide Diplomatique*, iv, § 33-36; Twiss, I, § 198.

<sup>67</sup> *Ibid.* *Guide Diplomatique*, iv, § 37.

<sup>68</sup> Diplomatic Representatives of the U. S. are subject to certain restrictions as to the dress they may wear at foreign courts. Cf. Wharton, *Int. Law Dig.*, § 107b, "Court Dress."

<sup>69</sup> See above, p. 321.

tion. In order, therefore, to secure a free and fearless discharge of diplomatic functions a consensus of nations has established the right of every envoy to enjoy for himself, his family and his suite a certain exemption from such jurisdiction. While such privilege continues the envoy remains subject to the laws of his own state which govern his personal status and rights of property according to the fiction that although *de facto* resident in a foreign country he is *de jure* resident within the territory of his own. Such is the nature of the fiction of extritoriality<sup>70</sup> invented to give intensity to the idea that the envoy, his family and his suite are exempt from all local control. If that were absolutely true, if there was no conflict between the fiction and the fact, the task involved in framing a general definition of the immunity would not be a difficult one. The fact is, however, that such immunity is neither unqualified nor unlimited, and could not be so without grave inconvenience to the state granting it. An effort will, therefore, be made to define its general scope and character, and then to state the several limitations by which it is curtailed.

§ 300. **Their duration and extent.**—The exemption, which is supposed to rest upon a tacit compact between the sending and receiving state,<sup>71</sup> begins the moment the envoy enters the territory of the latter, and continues not only during his entire residence but until he loses his official character or leaves the country, even when prior to his departure war has broken out between his own state and that to which he is accredited.<sup>72</sup> While the privilege continues it exempts the envoy, his hotel and moveable effects from the local jurisdiction, civil and criminal, and through him it is extended to those of his suite

<sup>70</sup> Grotius defined his idea of the fiction when, speaking of legates, he said: "fictione quadam habentur pro personis mittentium, ita etiam fictione simili constituerentur quasi extra territorium." *De Jure Belli ac Pacis*, II, c. 18, §§ 4, 5.

<sup>71</sup> Martens has stated the matter clearly when he says that the "extension of extritoriality pertains only to the positive law of nations, to treaties or usage, and is susceptible of modifications, which, in fact, it undergoes; whence it is

not enough always to appeal to extritoriality in order to enjoy those rights which may be derived from the extended notion given to the word." *Précis*, vii, c. 5, § 215. See also to the same effect, Rutherford's *Inst.* ii, b. ii, c. 9, § 20; Wicquefort, *de l'Ambassadeur*, i, § 27; Bynkershoek, *De Foro Legatorum*, c. 5, 8; Klüber, *Droit des Gens Moderne de l'Europe*. Pt. II, tit. 2, p. 203; Wheaton, *Hist. Law of Nations*, 237-243.

<sup>72</sup> See above, p. 325, note 37.

possessing a diplomatic character; and in a lesser degree to his wife, children, chaplain, private secretary and servants, persons necessary to his comfort and convenience, but not a part of the diplomatic corps of his country. To the first class belong secretaries of embassies and legations who, like the minister himself, hold commissions from the sovereign; and the messengers and couriers who, while bearing dispatches, are exempt from seizure on the high seas and upon land when passing through friendly third states.

§ 301. When an envoy may be arrested and expelled—Cases of Gyllenborg and Cellamare.—The exemption of a diplomatic agent from the criminal side of the local jurisdiction can only be suspended in an extreme case when, by actually plotting or conspiring against the state to which he is accredited, such agent forces its police authorities to arrest him in self-defense. Such action was taken by the government of Great Britain, in 1717, when Count Gyllenborg, the ambassador of Sweden, was arrested and his diplomatic documents seized because evidence had been obtained that he was one of the moving spirits in a conspiracy then on foot to overthrow George I, and to set the old Pretender on the throne. When the reasons were explained all the diplomats present, except the ambassador of Spain, expressed themselves as satisfied; and the Count was detained as a prisoner until exchanged for the English ambassador to Sweden, who had been arrested in retaliation.<sup>73</sup> In the next year the Spanish ambassador at Paris, Prince Cellamare, was arrested and conducted across the frontier because he had engaged in a conspiracy to seize the duke of Orleans and proclaim the king of Spain regent of France in his stead, with the duke of Maine as deputy.<sup>74</sup> As there was no protest from other powers this case and the preceding are generally accepted as settling the right to arrest and expel an envoy detected in actual conspiracy against the government to which he is accredited.<sup>75</sup> While such government cannot punish him even under such circumstances, it may forcibly resist him, and if necessary forcibly eject him from

<sup>73</sup> Ch. de Martens, *Causes Célèbres*, I, 75-138; Ward, *Hist. Law of Nations*, II, 548-550; Lord Mahon, *Hist. of Eng.*, I, ch. viii. As to the case of Lesley, Bishop of Ross, who claimed immunity from the criminal jurisdiction upon the

ground that he was an ambassador of Mary Queen of Scots, see Pitt-Cobbett, *Cas. Int. Law*, pp. 65, 104-105.

<sup>74</sup> Ch. de Martens, *Causes Célèbres*, I, 139-173.

<sup>75</sup> Klüber, § 211; Heffter, § 42;



the country.<sup>76</sup> In ordinary cases of a violation by a diplomatic agent of the local criminal law the correct and usual course is to ask his recall; or, if the case is serious, to expel him without that formality, thus casting upon his own state the duty of punishing his offense.<sup>77</sup>

§ 302. When an envoy may be punished by a local tribunal—**Wicquefort's case.**—Such an agent cannot be subjected to trial and punishment in a local tribunal,<sup>78</sup> unless his state should voluntarily withdraw the immunity after the commission of the offense; or, where it has been actually waived beforehand by his being received under conditions amounting to a consent that he shall submit to such jurisdiction, as in the case of a subject received as a foreign minister on that express condition.<sup>79</sup> In 1675 Wicquefort, a native of Amsterdam, was convicted and sentenced to imprisonment for life with confiscation of goods for betraying state secrets to foreigners while holding office under the States-General, although he was then acting at the Hague as the resident diplomatic agent of the Duke of Lüneburg.<sup>80</sup> As Wicquefort was a public official of his own country when he assumed the diplomatic character his case does not necessarily conflict with the doctrine that when a state receives one of its private citizens as a foreign minister, without any express reservation of its jurisdiction, it thereby concedes to him the full diplomatic immunity.

§ 303. Immunity does not include mere visitors—**Sa's case.**—Such immunity from criminal process certainly extends to the minister, the official members of the legation, his wife and children, and to such other persons as are in good faith permanent members of his family, not including mere visitors. An extreme application of that exception occurred in the case of Don Pantaleon Sa, the brother of the Portuguese ambassador at London, who was tried, convicted and hung by permission of Cromwell for having committed a murder of special atrocity in that city. His claim of diplomatic exemption was ignored, although he averred that he was a member of his brother's

Phillimore, ii, §§ cliv-viii; Bluntschli, § 209; Hall, § 50.

<sup>76</sup> Grotius, *De Jure Belli ac Pacis*, II, c. 18, § 4; Bynkershoek, *De Foro Legat.*, c. 17, 18, 19; Vattel, iv, c. vii, §§ 94-95; Martens, *Précis*, vii, c. 5, § 218; Ward, *Hist. Law of Nations*, ii, c. 17, 291-334.

<sup>77</sup> Walker, *Science of Int. Law*, p. 226.

<sup>78</sup> Vattel, iv, c. 7, § 94; Phillimore, ii, §§ 157-170; Bluntschli, §§ 209, 210; Pitt-Cobbett, *Cas. Int. Law*, pp. 108-110.

<sup>79</sup> See above, p. 328.

<sup>80</sup> Bynkershoek, *De For. Leg.*, 11

suite, and waiting under a promise from his sovereign to succeed him upon his recall then momentarily expected.<sup>81</sup>

§ 304. **Minister cannot be compelled to appear as a witness.**—As a minister cannot be subjected to restraint by process from a court, he can neither be compelled to appear as a witness nor to give a deposition before a magistrate in a proceeding requiring him to submit to cross examination.<sup>82</sup> He can be requested to waive his privilege and voluntarily appear but he cannot be compelled to do so. In the event of such a request the state in question must determine whether the right to make the waiver is vested in the minister or only in the government he represents.<sup>83</sup> When, in 1856, the Dutch minister at Washington, who was a material witness in a case of homicide, refused to appear in open court, although willing to make a deposition on oath, his government refused to order him to give evidence publicly. In consequence of such refusal the United States, availing itself of the only recognized expedient, demanded his recall.<sup>84</sup>

§ 305. **Exemption from civil jurisdiction—Legislation, English and American.**—The general immunity which exempts an envoy from the civil side of the local jurisdiction is also subject to certain qualifications. The English act (7 Anne, c. 12) heretofore referred to, declaratory of the common law, of which the law of nations must be deemed a part, provided that “all writs and processes whereby the goods or chattels of a diplomatic agent may be seized, distrained, or attached shall be

and 18; Wheaton, *Hist. of the Law of Nations*, p. 234.

<sup>81</sup> Ward, *Hist. of the Law of Nations*, ii, 535-546. As to Hale's untenable contention that an ambassador may be tried for murder, see *Pleas of the Crown*, I, 99. Nearly twenty years later the case of Pantaleon was quoted as a precedent to justify the arrest by the Emperor of the Prince von Fürstenburg, envoy of the Elector of Cologne. Welwood's *Memoirs*, p. 112.

<sup>82</sup> “But where by the laws of the country, evidence must be given orally before the court, and in the presence of the accused, it is proper for the minister or the member of the mission whose testi-

mony is needed to submit himself for examination in the usual manner.” Hall, § 53. That was the course pursued by Señor Camacho, minister from Venezuela, in the case of Guiteau, the assassin of President Garfield. See *Guiteau's Trial*, I, 136.

<sup>83</sup> When a diplomatic representative of the U. S. is called upon to waive his privilege and give testimony, “he should not do so without the consent of the President, obtained through the Secretary of State.” Printed Pers. Inst. Dip. Agents, 1885. Wharton, *Int. Law Dig.*, § 98.

<sup>84</sup> For the correspondence of the government of the Netherlands

deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever. \* \* \* Provided, and be it declared, that no merchant or other trader whatsoever, within the description of any of the statutes against bankrupts, who hath or shall put himself into the service of any such ambassador or public minister, shall have or take any manner of benefit by this act." The corresponding statute of the United States provides that "whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a state, or by any judge or justice, whereby the person of any public minister of a foreign state or prince, authorized and received as such by the President, or any domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized or attached, such writ or process shall be deemed void."<sup>85</sup> The object of all such legislation is to secure to diplomatic agents in foreign countries immunity from every kind of writ process employed for the purpose of forcing them to pay their debts out of any property there employed as a means or instrumentality in the exercise of their diplomatic functions. As Grotius has expressed it: "As to what respects the personal effects (*mobilia*) of an ambassador, which are considered as belonging to his person, they are not liable to seizure, neither for the payment nor for security of a debt, either by order of a court of justice, or, as some pretend, by command of the sovereign. This, in my judgment, is the soundest opinion; for an ambassador, in order to enjoy complete security, ought to be exempt from every species of restraint, both as to his person, and as to those things which are necessary for his use. If, then, he has contracted debts, and if, which is usually the case, he has no real property (*immobilia*) in the country, he should be politely requested to pay, and if he refuses, resort must be had to his sovereign."<sup>86</sup>

§ 306. Not forfeited by trading.—While a diplomatic agent should not be permitted to engage in mercantile transactions, it has been held that such a breach of propriety on his part does not work a forfeiture of his privilege. In deciding the case of Taylor v. Best, 1854,<sup>87</sup> the lord chief justice said, "If

in refusing to permit its agent to testify, see Senate Ex. Doc. No. 21. 34th Congress, 3d sess. See also Halleck, i, 294; Calvo, §§ 583-4.

<sup>85</sup> Rev. St. U. S., § 4063; Ex parte

Cabura, 1 Wash. C. C. 232; U. S. v. Lafontaine, 4 Cranch, C. C. 173.

<sup>86</sup> *De Jure Belli ac Pacis*, II, c. 18, § 9.

<sup>87</sup> 14 C. B. 487.

an ambassador or public minister, during his residence in England, violates the character in which he is accredited to that court, by engaging in commercial transactions that may raise a question between the government of Great Britain and that of the country by which he is sent, he does not thereby lose the general privilege which the law of nations has conferred upon persons filling that high character—the proviso in the statute of Anne limiting the privilege in cases of trading applying only to the servants of the embassy.” In order that the conclusion thus reached should not be given too wide a construction Lord Campbell, in deciding the case of the *Magdalena Steam Navigation Company v. Martin*, 1859,<sup>88</sup> after upholding the doctrine laid down in *Taylor v. Best*, said “it certainly has not hitherto been expressly decided that a public minister duly accredited to the queen by a foreign state is privileged from all liability to be sued here in civil action.”

§ 307. **How envoy's personal effects may be subjected.**—If the question be asked under what circumstances a civil liability may be enforced in the local courts against a public minister duly accredited, the answer can be made that while no such proceeding can bind the official property of the embassy or legation, including the hotel itself, its furniture and appurtenances, and the envoy's personal effects, carriages and the like, a proceeding taken in the proper form may bind other property held in the country by the minister in his private capacity. Such, for instance, as real property there held other than his hotel or dwelling; or such personal property as he may own as a private person or merchant engaged in trade or other business, or in a private fiduciary character as executor or trustee.<sup>89</sup> As the minister does not hold such lands and goods by virtue of his office, and as they are in nowise necessary to its exercise, there is no reason why his diplomatic immunity should shelter them. But in any suit or seizure intended to bind them through the action of the local courts the fiction of the minister's extritoriality must be kept up by proceeding against him in the form usually employed against any other absent person reputed to be out of the country.<sup>90</sup>

<sup>88</sup> Ellis and Ellis, 111. See also *Musurus Bey v. Gadhan*, L. R. (1894), 1 Q. B. 535.

<sup>89</sup> Martens, *Précis*, 216-7; Klüber, § 210; Woolsey, §§ 91, 92, 96;

Calvo, § 592; Halleck, i, 285-7; Hall, § 50; Dana's *Wheaton*, Note 129, specially v., “What property is exempt from arrest.”

<sup>90</sup> “At the least, according to Heff-

§ 308. **How his civil immunity may end.**—A minister's immunity from civil jurisdiction vanishes, of course, (1) when he waives it at the time of his reception; (2) when, with the consent of his government, he subsequently clothes the local courts with jurisdiction over him by voluntarily appearing before them either as plaintiff or defendant.<sup>91</sup> In that event, if judgment is rendered against him, even on a counter claim, he must pay it. If judgment is rendered in his favor, and the other party appeals, he must submit to the appellate jurisdiction. A final judgment against him can be satisfied, however, only out of property which he possesses separate and apart from that exempt by virtue of his diplomatic character.<sup>92</sup>

§ 309. **Mr. Wheaton's notable case at Berlin. Tacit hypothecation not enforceable.**—While the famous American publicist, Wheaton, was minister at the court of Berlin, the proprietor of the house in which he resided claimed the right to detain his goods found on the premises at the expiration of the lease, in order to secure the payment of damages alleged to be due, on account of injuries done to the house during the contract. The proprietor relied upon a section in the Prussian Civil Code, declaring that "the lessor is entitled, as security for the rent and other demands arising under the contract, to the rights of a *pfandgläubiger*, upon the goods brought by the tenant upon the premises, and there remaining at the expiration of the lease." In the same code a right so secured was thus defined: "A real right, as to a thing belonging to another, assigned to any person as security for a debt, and in virtue of which he may demand to be satisfied out of the substance of the thing itself, is called *unterpfandsrecht*."<sup>93</sup> If Mr. Wheaton had been a subject of the country there could not have been a

ter, no step can be taken towards an ambassador which can not be taken towards an absent stranger." Woolsey, § 91. See, to the same effect, Bluntschli, §§ 138-140; Vattel, iv, c. viii, § 115.

<sup>91</sup> Vattel, iv, c. viii, § 111; Phillimore, ii, pp. 180, 217. With the consent of his government he may bring suit, and become responsible for costs.

<sup>92</sup> When in 1720 the envoy of the Duke of Holstein was sued in Hol-

land for a debt contracted in trade, a decree of arrest was granted against him, and all his goods within the jurisdiction subjected to the decree, except the movables belonging to him as ambassador, which were held to be exempt. Bynkershoek, *De Foro Legatorum*, c. xvi.

<sup>93</sup> *Allgemeines Landrecht für die preussischen Staaten*, Part 1, tit. 21, § 395; tit. 30, § 1.

moment's doubt as to the right of the landlord to seize and detain the goods either for unpaid rent or for damages, under the municipal law. The real question was as to the right of the proprietor as against a foreign minister who, as a general rule, can only be compelled to perform his contracts through an appeal to his own government. After an amicable settlement had been made of the damages claimed, and the goods returned, a discussion of the right involved took place between the two governments, in the course of which the United States distinctly admitted that if there had been an express hypothecation by a formal giving in pledge, implying a transfer of possession as security for a debt, there could be no doubt that the pawnee would have possessed such a real right as the Prussian Code contemplated, untrammelled by any diplomatic immunity whatever. In that event the privilege would have been waived. On the other hand, it was confidently maintained that where there is only an implied contract, or *facit* hypothecation purely by operation of law, as in the case in question, the unwaived diplomatic immunity would prevent a distress for rent under the local municipal law.<sup>1</sup> Bynkershoek, on the authority of Grotius, states that the goods of foreign ministers cannot be taken by way of distress or pledge;<sup>2</sup> and the act of Congress of 1790 expressly includes distress for rent among the legal remedies denied creditors of such ministers.<sup>3</sup>

§ 310. **Immunity of minister's hotel and grounds.**—The immunity that protects an envoy's residence, usually called his hotel, together with its grounds and outbuildings, applies, no matter whether it is owned or rented by his government or himself or furnished by the state to which he is accredited.<sup>4</sup> It is supposed to be his sanctuary within whose curtilage his family and suite, his diplomatic papers, his personal effects and equipages are beyond local interference or control. And yet despite the fiction of extritoriality, more perfectly developed perhaps in this instance than any other, the fact remains that in certain particulars even the hotel is subject to local law. The state granting immunity necessarily reserves the power of self-defense, which it may rightfully exercise in the event the envoy is implicated in actual conspiracy against it, either by ejecting him forcibly from the country, or by forcibly

<sup>1</sup> For a complete statement of the matter, see Dana's *Wheaton*, §§ 228-240.

§ 19; *De Foro Legatorum*, c. viii.

<sup>3</sup> See above, p. 339.

<sup>4</sup> Klüber, § 192, note.

<sup>2</sup> *De Jure Belli ac Pacis*, II, c. 18,

entering and searching his official abode.<sup>5</sup> In the presence of such an emergency the personal and local immunities both disappear.

§ 311. **Envoy must not harbor criminals not of his suite.**—Despite the practice that existed during the seventeenth and eighteenth centuries of misusing the hotels of diplomatic agents as asylums for criminals, through an extension to them of the right attached during the Middle Ages to many sacred places, it is now settled in European countries that its abolition is the only rational answer to Bynkershoek's question:<sup>6</sup> "Are ambassadors sent to harbor thieves?" If a criminal, not a member of the envoy's family or suite, takes refuge in his hotel the local authorities can demand that he be delivered up; and if the envoy refuses to comply the local sovereign has a clear right to ask his recall. Such was the course pursued by the Swedish king when the British ambassador at Stockholm, Mr. Guidekens, asserted the absolute right of asylum in favor of a merchant accused of crime who had escaped to his hotel.<sup>7</sup> With so convenient and efficacious a remedy always at hand, it should not be claimed that in case of a refusal to deliver a criminal the local authorities have a right to make a forcible search and seizure within the hotel by the breaking down of doors and the like.<sup>8</sup> Where a demand is made for the surrender of one over whose person or offense the envoy's country claims exclusive jurisdiction such envoy should, in case of refusal, either send the accused home for trial, or try him himself, provided he has jurisdiction to do so under the laws of his own state, coupled with the consent of the local sovereign that he may exercise it within his territory.

§ 312. **Right of asylum for political refugees in certain countries.**—While the barbarous treatment often inflicted upon political offenders in Oriental countries, and the frequent revolutions that occur in the South and Central American states, seem to have established in those parts a custom in favor of

<sup>5</sup> "It is equally agreed that this immunity ceases to hold in those cases in which a government is justified in arresting an ambassador and in searching his papers." Hall, § 52. See, to the same effect, Dana's *Wheaton*, Note No. 129, II.

<sup>6</sup> *De For. Leg.*, § 21.

<sup>7</sup> Martens, *Erzählungen*, etc. i, 217-235.

<sup>8</sup> Such, however, is clearly the law. Vattel, iv, c. ix, § 118; Klüber, § 208; Martens, *Précis*, § 220; Phillimore, ii, § cciv-v; Bluntschli, § 200. As to the notable case of the Duke of Ripperda, who was taken by force in 1726 from the house of the English Ambassador at Madrid, under an order from the Council of Castile deciding "that

the right of asylum for political refugees, the government of the United States has deemed it its duty to say, that, "though the privilege of asylum in Mohammedan states, as well as in South America, are more liberally dispensed than in the leading European states, they should be in all cases carefully guarded."<sup>9</sup>

§ 313. **Immunity of envoy's residence defined.**—Subject to the foregoing exceptions the general statement may be made that while the exact limits of the inviolability of the hotel are not perfectly defined, a fair result of reasoning on principle and of a comparison of authorities is that the residence of the minister should enjoy absolute immunity from the execution of all compulsory process within its limits, and from all forcible intrusions. "If it can be rightfully entered at all without the consent of its occupant, it can only be so entered in consequence of an order emanating from the supreme authority of the country in which the minister resides, and for which it will be held responsible by his government."<sup>10</sup>

§ 314. **Freedom of religious worship.**—No matter what may be the creed of the state to which the envoy is accredited, he is entitled to freedom of religious worship in a private chapel in his own house, according to the forms peculiar to his nation, provided he makes no public manifestation of it, nor attracts attention to it by the ringing of bells, processions or other external rites.<sup>11</sup> Since the time of the Reformation the Catholic and Protestant nations have mutually recognized this privilege either by convention or usage; and by like means it has been secured to ministers and consuls in Turkey and other Oriental states.<sup>12</sup> In most countries the growing spirit of religious toleration has so widened the privileges as to permit embassies and legations to maintain public chapels, in which

he might be taken out of it, even by force," see Vattel, u. s., and Martens, *Causes Cél.*, i, 178, and ii, 52.

<sup>9</sup> Mr. Clayton, Sec. of State, to Mr. McCauley, May 31, 1849, MSS. Inst. Barb. Powers.

<sup>10</sup> Mr. Buchanan, Sec. of State, to Mr. Shields, Mar. 22, 1848. MSS. Inst., Venez.

<sup>11</sup> Martens, *Précis*, § 222-226; Klüber, § 215, 216; Ch. de Martens, *Guide Diplomatique*, § 35.

<sup>12</sup> There is no significance in the silence of Grotius upon this subject, because in his day a resident embassy was a novelty; it had not the sanction of ancient custom. Vattel was able to speak of the right, however, as one belonging to a public minister "by established custom in almost every country." *Droit des Gens*, iv, § 104. He says "that a minister, and especially a resident minister, should enjoy the full exercise of his religion within



natives of the same religion may freely unite with foreigners in the celebration of a common faith.<sup>13</sup>

**§ 315. Exemption from general taxes. Liability for local dues.**

—It is usual to assert that the person of the envoy, his movables, and the property belonging to him as the representative of his sovereign are not subject to taxation. A far more exact idea of the exemption can be drawn, however, from the statement of Twiss, who says that “a foreign minister is privileged from being called upon to contribute personally to general taxes of a country; that is, to such taxes as are levied by the government, and which are available for the general purposes of the state, in which the ambassador is not interested. But a foreign minister is not exempt from the payment of local dues, which are raised for purposes of local administration, and which are expended on local objects, from which he himself, in common with his neighbors, derives immediate benefit. Thus he is liable to pay local rates assessed upon his hotel, or its site, for sewerage, lighting, watching and similar objects. He is also liable to pay tolls for the use of roads and bridges, and also for the carriage of his letters, if they are conveyed to him by the local post.”<sup>14</sup> Even the exemption from general taxes as thus formulated is not universally recognized. “When a foreign legation occupies rented property in this country, the owner of the premises is not exempted from all lawful taxes;” and “the rule observed by this government with respect to the taxation of property owned by a foreign government and occupied as its legation, is to accord reciprocity in regard to general taxation, but not to specially exempt it from local assessments, such as water rent and the like, unless it were definitely understood that these taxes would also be exempted by the foreign government upon a piece of property belonging to the United States and used for a like purpose by our minister.”<sup>15</sup>

his own house, for himself and suite.”

<sup>13</sup> Calvo, i, p. 665; Dana's Wheaton, § 248.

<sup>14</sup> Law of Nations, I, § 203.

<sup>15</sup> Mr. Bayard, Sec. of State, to Mr. Woolsey, Apr. 15, 1886. MSS. Dom. Let. Wheaton claims, too broadly, no doubt, that “the hotel in which he resides, though exempted from the quartering of

troops, is subject to taxation in common with the other real property of the country, whether it belongs to him or to his government.” Dana's ed., § 242. Phillimore (ii, 214) states the rule more reasonably when he says “the fiction of exterritoriality can not be applied to immovable possessions, and there is no doubt that they, with their incidents, remain sub-

**Exemption from customs dues.**—As to immunity from customs dues, it is the usage of nearly all nations to permit the heads of all missions, temporary or permanent, of whatever rank, to import free of duty such articles as are intended for their private use or consumption. While in some countries the privilege is limited to a certain amount, such amount is usually so liberal as to preclude the idea that any restriction is really intended.

§ 316. Immunities of envoy's servants. Practice not uniform.—As domestics and servants permanently employed about the person or premises of the envoy are to a certain extent exempt from the local jurisdiction, the municipal law often requires that a list of them be furnished the minister of foreign affairs so that the privileges to which they are entitled may be understood and respected by the local police.<sup>16</sup> There is, however, no uniform practice among nations defining the precise extent to which such privileges ought to be recognized. Although the statute of Anne declares that all civil process against the servants of ministers, unless they are traders, shall be void, in criminal matters the British authorities claim the right of jurisdiction over them, if the offense with which they are charged is committed outside of the minister's residence. When, in 1827, a coachman of Mr. Gallatin, American minister at London, was charged before a magistrate with assault committed outside the legation, a warrant was issued under which the accused was arrested in his stable on the premises. After informal complaint had been made the British Foreign Office replied that the statute could not be so construed as "to protect the mere servants of ambassadors from arrest, upon criminal charges," and, in substance, that the premises of ministers are not entitled to inviolability. Nothing more was admitted than the fact "that courtesy requires that their houses should not be entered without permission being first solicited in cases where no urgent necessity presses for the immediate capture of the offender." For that reason the magistrate was rebuked only for "the mode in which the warrant was executed in the

ject to the jurisdiction of the country in which they are situated. . . . From this rule with regard to real property is to be exempted the actual dwelling-house of the ambassador, which is intimately connected with his personal invio-

liability." That view is supported by Hall, (§ 63), and Calvo (§ 529).

<sup>16</sup> Bynkershoek refers to the custom as one generally neglected in his time. *Foro. Legat.*, c. 16. The same statement would not be far from the truth at the present day.

present instance."<sup>17</sup> While the English practice is exceptional, it is entirely in line with an attempt made at Munich in 1790 to draw a distinction between the actual members of a mission and those only in attendance on them, and to assert local jurisdiction over the latter as a matter of right.<sup>18</sup> Before protection can be secured for a servant of a minister, in any event, the fact must be proven that he is not a mere appointee, but a *bona fide* member of a diplomatic household, because it is only his character as such that entitles him to immunity.<sup>19</sup> Where the immunity is recognized, who can punish such a servant for crimes committed against the local law?

§ 317. Envoy's contentious jurisdiction no longer exists.—

There was a time when publicists claimed that an envoy possessed jurisdiction, both civil and criminal, over his suite; and upon that theory, in 1603, Sully, then Marquis of Rosny, French ambassador at London, assembled a council or jury of Frenchmen for the trial of one of his people who had killed an Englishman in a brothel. After the accused had been thus condemned to death and delivered to the English authorities for execution he was pardoned by James I.<sup>20</sup> The *voluntary* side of such jurisdiction remains, but the contention has passed away, if it ever really existed. As Heffter has well expressed it: "The right of *contentious* jurisdiction is nowhere, within my knowledge, conceded to ambassadors at Christian courts, even for the persons of their suite; but they here simply execute requisitions directed to them, especially in regard to the hearing of witnesses, and all this according to the laws of their own country."<sup>21</sup>

§ 318. Extent of voluntary jurisdiction.—By virtue of his voluntary jurisdiction, a diplomatic agent may still, in accordance with the forms prescribed by the laws of his own state, authenticate and legalize wills and other unilateral acts and contracts, affixing his seal and the like. It seems to be clear

<sup>17</sup> Wharton, Int. Law Dig., § 94; Lawrence's, Wheaton (ed. 1863) 1006, 1007.

<sup>18</sup> Martens (*Précis*, 219, and *Causes Cél.*, iv, 20) regarded the distinction inadmissible, and it seems to have been inconsistent with usage.

<sup>19</sup> It is not the minister who gives "protection;" it is the law

that clothes his servants and domestics with a public character.

<sup>20</sup> As the accused had been condemned by a tribunal constituted under the authority of his own country, the French claimed that the pardon was unauthorized. Ward, Hist. of the Law of Nations, ii, 527.

<sup>21</sup> *Völkerrecht*, § 216.

that such an agent may legalize contracts of marriage between members of his suite; and some writers claim that he may also legalize marriages between subjects of his state, other than members of his suite, when specially authorized to do so by his sovereign. There is, however, no general custom compelling other states to recognize such marriages. Even in countries where the marriage of two foreigners may be solemnized, it seems that the marriage of a subject of the state with a foreigner in the house of his ambassador, according to the law of the foreign state, would not, as a general rule, be upheld. As evidence of the tendency in that direction reference may be made to the case of *Morgan v. French*, in which a marriage between an Englishman and a French subject, celebrated at the English embassy at Paris, was declared void by the Tribunal Civil de la Seine,<sup>22</sup> and to the case of a marriage between an Austrian and an English woman, celebrated in English form at the English embassy at Vienna, annulled by the Supreme Court of Austria in 1880.<sup>23</sup> There is, however, no well-defined rule upon the subject, which is involved in great confusion and uncertainty.<sup>24</sup>

§ 319. **How accused servants should be dealt with.**—Despite the general principle that the servant of an envoy cannot be made defendant in a civil suit or arrested on a criminal charge without his master's consent, when the local criminal law is broken the envoy must either arrest the offender and send him home for trial, or, what is the better course, if the case is not exceptional, surrender him to the local authorities for trial and punishment. In 1867 the Czar permitted a French court to try one of his subjects who had entered the Russian embassy at Paris and there wounded one of its attachés.<sup>25</sup>

§ 320. **How an envoy's mission may terminate, with or without formal recall.**—An envoy's mission may terminate through circumstances which may cause him to enter upon a new career at the same post, without a return to his own country. Such

<sup>22</sup> *Journal de Droit Int. Privé*, 1874, p. 72.

<sup>23</sup> Note to Gillespie's translation of Von Bar, p. 493.

<sup>24</sup> For a more complete statement of the whole subject, see Lawrence, *Commentaire*, iii, 357-78; Stocquardt, in the *Rév. de Dr. Int.*, 1888, pp. 260-300; Hall, p. 192, note 1.

<sup>25</sup> The French government refused to surrender the criminal upon the ground that the fiction of extritoriality did not apply (1) because the accused Russian was not in the employ of the ambassador; (2) because the calling in of the local police was a waiver of the immunities of the residence.

is the case when there is a change in his diplomatic rank; or when the death or abdication of his own sovereign, or of the sovereign to whom he is accredited, makes it necessary that he should be armed with fresh credentials corresponding with changed conditions. If there is a mere change of rank there must be a letter of recall to close the old career and a fresh letter of credence to define the new; if the envoy's sovereign dies or abdicates, it is usual, in monarchical countries, for a letter of notification<sup>27</sup> of a continuance of his appointment to be sent by the successor of the deceased or deposed sovereign to the prince at whose court he resides; if the prince to whom he is accredited dies, new letters of credentials must be sent for presentation to his successor.<sup>28</sup> In the United States, and other countries governed under republican systems, no change or interruption takes place in the functions of diplomatic agents either upon the death of the president, or at the expiration of his term of office and the inauguration of his successor.<sup>29</sup> In the following cases the termination of the envoy's mission is absolute: (1) When the period fixed for the duration of the mission expires, or, when the return of the ordinary minister to his post ends the term of a minister *ad interim*. In neither case is a formal recall necessary. Under this head may be classed special missions, whose objects have been attained or have failed; and mere missions of ceremony, when their purpose has been fulfilled. (2) When the envoy is recalled either through the voluntary action of his own government or at the special request of that to which he is accredited. In the first case, no matter whether the object of the mission has been

<sup>27</sup> Calvo claims that while the accredited agent can be thus authorized to continue his functions, "he most assuredly needs new letters of credence to define and establish his position. It is by this fact relating to their representative character that ministers are always distinguished from consuls." Vol. 1, §§ 466, 470.

<sup>28</sup> Martens, *Précis*, §§ 238-42; Heffter, § 223; Phillimore, ii, § cexl; Dana's Wheaton, §§ 250-251; Bluntschli, § 227-43; C. de Martens, *Guide Diplomatique*, c. ix. There is a difference of opinion as to the termination of a diplomatic

mission by a change of government through revolution. On the one hand, it is claimed that the relations between the diplomatic agent and the new government may be regarded as informal or official at the choice of the parties without a fresh letter of credence. On the other, it is maintained that such a letter is specially necessary as a means of emphasizing the difference between a diplomatic agent and a consul. Practice appears to favor the latter view. Hall, p. 318.

<sup>29</sup> The same is true in the event of the election of a new pope. Calvo, § 1367; Halleck, i, 304.

accomplished or has failed, or whether the recall is the result of motives not affecting the friendly relations of the two governments, formal letters of recall must be sent to the envoy by his government, copies of which he must present to the minister of foreign affairs, asking at the same time an audience with the sovereign for the purpose of taking leave. At such audience it is expected that the envoy will present to the sovereign the original of his letters of recall with a formal address, or with informal remarks appropriate to the occasion. If the recall is the result of a misunderstanding between the two governments, the circumstances of each case must determine whether or no a formal letter of recall is to be sent to the envoy; or whether he may quit the residence without waiting for it; or whether he is to demand of the sovereign an audience of leave. If, however, the recall is at the request of the government to which he is accredited, it is clear that the envoy would neither ask nor receive such an audience.<sup>30</sup>

§ 321. **Dismissal of envoy before recall. Should not be capriciously sent away.**—A sovereign at whose court an envoy resides may send him away without waiting for his recall, either by reason of acts of his government, or on account of his own misconduct. In the first event, it is usual for such sovereign to inform him by note that he desires to end all diplomatic intercourse with his government, at the same time presenting him with his passports. In the second, not only the dignity of the envoy, but that of his state is so involved that justice and courtesy alike demand that reasons should be given sufficient to warrant a proceeding of such gravity. In justice to itself the dismissing state should formulate the grounds upon which its action is based,—in justice to its agent the accrediting state should ascertain whether such grounds rest upon adequate proof. There is no reasonable foundation for the position assumed by Halleck,<sup>31</sup> and reproduced by

<sup>30</sup> No matter in what manner a mission is terminated, or the functions of its incumbent suspended, the diplomatic agent continues in possession of all his immunities until his return to his own country. Vattel, iv, c. 9, § 126; Martens, *Précis*, vii c. 9, § 239; Ch. de Martens, *Guide Diplomatique*, vii, § 59, c. ii, § 15.

<sup>31</sup> Int. Law, i, 307, resting mainly upon an opinion of Attorney-General Cushing, which does not sustain the position. He also refers to Merlin, who merely says that "le souverain étranger ne peut s'offenser si l'on prie son ministre de se retirer quand il a terminé les affaires qui l'avaient amené."

Calvo,<sup>32</sup> that a state is in duty bound to recall an envoy who has become unacceptable to the government to which he is accredited simply upon its statement that he is so; and that such state has no right to ask for reasons to be assigned why such envoy has become unacceptable since his reception as *persona grata*. Dana also falls into obvious confusion when he assumes that a dismissal or demand for recall may be rested upon the identical grounds upon which a state may object to receive a particular person in the first instance.<sup>33</sup> After all special objections to the personality of an envoy have been waived by his reception, it is obviously unjust that he should be expelled and disgraced without a reasonable and provable cause. As Hall has fairly expressed it: "Courtesy to a friendly state exacts that the representative of its sovereignty shall not be lightly or capriciously sent away; if no cause is assigned, or the cause given is inadequate, deficient regard is shown to the personal dignity of his state; if the cause is grossly inadequate or false, there may be ground for believing that a covert insult to it is intended. A country, therefore, need not recall its agent, or acquiesce in his dismissal, unless it is satisfied that the reasons alleged are of sufficient gravity in themselves."<sup>34</sup> No more just or reasonable rule can be formulated as a standard by which the merits of particular cases of dismissal or forced recall, past or present, may be tested.

§ 322. Notable cases of recall or dismissal. Case of Genet, 1793.

—Washington gave an admirable example of the patience and moderation which should characterize such a proceeding when in 1793 the French minister, Genet, attempted to violate the neutrality of the United States by granting commissions to

<sup>32</sup> *Droit International*, § 439.

<sup>33</sup> "Although there be no misconduct that entitles the sovereign to dismiss him, still it is no just cause of offence if he object to a particular person as ambassador, on grounds short of misconduct, and merely for the reason that he is a person with whom, for whatever cause, diplomatic or personal relations can not be agreeably or advantageously maintained." Dana's Wheaton, Note 137.

<sup>34</sup> *Int. Law*, pp. 318-19. The government of the U. S. has, however, given its sanction to the view

maintained by Halleck, Calvo and Dana. "The official or authorized statement that a minister has made himself unacceptable, or even that he has ceased to be '*persona grata*,' to the government to which he is accredited, is sufficient to invoke the deference of a friendly power and the observance of the courtesy and the practice regulating the diplomatic intercourse of the powers of Christendom for the recall of an objectionable minister." Mr. Fish, Sec. of State, to Mr. Curtin, Nov. 16, 1871. MSS. Inst. Russia.

American citizens who fitted out privateers manned by Americans to cruise against English commerce. Despite such proceedings, aggravated by an insolent correspondence in which the minister attempted to stir up Congress and the people against him, the president did not insist upon Genet's recall until it became a necessity, in recognition of which the Provisory Council of the French Republic demanded "the arrest of Mr. Genet and all the other agents who may have participated in his faults and sentiments."<sup>35</sup>

**Case of Yrujo, 1804.**—When in 1804 the recall of the Spanish minister, Yrujo, was demanded on account of an attempt made by him to bribe a Philadelphia newspaper to advocate the Spanish view of the boundary question then in controversy with the United States, and his government consented with the proviso that he should be permitted to depart on the footing of a minister going home on leave, he was permitted to hover around Washington until 1807.<sup>36</sup>

**Case of Jackson, 1809.**—In 1809 the United States demanded the recall of the British minister, Jackson, primarily because he charged that the Secretary of State, as an act of falsehood and duplicity, had concluded an agreement with his predecessor, Erskine, "in violation of that gentleman's instructions," which "were at the time, in substance, made known to you;" and, secondarily, because of continued offenses in the form of "toasts given by him at the public dinners at Boston." As the government of the offending minister was not satisfied with the evidence offered to sustain the charge of misconduct, it only consented to the demand for recall, after recording the fact that "His Majesty has not marked with any expression of his displeasure the conduct of Mr. Jackson, \* \* \* who does not appear, on the present occasion, to have committed any intentional offense against the government of the United States."<sup>37</sup>

**Case in 1855.**—In 1855 it was held by this government that a foreign minister who engages in the enlistment of troops here for his government is subject to be summarily expelled

<sup>35</sup> Fauchet's letter to Mr. Randolph, Sec. of State, Feb. 21st, 1794. Cf. Hildreth's Hist. of the U. S., iv, 439; Wharton, Int. Law Dig., § 84.

ton, St. Tr., 322; Int. Law Dig., §§ 84, 106.

<sup>37</sup> Lord Wellesley's reply to Mr. Pinkney, 3 American State Papers (Foreign Relations), 355, ff; Lyman's Diplomacy of U. S., ch. i;

<sup>36</sup> Schouler's U. S. ii, 108; Whar-



from the country, or, after demand of recall, dismissed by the president.<sup>38</sup>

**Case of Catacazy, 1871.**—In 1871, “the conduct of Mr. Catacazy, the Russian minister at Washington, having been for some time past such as materially to impair his usefulness to his own government, and to render intercourse with him for either business or social purposes highly disagreeable,” an intimation was made to his government that “under the circumstances the president is of the opinion that the interests of both countries would be promoted and those relations of cordiality with the government of the Czar, of the importance of which he is well aware, would be placed upon a much surer footing, if the head of the Russian legation here was to be changed.”<sup>39</sup> As there was hesitation and delay in acceding to the request, upon the eve of the visit of a Russian grand duke, a second communication was sent saying “the president cannot be expected to receive as the principal attendant of his highness one who has been abusive of him and is personally unacceptable.”<sup>40</sup> Before the offending minister was finally withdrawn this government felt called upon to say that after it “has requested the recall of a foreign minister, if there be delay or difficulty in obtaining such recall, his passports, in case of continued misconduct on his part, may be sent to him forthwith.”<sup>41</sup>

**Case of Lord Sackville, 1888.**—Shortly before the presidential election of 1888, a person professing to be a British-born subject wrote to the British minister at Washington, Lord Sackville, asking him to advise the writer “privately and confidentially” how he should vote, and to inform him whether in his opinion Mr. Cleveland would, if re-elected, pursue a policy friendly to England. Lord Sackville fell into the trap, and replied in a letter, promptly published, which made him at least technically liable to the charge of interfering in the internal affairs of the country. The further charge that he had spoken insultingly of the president and Senate to a newspaper reporter he repudiated entirely in a letter to the Secretary of State. Upon that state of facts his recall was demanded; and

Alison's Hist. of Europe, 10, 651.

<sup>38</sup> 7 Opinions of Attys. Genl. U. S., 367.

<sup>39</sup> Mr. Fish, Sec. of State, to Mr. Curtin, June 16, 1871. MSS. Inst. Russia.

<sup>40</sup> Mr. Fish, Sec. of State, to Mr. Curtin, Aug. 18, 1871. MSS. Inst. Russia.

<sup>41</sup> Mr. Fish, Sec. of State, to Mr. Catacazy, Nov. 10, 16, 1871. MSS. Notes, Russia.

when his government failed to comply, before it had time to receive any explanation from him, he was given his passports and dismissed within three days.<sup>42</sup>

**Case of Bulwer, 1848.**—Equally precipitate action, but on far graver provocation perhaps, marked the dismissal of Mr. Bulwer, British minister to Spain, who, in 1848, was given his passports by the reactionary government of Narvaez, with an intimation that he should quit Madrid within forty-eight hours, upon the ground that he had interfered with the internal affairs of the country, not only by involving himself with the opposing party, but by complicity in actual revolt. When the Spanish government failed to justify its charges Lord Palmerston responded by dismissing the Spanish minister at London.<sup>43</sup>

§ 323. **When mission is terminated by death of envoy.**—When a mission is terminated by the death of an envoy, it becomes the duty of the first official of the embassy or legation to place seals upon his effects, and to make arrangements for the interment of the body, or for sending it home, after all proper ceremonies and honors have been observed according to the custom of the place. Except in case of necessity the local authorities are not expected to interfere. While the personal immunities of the envoy necessarily end at his death, the courtesy of nations entitles his widow and family, together with their domestics, to the enjoyment for a limited time of the same immunities possessed by them during his lifetime. All questions as to the validity of the envoy's testament, as well as those respecting the succession *ab intestato* to his movable property, remain, of course, to be determined by the laws of his own country of which he dies a *de jure* resident.<sup>44</sup>

§ 324. **Commissioners for special purposes not entitled to immunities.**—Despite Heffter's views<sup>45</sup> to the contrary commission-

<sup>42</sup> Martens (N. R. G.) 2e Ser. xvi, 649; Parl. Papers, U. S. No. 4 (1888) and No. 1 (1889).

<sup>43</sup> Calvo (§ 581) charges that Mr. Bulwer was actually implicated in the insurrectionary movement; but Hall (p. 321, note 1) claims that the State Papers, 1848, entirely disprove the accusation.

<sup>44</sup> Phillimore, ii, § 242. The envoy continues subject to the laws of his own country as to all that

concerns his personal status and property. Grotius, *De Jure Belli ac Pacis*, II, c. 18, §§ 4, 5. He preserves his domicil in his own country as a necessary consequence of the fact that his functions are determinable at the will of his sovereign. He can not, therefore, have the intention of residence.

<sup>45</sup> He claims that they have a right to the "prerogatives essen-

ers appointed under treaty stipulations for special purposes, such as the arrangement of a military evacuation or the delimitation of a frontier, are not entitled to diplomatic immunities. So distinctly is that fact recognized that when a commissioner of Great Britain, under the sixth article of the treaty of amity, commerce and navigation, made between that power and the United States in 1794, was tried for an offense against the local law by a court sitting at Philadelphia, his government made no complaint whatever.<sup>46</sup> Such functionaries are, however, entitled to special protection and courtesy, and perhaps to something more, if circumstances should arise demanding it. No very distinct practice has been developed as to their treatment.<sup>47</sup>

§ 325. **Judge consuls and consuls a l'étranger.**—The judge consul, whose office was reproduced in the chief maritime cities of South Europe after its first appearance at Barcelona, in 1279, was originally a local officer annually elected by the mercantile community to settle disputes between such community and foreign merchants in matters of commerce and navigation.<sup>48</sup> As the interests of commerce widened, the primitive system of domestic consuls gave place to the existing system of consuls à l'étranger, appointed not by the resident body of merchants in each city but by foreign states, who commissioned them to look after the commercial interests of their citizens. Consuls of the new type, whose existence dates from the sixteenth century, were never charged with the conduct of foreign affairs, and for that reason were never endowed with a diplomatic character.

§ 326. **A consul's quasi-international character.**—And yet while a consul is thus primarily a state officer sent abroad to look after such interests of its citizens as affect foreign states only, remotely and indirectly, the fact that his functions are performed on foreign soil in an official house over whose portals he may place the arms of his country, and that any outrage upon him in his official capacity is a violation of international law, certainly clothes him with at least a quasi-interna-

tielles dues aux ministres publics." § 222.

<sup>46</sup> Mr. Monroe, Sec. of State, to Mr. Harris, July 31, 1816. Wharton, Int. Law Dig., 93a.

<sup>47</sup> De Garden, *Traité de Dip.*, ii, 13; Bluntschli, § 243; Hall, § 104.

<sup>48</sup> The *Consolato del Mare*, one of the earliest compilations of rules for the decision of maritime and commercial questions, is considered to have been so called, as embodying the rules according to which the judge-consuls, estab-

tional character. A copy of the commission he receives from his own state is forwarded to the minister of state in the country in which he is to officiate, in order that an *exequatur* may be obtained for him, without which he cannot enter officially upon the exercise of his consular duties. From the time he is thus recognized he receives to a certain limited extent the protection of the law of nations.<sup>49</sup>

§ 327. His duties in that sphere—Passports.—As the chief duties of a consul as a state officer necessarily involve matters of a purely domestic character, with which international law has no concern whatever, reference need be made only to such as bring him into direct or indirect relations with the officials of foreign states. Under that head may be classed the consular duties which make it the business of the commercial agent to collect information of an economic, commercial or political character; to use unofficially with the authorities of the country such influence as he may have in behalf of his fellow citizens in need of it; to see that the laws of the state in which he officiates are properly administered when the rights or interests of such fellow citizens are involved, and to report to his own government through the proper diplomatic channel any failure in that regard; and to perform all necessary acts in relation to passports. As a general rule a citizen leaving his own country obtains from its government a passport which, so far as other states are concerned, is really no more than a certificate of citizenship with a description of his person, usually substantiated by his autograph. When such a document is presented at the frontier of a friendly foreign state it is usual for it to grant to the bearer the right of passing through in the form of a *visé* entered upon the document itself, in order to obviate the inconvenience which would result if an entirely new passport were demanded at the borders of every nationality.<sup>50</sup> Each state determines, of

lished in the maritime cities of Spain, proceeded in determining the questions submitted to their decision." Twiss, I, § 206. See also Pardessus, *Lois Maritimes*, iv, 256, v, 108, 116 seq.

<sup>49</sup> The rights and privileges of consuls rest on the general law of nations and on treaty. 1 Opinions of Attys. Genl. U. S., 378. The fiction of extritoriality does not

extend to them. *Ibid.*, 7, 18.

<sup>50</sup> "The theory and practice respecting passports to private citizens in time of peace seems to be this: each nation, as a part of its internal system, may withhold the right of transit through its territory. Permissions to foreigners to pass through are properly passports." Dana's *Wheaton*, note 124.

course, who shall give or receive its passports, and designates the officials at home or abroad, who shall have the authority to issue them. It is usual to grant to consuls the right to issue passports only to subjects of their own country living within the spheres of their consulates, and to put their visé upon the passports of foreigners going from such spheres to the countries to which such consuls belong.<sup>51</sup>

§ 328. **Consular organization as a whole—Certain local exemptions.**—The consular organization as a whole is usually made up of consuls-general, consuls, vice-consuls, and commercial agents, who have no right to any foreign ceremonial or mark of respect, and no right to precedence except among themselves, according to the rank of the several states to which they belong. As mere commercial agents they possess neither the diplomatic character nor its consequent immunities either for themselves, their families, their houses or their property.<sup>52</sup> And yet by comity they enjoy certain exemptions from local and political obligations as privileges incident to their official character as the duly appointed and recognized officers of foreign states. A consul cannot be arrested for political reasons; he is exempt from any personal tax and from having soldiers quartered in his house; he cannot be burdened with such local obligations as might conflict with the discharge of his consular duties, such as service on juries, in the militia or even in a municipal guard. While his house, over whose door he may place the arms of his nation, is liable to domiciliary visit and search, the papers and archives of the consulate are, as a general rule, exempt from seizure or detention.<sup>53</sup> If, in time of war, his house is in the midst of actual hostilities, it is usual for the combatants not to injure it by their fire, except in cases of urgent and manifest military necessity.

<sup>51</sup> As to the functions and privileges of consuls, see Martens, *Précis*, iii, c. 3, § 84; De Garden, *Traité de Dip.*, i, 315; Pinheiro-Ferrera, title, "Passport;" Heffter, §§ 244-8; Bluntschli, §§ 245-75; Calvo, §§ 442-500; Lawrence, *Commentaire*, i, 1-103.

<sup>52</sup> "Consuls are not diplomatic characters, and have no immunities whatever against the laws of the land, and hence they can be prosecuted for breach of neutrality

laws." Mr. Jefferson, Sec. of State, to Mr. Gore, Sep. 2, 1793. MSS. Dom. Let.

<sup>53</sup> Calvo (§ 484) states that not many years ago the archives of the French consulate at London were seized and sold for arrears of house tax due from the landlord of the house occupied by the consulate. Lawrence (*Rev. de Droit Int.* x, 317) states that in 1857 the archives of the U. S. consulate at Manchester, including flag, seal,

§ 329. **A consul's local obligations.**—Such privileges, conceded to consuls with the view of enabling them efficiently and safely to discharge their official duties, do not withdraw them either from the civil or criminal jurisdiction of the courts of the country in which they officiate. Leaving such privileges out of view, even consuls who owe no allegiance to the state in which they reside, and the sole object of whose residence is the discharge of their consular functions, possess only the ordinary personal exemptions and disabilities incident to aliens who are mere sojourners.<sup>54</sup> If such consuls hold real property, engage in business and have a fixed residence in the country neither their consular privileges nor their official status so affect their property or trade as to change its national character.<sup>55</sup> In the event a citizen of the country is commissioned by a foreign state as its consul he, like a native-born minister, accepted without conditions, is no doubt entitled from the time he receives his *exequatur* to the privileges necessary for the proper performance of his official duties. He would not be entitled, of course, like an alien consul to exemptions incident to his personal status as an alien.

If a consul misbehaves himself by meddling in the political affairs of the country in which he resides, or by attempting to violate its neutrality, or by refusing to appear and give evidence before a court, or the like, his *exequatur* may be revoked, and he may be punished or sent out of the country at the option of the offended state.<sup>56</sup>

§ 330. **Consuls not affected by political changes.**—As a consul is not a diplomatic representative his official position is not supposed to be affected by political changes in the state in which he is acting. The sending of a person for the perform-

and arms, were seized for a private debt of the consul, and would have been sold if the amount due had not been paid by the American minister at London. Hall (p. 335, note 2) says there is no foundation for either story.

<sup>54</sup> 2 Opinions of Attys. Genl. U. S., 725. A foreign consul in the U. S. possesses, however, the privilege of being sued only in a Federal court, a privilege which belongs not to him personally but to the sovereign he represents. Du-

rand v. Halbach, 1 Miles (Phila.), 46.

<sup>55</sup> Consular privilege cannot protect a consul as to mercantile affairs engaged in by him outside of his official business. Kent, i, 44, 62; Phillimore, ii, 335; Arnold v. Ins. Co., 1 Johns., 363; Griswold v. Ins. Co., 16 Johns., 346; Indian Chief, 1 C. Rob. (Admr.), 26; Wharton, Int. Law Dig., § 120.

<sup>56</sup> Coppel v. Hall, 7 Wallace, 542; 2 Opinions of the Attys. Genl. U. S., 725.

ance of consular duties into a given territory does not necessarily imply a recognition of the government of such territory, if its legitimacy is at the time in question. If the form of government of a state is changed, or if that part of it in which the consul resides is annexed to another, no new *exequatur* is required. No such demand was made of consuls within the limits of the Confederate States, appointed before the outbreak of the civil war, who continued to exercise their functions during its continuance.<sup>57</sup>

§ 331. Consuls clothed with judicial and diplomatic functions by treaty.—Within the last forty years a long series of treaties has been concluded between states recognized as members of the family of nations for the purpose of re-defining and somewhat enlarging the privileges and duties with which consuls were originally clothed by custom, especially such as relate to the manner in which their evidence is to be procured by courts, and to the infractions of territorial law for which they may be tried in local tribunals.<sup>58</sup> In their efforts to withdraw their citizens from the jurisdiction of local magistrates in Mohammedan and other non-Christian states, not fully within the pale of international law, the civilized nations have so extended and developed the office of consul, by special conventions, as to give it in those parts a dignity and importance entirely abnormal. The general purpose of such arrangements may be defined to be the clothing of consuls with both diplomatic and judicial functions where exceptional powers and immunities are made necessary by the absence of stable and responsible local government. For instance, “all Christian nations refuse to the government of Morocco any right, power, or control whatever, in any circumstances, over the persons or property of Christians, or Franks, as they are called, residing in that empire.”<sup>59</sup> While in Morocco every

<sup>57</sup> In 1823 consuls were appointed by Great Britain to the South American Republics, and their governments informed that such appointments were made for the protection of British subjects, and for the collection of information that might lead to the establishment of friendly relations. Not until eighteen months thereafter was any one of such republics recognized as a state.

<sup>58</sup> As examples, see the treaties made between France and Italy, 1862 (Martens, N. R. G., 2e, Ser. i, 631), North German Confederation and Spain, 1870 (N. R. G., xix, 21), Germany and the United States, 1872 (N. R. G., xix, 21), Germany and Russia, 1874 (N. R. G., 2e, Ser. i, 233), United States and Italy, 1878 (Id., iv, 272).

<sup>59</sup> Mr. Seward, Sec. of State, to

citizen of the United States is required to seek from the consul a certificate showing that he is under his protection. As the several conventions differ as to details a special study must be made in order to ascertain just what provisions prevail in any given district. Looking at the matter from a diplomatic point of view, whenever a consul is appointed *chargé d'affaires* he has a double political capacity; and though invested with full diplomatic privileges, he becomes so invested as *chargé*,<sup>60</sup> not as consul, the consular character being necessarily subordinate to the diplomatic.

§ 332. **Extension of judicial side of consular office.**—It is, however, on the judicial side that the consular office has received the widest extension through the new system of conventions. Reference has been made already to the judicial powers vested in British consuls and other officers in the East under the Foreign Jurisdiction Acts, enacted to give effect to the “power and jurisdiction within divers countries and places out of Her Majesty’s dominions,” secured “by treaty, capitulation, grant, usage, sufferance, and other lawful means.”<sup>61</sup> A variety of Orders in Council have been made under the authority of these acts regulating the procedure in such extraterritorial courts, special reference being made to those existing in China, in the Western Pacific Islands, and in various parts of the Turkish Empire, including the courts at Constantinople and in Egypt.<sup>62</sup>

§ 333. **Consular courts in Egypt—Reformed Tribunals of 1875.**—The creation of such courts in the country last named went on until there were sixteen or seventeen consulates exercising jurisdiction, civil and criminal, over the subjects of their respective nations, in addition to the native tribunals. In all civil and commercial matters the general rule was that the defendant should be brought, before his own tribunal in accordance with the maxim *actor sequitur forum rei*,—the native before the native tribunal, the foreigner before the tribunal of his consulate. In criminal matters it was also the general rule that the subjects of the local sovereign who committed crimes against those of a foreign state were to be dealt with by the local tribunals, while the subjects of each

Mr. McMath, Apr. 28, 1862. MSS.  
Inst. Barb. Powers.

<sup>61</sup> See above, pp. 244-45.

<sup>62</sup> Cf. Sir J. F. Stephen, Hist. of

<sup>60</sup> 7 Opinions of Attys. Genl. U. the Crim. Law, ii, 59.  
S., 342.



foreign state committing crimes against natives had the right of trial in, or protection from, the consular courts of their own nation. When a foreigner committed a crime the local police had no authority to arrest him unless he was caught in the act; and after his arrest the investigation was made before his consul, who, if the crime was grave, was bound to send him home for trial. In order to remove the confusion and police demoralization resulting from such a condition of things<sup>63</sup> an International Commission, in which were represented Great Britain, France, the United States, the North German Confederation, Russia, Austria-Hungary, Italy and Egypt, met at Cairo, in October, 1869, to consider certain reforms in the administration of justice proposed by the government of the last named; and, after prolonged negotiations, the old consular system was finally superseded by the Reformed Tribunals established by order of the Khedive in June, 1875, with a mixed staff of judges composed partly of natives and partly of foreigners, the latter being always in the majority. The new arrangement, to which all of the more important powers, including the United States, have assented, consists of three courts of first instance at Alexandria, Cairo, and Zagazig, with a superior court of appeal at Alexandria, the jurisdiction and procedure of them all being regulated by codes drawn up for that purpose.<sup>64</sup>

<sup>63</sup> The inefficiency of the then existing system was explained in a report drawn up in 1876 by Nubar Pasha, and communicated to the Powers.

<sup>64</sup> "The institution of these courts is indeed the turning-point of recent Egyptian history. . . . New Codes, to be administered by the courts came into operation on the 18th October, 1875, and the courts themselves were opened for business on 1st January, 1876. The powers of the courts, originally

granted for five years, have been prolonged, by a series of decrees, to 1st February, 1882, to the 1st February, 1883, to 1st February, 1884, and lastly to 1st February, 1889." Holland, *European Concert in the Eastern Question*, pp. 102-3. Like decrees have been made since the last date given. For the text of "*Réglement d'organisation judiciaire pour les procès mixtes en Égypte*," see *Annuire de l'Institut de Droit International*, 1877, p. 321.

## CHAPTER V.

### THE TREATY-MAKING POWER.

§ 334. **Ancient international law conventional—Religious leagues.**—The weight of learned opinion upholds the conclusion that there existed in the ancient world no clearly defined or generally recognized law of nations apart from that derived from positive conventions. As Mitford has expressed it: "It appears to have been very generally held among the Greeks of that age, that men were bound to no duties to each other without an express compact."<sup>1</sup> Death or slavery was to be expected by the conquered unless there was an express stipulation to the contrary.<sup>2</sup> Such was the natural outcome of a condition of political and religious exclusiveness in which first the tribe and then the state taught each of its members to believe that the natives of other states who worshipped unknown gods were unclean beings, natural foes.<sup>3</sup> The first effort to admit the stranger into political fellowship was through the making of leagues recognizing a common divinity in whose honor a libation of mixed wines was poured out by the contracting parties with the prayer that he who first violated the compact might have his blood poured out in like manner.<sup>4</sup> To that class of leagues, whose primary purpose was purely religious, belonged the early compacts providing incidentally for freedom of commerce and for hospitality to strangers.<sup>5</sup>

§ 335. **A fully matured treaty system in Greece.**—An effort has been made already to emphasize the fact that the commercial communities in Greece so far favored the admission of peaceful aliens within their walls as to enter into international conventions providing for the mutual administration

<sup>1</sup> Hist. of Greece, i, c. 15, § 7.

<sup>2</sup> See above, p. 11.

<sup>3</sup> "The Roman dominion, giving to many nations a common speech and law, smote this feeling on the political side; Christianity more effectually banished it from the soul by substituting for the variety of local pantheons the belief in one God, before whom all men are equal." Bryce, Holy Roman Empire, 88.

<sup>4</sup> Homer, Il., III, 300.

<sup>5</sup> As to the real nature of the Delphic Amphictyony, whose primary purpose was religious, and whose political action was incidental, see above, p. 13. At a later time the advocate of King Perseus declared to the Achaean Assembly that "no person seeks to induce you to enter into any new alliance which will embarrass us, but only into an agreement which will se-

of justice to resident foreigners, for the establishment of mixed tribunals, or even for the grant of isopolity.<sup>6</sup> The outcome of such efforts to provide for closer relations between the members of its various communities, and to preserve the internal equilibrium of Greece was a fully matured treaty-system which, for a long period of time, was in full operation. In that way the art of treaty-making was highly developed in Greece, and there can be but little doubt that the respect entertained for obligations imposed by international agreements was quite as great as that existing in modern times.

§ 336. *Collegium Fetialium* at Rome.—The principal duties imposed upon the *Collegium Fetialium* at Rome related to the solemnities with which war was proclaimed and concluded, and to the process through which treaties and alliances were entered into, and general negotiations conducted.<sup>7</sup> By the Roman lawyers all international compacts were divided into three classes: 1, *pactiones*; 2, *sponsiones*; and 3, *foedera*.<sup>8</sup> At a

cure to each party *freedom of commerce and reciprocity of right.*"

<sup>6</sup> See above, pp. 11-12.

<sup>7</sup> See above, p. 24. The *Collegium* is "said to have been founded by Numa, and to have derived its origin from the Egyptians through the Greek colonies." Prof. H. Brougham Leech, *Essay on Ancient Int. Law*, p. 18. The oldest text of a treaty now in existence is that of a treaty entered into between Ramses II., King of Egypt, and the Prince of the Kheta.

<sup>8</sup> (1) Those of the first order (Polyb. iii. 22; Liv. xxxviii. 38) provided that the two states should, if possible, not engage in war with one another, and contained regulations as to the sojourn of the citizens of each on the territory of the other (Liv. xxx. 37, xxxvii. 30, xxxviii. 38). (2) Treaties of the second class bargained for greater intimacy between the two states, and bound the superior power to give aid if called upon (Caes. B. G. i. 31). Those (3) providing for military assistance sometimes placed the parties on an absolute equality

(Liv. 34, 57, xxviii. 45, xxvi. 24); in other cases the socius was subordinated to Rome (Cic. Balb. 16, 35); it remained free, but practically was at Rome's orders, as a client at those of his patron, though the Romans admitted their obligation to afford full protection (Liv. xxx. 42; Caes. B. G. i. 43), and included the socius in their own treaties with neighboring peoples (Liv. xxx. 37, xxxviii. 11, 38)." See "Concise Dictionary of Greek and Roman Antiquities," based on Sir Wm. Smith's larger Dictionary. Henry Holt & Co., 1898. See also MacKensie's *Roman Law*, 6th ed., p. 205; Salkowski's *Roman Private Law*, Whitfield's trans. It may be said that *pactiones* were merely agreements more or less formal; that *sponsiones* were treaties formed by ceremonies of a religious character and having the sanction of an oath; that *foedera* were leagues or treaties of alliance under which the allied community could acquire some rights that even the Romans would feel bound to respect.

very early day it became the special business of the College of Herald's to determine the conditions, and to prescribe the forms, under which the Roman people could denounce treaties and declare war without incurring the anger of the gods. The statement may, therefore, be made without exaggeration that certainly the most solemn and potent part of ancient international law was that which rested upon positive compacts or conventions.

§ 337. **Apart from compact, no positive international code.**—While it is undoubtedly true that the pages of Thucydides and Cicero clearly recognize the fact that, outside of such binding documents as treaties, there were certain usages and customs, sanctioned by time and general acceptance, and tending in the direction of justice and humanity, the fact remains that they were too vague and ill-defined to constitute a positive code of international morality.<sup>9</sup> Down to the end of the eighteenth century the Mohammedan world in its dealings with the Christian nations of Europe likewise proceeded upon the principle that there was no other law of nations than that derived from positive compacts or conventions.<sup>10</sup>

§ 338. **The modern common law of nations.**—Modern international law has been defined to be the aggregate of rules regulating the intercourse of states which have been gradually evolved out of the moral and intellectual convictions of the civilized world as the necessity for their existence has been demonstrated by experience.<sup>11</sup> In that mass of rules, occupying a province half way between the province of morals and that of positive law, such as are expressly defined by treaty are only an element, and in fact a subordinate element, for the reason that their stipulations are void whenever they conflict with that higher law recognized by the consensus of nations as the embodiment of certain fundamental principles with which no treaty can be in conflict. That higher law, upon which the validity of all treaties depends, is generally known as the common law of nations, to distinguish it from the more precise rules defined in particular conventions. The attempt has been made heretofore to describe the sources from which that higher or common law has been drawn, and the processes through which the elements thus derived have been blended

<sup>9</sup> See above, pp. 16-17.

<sup>10</sup> "At the commencement of the present century it would not have been incorrect to have described those relations as resting solely on

compact." Twiss, I, § 61, citing Lord Stowell's judgment in the *Madonna del Burso* (1804), 4 C. Robinson's Adm. Reports, 172.

<sup>11</sup> See above, p. 86.

in the existing international system which the Peace of Westphalia made possible.<sup>12</sup>

§ 339. All treaties void or voidable that conflict with it.—In the light of the foregoing statement it will be less difficult to understand how it is that every treaty is void, or at least voidable, that conflicts with certain principles which established usage has fixed as the foundation stones of modern international polity. Such principles are those which forbid the domination of the entire world by a single power; the acquisition of proprietary rights over the open sea; the subjugation or partition of a state, unless its existence is entirely incompatible with the general security; the imposition by treaty of conditions inconsistent with the existence or development of a state, and the acquisition by treaty of rights previously vested in other states. As international law regards states as moral beings, subject to all the obligations incident to them as such, a compact for the establishment of the slave trade would also be void, because in conflict with the general principle in favor of human freedom which the consensus of civilized states has recently recognized. As the tendency is to apply as far as possible the analogies of private law, when the validity or construction of international compacts are in question, it may be said that just as private contracts are void when contrary to public policy as defined in municipal law, so are the first named when in conflict with public morality as defined in international law.

§ 340. Treaties and agreements not subjects of international law.—Before attempting to classify such treaties and agreements as are admitted to be subjects of the law of nations, it will be convenient to eliminate such as are excluded from that category, although a state, or one of its organs, may be a party thereto in an individual capacity. Only those compacts can be considered international which are entered into by one independent state with another, or others of its class, in conformity with law. Tested by that rule the following agreements cannot be considered as international: (1) Contracts entered into between a state and a private individual for a loan or the like; (2) agreements entered into between a state and the church for the regulation of matters religious or political, such as the *concordats* of certain states with the pope, who executes them not as a temporal prince, but as the head of the Catholic Church; (3) agreements between reigning families or

<sup>12</sup> Part II, entitled "Sources and Foundations of Modern International Law."

dynasties regulating matters of succession or the like.<sup>13</sup> For instance, a family compact for mutual support, or a special agreement to seat a particular prince upon the throne and to guarantee his possession as a safeguard against internal revolution, the motive being the advancement of personal as distinct from strictly international interests. Such arrangements, which expire with the death of the sovereign or the extinction of his family, if not sooner ended by their own terms, are often described by the text-writers as *personal* treaties in contradistinction to *real* ones<sup>14</sup> that continue to bind the state regardless of changes in its internal constitution or in the persons of its rulers.

§ 341. *Treaties as classified by Vattel, Martens and Calvo.*—Despite the various forms of classification to which treaties and conventions have been subjected by the leading publicists, it is difficult to find one at once simple, comprehensive and practical. Vattel, for example, divides them into personal treaties, expiring with him who contracts them, and real treaties, binding the state permanently; and into equal treaties “in which the contracting parties promise the same thing or things that are equivalent,” and unequal, “in which the allies do not reciprocally promise to each other the same things, or things equivalent.”<sup>15</sup> Martens, after repeating such divisions, speaks of transitory conventions, perpetual in their effects; treaties properly so called, stipulating for the performance of successive acts dependent on the continued life of the state and other contingencies; and mixed treaties, partaking of the nature of both.<sup>16</sup> Calvo,—after dividing treaties with reference to their nature into personal and real, in reference to their form into transitory and permanent, and in reference to their effects into equal and unequal, simple and conditional,—finally classifies them with reference to their objects into treaties of guarantee, alliance, neutrality, boundary, cession, jurisdiction, commerce, extradition.<sup>17</sup>

<sup>13</sup> Bluntschli, § 443; Hall, p. 339, note 1; Dana's Wheaton, §§ 29, 275.

<sup>14</sup> Grotius, *De Jure Belli ac Pacis*, II, c. 16, § 16. “The former,” says Puffendorf, “are such as are made with the prince purely with relation to his person, and expire with him; the latter are such as are made with the kingdoms or commonwealths, rather than the

prince or government, and these outlive the ministry and the government itself, under which they were first made.” *De Jure Naturae et Gentium*, VIII, c. 9, § 6.

<sup>15</sup> *Droit des Gens*, II, c. XII, §§ 183, 172, 175.

<sup>16</sup> *Précis*, § 58-62.

<sup>17</sup> *Droit International*, §§ 643-68.

§ 342. All real treaties divisible into two classes. Executed conventions.—As personal treaties have been excluded already from the domain of international law proper, the task of classification is limited to real ones which bind states as such. If the artificial and unfruitful terms, “equal,” “unequal,” and “mixed” are then discarded as confusing, all treaties properly so-called, binding states in their corporate capacity, may be divided into two classes: First, those which, having been executed once for all, are intended to be perpetual in their effects, regardless of changes in the sovereignty and form of government of the contracting parties, because their objects are fully attained. While the operation of such permanent settlements may be suspended during war, they revive upon the return of peace, *proprio vigore*. To that class belong treaties containing recognitions of independence, settlements of boundaries, cessions, exchanges of territory, and grants of permanent servitudes<sup>18</sup> in favor of one nation within the territory of another. The perversely inapt and misleading term, “transitory,” generally used to describe perpetual treaties of the class in question, should be discarded for the term “executed,” which, when taken in the sense given it in English private law, perfectly expresses the idea.

§ 343. Executory conventions.—A private contract, as defined by Chief Justice Marshall, “is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing. \* \* A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant.”<sup>19</sup> After such treaties as have been carried into immediate effect and their objects so performed as to leave nothing for future action are grouped in the first class, as executed conventions, all that remain may be ranged in the second, as executory, because they stipulate for the performance of successive acts to be continued through a period of time, limited or unlimited. All such agreements as thus fall in the second class may be conveniently described with reference to their objects as treaties of alliance, neutrality, guarantee, commerce, extradition and the like. While it often happens in practice that a single compact between two or more states embraces articles belong-

See also Heffter, § 89; Twiss, I, 12, § 192; Martens, *Précis*, II, c. 2, §§ 228-232.

§ 58.

<sup>18</sup> Vattel, *Droit des Gens*, II, c. <sup>19</sup> Fletcher v. Peck, 6 Cranch,

136.

ing to both classes, there is no reason why confusion should thereby result. The validity and construction of each article must be tested by the rules relating to the class to which it belongs, regardless of the fact that it happens to be united in the same paper with others of a different character.

§ 344. Executed conventions as defined by Master of the Rolls, 1830.—The permanent character of executed conventions was clearly recognized by the English and American courts in cases involving the effects of the war of 1812 upon the treaty of peace of 1783 between Great Britain and the United States, in which the independence of the latter was acknowledged, and future confiscations prohibited; and upon that of 1794, between the same parties, in which the titles of American citizens holding lands in Great Britain and of British subjects holding lands in the United States, that might otherwise have been forfeited for alienage, were confirmed. When the question arose in the Rolls Court in 1830 whether or no the rights of American citizens who held lands in Great Britain on the 28th day of October, 1795,—rights expressly guaranteed by article nine of the treaty of 1794<sup>20</sup> declared to be permanent,—had been affected by the war of 1812, the Master of the Rolls held that “the privileges of natives being reciprocally given, not only to the actual possessors of lands, but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace. The Act of 57 Geo. III, c. 95, gives full effect to this article of the treaty in the strongest and clearest terms.”<sup>21</sup>

§ 345. By Supreme Court of U. S., 1823.—When in 1823 the same question came before the Supreme Court of the United States, in the case of a certain foreign corporation whose right to hold lands in Vermont was denied “on the ground of alienage, and that its rights are not protected by the treaty of peace,” the court said it was “not inclined to admit the doctrine urged at the bar, that treaties became extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. \* \* There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial and other national rights, or which, in their terms, are meant to provide for the event of an interven-

<sup>20</sup> Martens (R.), V, p. 662.

<sup>21</sup> Sutton v. Sutton, 1 Russell & Mylne, 663.



ing war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. \* \* We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace."<sup>22</sup>

§ 346. **Revival of permanent servitudes.**—While executed conventions creating permanent servitudes in favor of one state within the territory of another, such, for instance, as a right of way over its territory, are suspended during war, they also revive with the return of peace without the aid of a new agreement. The term servitude, borrowed from the Roman law, signifies only an innocent use as distinguished from a right. To convert the former into the latter the jurists held that it was necessary to obtain a compact or stipulation to that effect.<sup>23</sup>

§ 347. **Treaties of alliance—offensive and defensive.**—By the provisions of executory conventions, such as treaties of alliance, guarantee, neutrality, commerce, jurisdiction, arbitration, extradition and the like, involving the performance of successive and neutral acts, the intercourse of states is now chiefly regulated. First on the list requiring special notice are treaties of alliance, which may be either offensive or defensive, or both.<sup>24</sup> In the first, the ally usually agrees generally to

<sup>22</sup> The Society for the Propagation of the Gospel in Foreign Parts v. The Town of New Haven, 8 Wheaton, 464. The weight of authority supports the conclusion that, as a general rule, treaties at most are only suspended by war, unless their terms imply a continuance of peace, or the reason for their existence is destroyed by war. Cf. Kent, Com. I, 176; Phillimore, pt. XII, c. 11; Klüber, § 165; Halleck, 371, 862; Heffter, §§ 122 and 180-1; Calvo, § 1687; Bluntschli, §

538; Hall, § 124-5. However, Twiss (I, § 234) says "that Great Britain in practice admits of no exception to the rule that all treaties, as such, are put an end to by a subsequent war between the contracting parties." Citing Lord Bathurst's letter of Oct. 30, 1815, to Mr. J. Q. Adams. American State Papers, 1834; iv, 354.

<sup>23</sup> See above, p. 263. For Klüber's interpretation of a servitude, see *Droit des Gens*, §§ 137-138.

<sup>24</sup> Vattel, *Droit des Gens*, III, § 79.

co-operate in hostilities against some power specially named, or against any power with whom the other party may become involved in actual war. In the second, the ally is expected, as a general rule, only to co-operate in the defense of the other contracting power in a war really and truly defensive,—a war actually commenced by the common foe in the first instance. According to Grotius<sup>25</sup> and other text writers the *casus faderis* of a defensive alliance does not arise in the case of an unjust war, that is, a war of aggression begun by the power who has only stipulated for aid in another contingency. It is said a tacit condition is annexed to every treaty made in time of peace for co-operation in time of war that succor can only be expected in a just war, for the reason that the common law of nations forbids both parties to be accessory to acts either of injustice or bad faith. The difficulty in such cases is to determine what constitutes a just or defensive war, since certain wars, offensive in form, are actually defensive both in spirit and substance.<sup>26</sup>

§ 348. **Conflicting views of Great Britain and Holland, 1756.**—An elaborate discussion of that question arose out of the conflicting views of Great Britain and Holland, during the war of 1756, as to the true construction of the treaties of 1678, 1709, 1713, and 1717,—the last named having been renewed by the Quadruple Alliance of 1718, and by the treaty of Aix-la-Chapelle of 1748. In these treaties each state guaranteed to the other all of their possessions and rights in Europe against “all kings, princes, republics and states,” with a stipulation that each should give to the other certain specially defined succor in the event either should “be attacked or molested by hostile act, or open war, or in any other manner disturbed in the possession of its states, territories, rights, immunities and freedom of commerce.”<sup>27</sup> After Great

<sup>25</sup> *De Jure Belli ac Pacis*, II, c. 15, § 13; c. 25, § 4; Bynkershoek, *Quaest. Jur. Pub.*, I, c. 9; Vattel, *Droit des Gens*, II, c. 12, § 168; III, c. 6, § 86-96.

<sup>26</sup> “Where attack is the best mode of providing for the defence of a state, the war is defensive in principle though the operations are offensive. Where the war is unnecessary to safety its *offensive* character is not altered because the wrong-doer is reduced to defensive warfare. So a state against which

dangerous wrong is manifestly meditated, may prevent it by striking the first blow, without thereby waging a war in its principle offensive.” Wheaton, § 285. Dana in his comments on the text (Note 147) says, “this reasoning makes the words ‘defensive war’ substantially synonymous with justifiable war, or necessary war.”

<sup>27</sup> Charles, Earl of Liverpool’s Discourse on the Conduct of the Government of Great Britain in respect to Neutral Nations, 1st ed.,

Britain's European possession of Minorca had been attacked by France the States-General refused the stipulated succor upon the ground that the *casus fœderis* had not arisen, as the former was in fact the real aggressor. Holland, while admitting that France had been the aggressor in Europe, contended that that act was merely a consequence of hostilities previously begun in America, to which the treaties did not apply. The elder Lord Liverpool in replying to such reasoning contended (1) that, while the treaties in question were called defensive, they were not really such in substance when given that "fair and liberal construction, such as might be expected from friends, whose interests these treaties were supposed to have forever united;" that the framers of them knew "that an injured nation might be necessitated to commit even a preventive hostility, before the danger which caused it could be publicly known;" (2) that "the treaties above mentioned promise the defense of the dominions of each party in Europe, simply and absolutely, whenever they are *attacked* or *molested*. If, in the present war the first attack was made out of Europe, it is manifest that long ago an attack hath been made in Europe; and that is, beyond a doubt, the case of these guaranties." As the Dutch were unwilling to be convinced the English argument, cogent as it was, was entirely unavailing.

§ 349. **Difference between a treaty of general alliance and one of limited succor.**—At this point the distinction should be emphasized between a general alliance and one of limited succor and subsidy, in which one power, without binding itself to engage in general hostilities, engages to furnish to another a certain limited number of troops, ships of war, money or provisions.<sup>28</sup> There was a time when a state could supply such auxiliary forces to one of the belligerents and still, in all other respects, remain neutral. Such was the attitude of the Swiss Confederation during the period in which it habitually supplied military contingents to the other European powers.<sup>29</sup>

§ 350. **Treaties of guarantee.**—Treaties of guarantee vary widely both as to their form and substance. In their simplest form they are mutual agreements in which one party for a consideration to the advantage of himself makes an assurance

1757. See also Dana's Wheaton, §§ 281, 282, 283.

<sup>28</sup> Vattel, *Droit des Gens*, III, c. V, §§ 80, 81, 82.

<sup>29</sup> Both Great Britain and France at one time relied upon treaties of subsidy with certain of the Ger-

man powers in order to procure troops to carry on their wars. In 1793 the former concluded a treaty of subsidy with the Landgrave of Hesse-Darmstadt, who undertook to furnish for three years a corps of 3,000 troops of all arms for

to the advantage of another, as in the treaty of Tilsit,<sup>30</sup> whereby France and Russia guaranteed to each other the integrity of their respective possessions. In the same way all the contracting powers gave mutual guarantees at the peace of Aix-la-Chapelle, in 1748,<sup>31</sup> and at that of Paris, in 1763.<sup>32</sup> In the second place, guarantees may be given by one or more parties for the benefit of a third, such as that entered into by France, England and Austria, April 15th, 1856, guaranteeing, "jointly and severally the independence of the Ottoman Empire recorded in the treaty concluded at Paris on the 30th March."<sup>33</sup> In the same way the sovereignty and independence of Greece were guaranteed by Great Britain, France, Russia and Bavaria in a treaty entered into in 1832,<sup>34</sup> and the Protestant succession to the throne of England by the Dutch at the Peace<sup>35</sup> of Utrecht in 1715.

§ 351. When guarantor can only intervene on demand of beneficiary.—When such a guarantee is given by a single state, or by two or more severally, or jointly and severally, a guarantor can only intervene on the demand of the party or parties for whose benefit or protection the guarantee has been given, for the obvious reason that the beneficiary primarily interested in the arrangement is the best judge of his own interests. Only after the initiative has been taken by the beneficiary is the obligation cast upon the guarantor to render the stipulated assistance; and then only when it does not conflict with the just rights of third parties, with prior treaty stipulations, or with the universally recognized principles of international morality.<sup>36</sup> If the promised assistance prove insufficient, the beneficiary has no right to call upon the guarantor for indemnity.<sup>37</sup> Such guarantees are also limited to rights and possessions existing at the time they were made. Upon that ground<sup>38</sup> it was that Louis XV declared in 1741 against Maria Theresa and in favor of the Elector of Bavaria, despite the fact that in the treaty of Vienna, definitely signed service in any part of Europe, in consideration of an annual subsidy. Martens (R.), V, 524.

<sup>30</sup> Martens (R.), VIII, 607, 661.

<sup>31</sup> Wenck, ii, 310 seq.

<sup>32</sup> Wenck, iii, 329; Martens (R.), I, 104-166.

<sup>33</sup> Martens (N. R. G.), xv, 770.

<sup>34</sup> Martens (N. R.), x, 550. According to the terms of a protocol signed by them, Feb. 3d, 1830, and

accepted by Greece and the Ottoman Empire.

<sup>35</sup> Second treaty of barrier (30 Jan. 1713). Schmauss, *Corpus Jur.*, p. 1287.

<sup>36</sup> Vattel, II, c. XVI, §§ 236-9; Klüber, §§ 157-9; Phillimore, ii, c. VII; Bluntschli, § 430-41; Hall, § 113.

<sup>37</sup> Dana's Wheaton, p. 355.

<sup>38</sup> "This reason is incontestably a good one, in the general view of it, and the only question at that

in November, 1738, France had guaranteed the pragmatic sanction of Charles VI. constituting his eldest daughter the heir of the entire mass of the Austrian heritage. Like all other obligations of suretyship, such guarantees are strictly construed.

§ 352. **Collective guarantee to secure a common interest.** Lord Derby's view.—In the third place, a guarantee may be given collectively by several powers in order to secure some general arrangement in which they have a common interest,—such, for instance, as that embodied in the treaties of 1831 and 1839 constituting Belgium an independent and neutral state. The guarantee given to Belgium was that she should be permitted to maintain that status, in consideration of which she bound herself to remain so for the common benefit of the contracting parties. In such a case one high authority maintains that when complaint is made it becomes the duty of all guarantors to examine the matter in common in order to ascertain whether or no there is good ground for intervention, so that a single conclusion may be supported by united action. If no such conclusion can be reached, then it is claimed that each guarantor has not only the right, but is charged with the duty, of taking alone such action as his judgment may dictate.<sup>39</sup> A more limited view of the duties imposed by such a collective guarantee was taken by Lord Derby, who, when expressing the opinion of the English government as to the extent of the obligation assumed by it in signing the Luxemburg convention of 1867, said in that year in the house of commons, “that in the event of a violation of neutrality all the powers who have signed the treaty may be called upon for their collective action. No one of those powers is liable to be called upon to act singly or separately. It is a case, so to speak, of limited liability. We are bound in honour—you cannot place a legal construction upon it—to see in concert with others that these arrangements are maintained. But if other powers join with us it is certain that there will be no violation of neutrality. If they, situated exactly as we are, decline to join, we are not bound single-handed to make up the deficiency. Such a guaranty has obviously rather the character of a moral sanction to the arrangements which it defends than that of a contingent liability to make war. It would no doubt give a right to time was, whether the court of also Flassan, *Histoire de la Diplo-*  
France made a just application of *matie Française*, VII, 195.  
it.” Vattel, II, c. XVI, § 238. See <sup>39</sup> Bluntschli, § 440.

make war, but would not necessarily impose the obligation."<sup>40</sup>

§ 353. **Agreements in which guarantees are embodied.**—Agreements in which guarantees are embodied appear either in primary and independent treaties specially made to maintain a certain state of things, or in auxiliary treaties; or in provisions accessory to a treaty so framed as to secure the performance of the stipulations of the principal engagement. Sometimes the faithful performance of treaties is guaranteed by the hypothecation of territories or fortresses;<sup>41</sup> and formerly it was secured by the giving of hostages, the last example of which, apart from the giving of such security for the performance of military conventions, occurred after the making of the Peace of Aix-la-Chapelle, 1748, when two British peers remained on parole at Paris until Cape Breton was restored to the French.<sup>42</sup> Another ancient mode of confirming the faith of treaties, that by solemn oaths, intensified by certain religious ceremonies, is entirely obsolete.<sup>43</sup>

§ 354. **Commercial conventions. Reciprocity.**—The treaty-making power now finds a wide field for its operation in the conclusion of conventions regulating the conditions of reciprocal trade, and defining the rights and duties of commercial intercourse. Such arrangements embrace not only the exchange of raw materials and manufactured articles, but also compacts for the reciprocal exchange of correspondence by post (such as that embodied in the Universal Postal Union entered into between the leading civilized states by virtue of article 18 of the treaty of Berne, 1874); for the regulation of trade-marks; for the prevention of collisions at sea; and for the protection of the rights of authors and artists in their literary works by means of international copyright. The prin-

<sup>40</sup> Hansard, 3d Ser., clxxxvii, 1822. In criticising that statement Hall (pp. 361-2) says that "the only objects of a guarantee are to secure that action shall be taken under circumstances in which a state might not move for its own sake, and to prevent other states from disregarding the arrangement, or attacking the territory guaranteed, by holding up to them the certainty that the force of the guaranteeing powers will be employed to check them. On the con-

struction given to a collective guarantee by Lord Derby neither end would be attained. Whichever view be adopted the word collective is inconvenient."

<sup>41</sup> Klüber, § 156.

<sup>42</sup> Vattel, II, c. XVI, § 247; Ward, *Hist. of the Law of Nations*, i, 172-175.

<sup>43</sup> The most modern example, perhaps of the use of an oath for such a purpose occurred in connection with the alliance between France and Switzerland, 1777.

ciple of reciprocity is, as a general rule, the dominating force in such agreements; and, in order to give effect to that principle, the most favored nation clause is usually inserted not only in commercial treaties but in literary and art conventions. It does not follow, however, that the mutual benefits stipulated are always equivalent. "The rule of the most favored nation may not be, and scarcely ever is, equal in its operation between two contracting parties. It could only be equal if the measure of voluntary concession by each of them to the most favored third power were precisely the same; but as that rarely happens, by referring the citizens of two contracting powers to such a rule, the fair competition between them, which always ought to be a primary object, is not secured, but, on the contrary, those who belong to the nation which has shown least liberality to other nations are enabled to engross almost the entire commerce and navigation carried on between the two contracting powers. The rule of the most favored nation is not so simple as the proposed substitute (that of a treaty of reciprocity, which Mr. Poinsett was instructed to negotiate)."<sup>44</sup> It has been held that a covenant to give privileges granted to the "most favored nation" only refers to gratuitous privileges, and does not cover privileges granted on the condition of a reciprocal advantage.<sup>45</sup>

§ 355. **Treaties establishing special tribunals.**—As explained heretofore the treaty-system of Greece embraced international conventions providing for the administration of justice to the sojourning foreigner, and for the establishment of mixed tribunals.<sup>46</sup> Such treaties of jurisdiction as have been made in modern times generally provide for the establishment of special courts for the settlement of such questions as may arise between foreigners not domiciled (*transeuntes*); or between such foreigners and the subjects of the country in which they reside; or for the exercise of jurisdiction over the same classes of persons by consuls or commercial agents. Special courts of the type referred to existed at an early day under conventions entered into between Great Britain and Portugal<sup>47</sup>

<sup>44</sup> Mr. Clay, Sec. of State, to Mr. Poinsett, Mar. 26, 1825.

<sup>45</sup> Mr. Livingston, Sec. of State, to President Jackson, Jan. 6, 1832. Wharton, Int. Law Dig., § 134.

<sup>46</sup> See above, p. 12.

<sup>47</sup> "There was an analogous

treaty of a later date between France and Portugal in regard to French subjects. But in case of a suit of a French subject against a British subject, the privilege granted to the British nation being the most ancient, the judge-conservator

(1654), between Great Britain and Spain and between France and Spain; and the judge-conservator appointed to settle in them all questions arising out of commercial controversies between subjects of the respective states was required to administer the foreign law when it was specially invoked. When, however, a natural-born subject of Great Britain or France acquired a domicile in Spain or Portugal he passed under the control of the local tribunals. Such special courts are the prototypes of the many foreign tribunals existing by treaty in Oriental lands, other than those which are strictly consular.<sup>48</sup> Everywhere the consular court is now a recognized institution whose influence is being widened by an ever-swelling list of conventions whose tendency is to define with precision not only the exceptional powers, purely contractual, vested in consuls for the special protection of their countrymen in states outside the pale of international law, but also the older and more limited powers with which they were originally invested by custom in states within it.<sup>49</sup>

§ 356. **Treaties of arbitration; their growing popularity.**—Treaties of jurisdiction reach their higher point when they embody agreements between sovereign states to submit their differences to arbitral tribunals, to whose final awards they bind themselves to bow with perfect loyalty. The constitution of every independent state embraces three factors known to national law as legislation, jurisdiction and execution. It has been well said that the ultimate problem of international jurisprudence is how to find in that sphere equivalents for those three factors without which there can never be either an authoritative international code, or an international tribunal armed with power to assume jurisdiction over all disputes between states, and to enforce its decrees against such as are refractory.<sup>50</sup> The only serious efforts so far made to approach such an ideal have been embodied in treaties of arbi-

of the British nation was held to be the competent judge." Twiss, I, § 157, citing *Gazette des Tribunaux* of 16 and 17 Oct., 1843, cited by Félix, *Traité du Droit International*, I, § 148. Reference has been made heretofore to the establishment at Rome of the court of the *praetor peregrinus* whose special duty it was to administer justice

between resident foreigners not domiciled at Rome, and between resident foreigners and Roman citizens. See above, p. 21.

<sup>48</sup> The international courts of Egypt, heretofore described, may be cited as an illustration.

<sup>49</sup> See above, p. 359.

<sup>50</sup> Lorimer's *Institutes of the Law of Nations*, ii, 186 seq.



tration whose growing popularity in our own time is certainly a hopeful indication. While the history of diplomatic intercourse discloses the fact that that method of settling international disputes was often resorted to before the present century began, it has been within that time that it has developed into real importance.

**Their history—Ancient, medieval and modern.**—When the high state of development to which the Greek treaty-system attained is taken into account, it would be strange, indeed, if we failed to find that states which constituted, through international agreements, such tribunals as have been heretofore described<sup>51</sup> for the settlement of disputes between their respective citizens, should have failed to provide like tribunals for the settlement of disputes between themselves as corporate persons. While the data underlying such a conclusion is scanty, it is at least probable that all or nearly all of the political unions had courts of that character. Both Grote and Schömann believe that, from the beginning, the Athenian symmarchy had a common tribunal at Delos; and in the project of the fifty years' truce (B. C. 421) it was provided that the parties to the new alliance should be such independent states as would submit their disputes to arbitration. It is, therefore, maintained that between Greek states thus closely united, it was a rule of public law that war was not to be waged until after an unsuccessful attempt to arrive at a settlement by judicial means; and that, after the restoration of peace, all questions of interpretation were to be submitted to some individual or state on whom the parties could agree.<sup>52</sup> Passing over the annals of the Roman Empire,—whose private law, as it stood in the time of Justinian,<sup>53</sup> has supplied the form of arbitration and rules of procedure since adopted by sovereign and independent states,—we find Gerohus, at the beginning of the twelfth century, suggesting the application of that method of settlement to international controversies; and Leibnitz, at the end of the seventeenth, proposing the pope and the emperor as joint public arbitrators. In 1713 the Abbé St. Pierre came forward with a project to secure perpetual peace between the European powers, which was circulated shortly after the conferences that led to the Peace of Utrecht,

<sup>51</sup> See above, p. 12.

<sup>53</sup> The parties had then ceased

<sup>52</sup> See article on Arbitration in *International Review* for 1874; at first the essence of the transaction. Schömann's *Gr. Alterth.*, ii, 5.

at which conference the Abbé was present. The aim of that project, more fully developed in 1729, was to perpetuate the settlement embodied in the treaties of Utrecht through an alliance or league of European states, which should renounce the right of war, and submit their differences to the arbitration of a diet representing twenty votes, three-fourths of which was to be final.<sup>54</sup> In 1786-89 followed the scheme of Jeremy Bentham, heretofore explained;<sup>55</sup> and in 1795 Immanuel Kant published his essay "touching perpetual peace"<sup>56</sup> in which he maintained that international law should rest upon a confederation of free states which should guarantee untrammelled intercommunication through the establishment of a world citizenship, under the direction of a congress to be called and dissolved at the pleasure of the members of the confederation. In 1838 the New York Peace Society, in a petition to the House of Representatives of the United States, proposed a board of international arbitration; and in 1842 James Mill went a step further by insisting, in a treatise, that delegates from the several governments should not only constitute an arbitral court, but should formulate a code for its guidance. In order to give practical effect to that idea, David Dudley Field published in 1872 "Outlines of an International Code," defining the constitution of "a High Tribunal of Arbitration;" Dr. Goldschmidt drafted in 1874 a complete code of "proposed rules for international tribunals of arbitration;" and the Institute of International Law, at its meeting at The Hague in 1875, adopted a scheme of arbitral procedure.<sup>57</sup> The efforts thus made to advance the cause of arbitration on its theoretical side have been more than equaled during recent years by the efforts to give to principles thus defined practical application. A special student of the subject declares in an estimate recently made that,—after subtracting numerous cases of mediation, ordinary boundary surveys, domestic commissions, direct treaty settlements, and pure diplomatic negotiations, often improperly included in such estimates,—the whole number of international arbitrations during the present century, exclusive of cases now pending and incomplete, is one hundred

<sup>54</sup> See Wheaton, *Hist. of Law of Nations*, Pt. ii. In order to gain favor for his scheme, St. Pierre attributed it to Henry IV. of France and his minister Sully.

<sup>55</sup> See above, p. 63.

<sup>56</sup> For his *Zum Ewigen Frieden*, see *Works*, vol. v, pp. 411-466. Wheaton, Pt. iv. §§ 36, 37.

<sup>57</sup> See *Annuaire* for 1877, p. 123-33.

and thirty-six.<sup>58</sup> Of that number fifty-seven are credited to the United States (all but four since 1800); thirty-three to Great Britain; and twelve to France.

§ 357. **Arbitral courts; their constitution and procedure.**—The basis of the entire arbitral proceeding is, of course, the treaty itself in which the parties are expected to define the precise scope of the submission, the constitution of the special tribunal, and the method of its procedure. It often happens that the litigating states choose the pope, a temporal sovereign, or other head of a state<sup>59</sup> as sole arbitrator, who may escape the personal labor of an examination by committing the whole matter to some learned coadjutor whose award he adopts as his own. It is more usual, however, for the opposing parties to agree upon private persons to act as arbitrators; or to commit their selection, in whole or in part, to foreign states. In that event an uneven number should be chosen, or a referee appointed, as an arbitration falls to the ground when there is an equal division of votes, or upon the death of an arbitrator where no provision for the appointment of a successor has been made. Such arbitrators, who cannot delegate their functions, constitute a real tribunal which may prescribe its own rules of procedure when the preliminary treaty has failed to define them. In that event it is expected that the principles of the civil law will govern unless the parties agree to be bound by special rules framed by themselves. If they deem proper the arbitrators may submit to the parties equitable propositions as the basis of settlement. If that expedient fails then a definite award should be rendered, which has all the moral force of a judgment at law, provided that the procedure of which it is the culmination has been justly and legally conducted. It is generally admitted that the arbitral decision or award may be honorably disregarded when the tribunal has exceeded the powers conferred upon it by the articles of submission; when the award has been

<sup>58</sup> Harvard Law Review, Nov., 1900, p. 182. Note on arbitration to Mr. J. B. Moore's article, "A Hundred Years of American Diplomacy." For other estimates, see Calvo's (§ 1489-1510) list of disputes settled by arbitration since 1794; *Rev. de Droit Int.* xix, 196 and xx, 511; and a short pamphlet published by the Peace Society en-

titled *The Proved Practicability of International Arbitration.*

<sup>59</sup> Since 1869 the President of the U. S. has acted as arbitrator in five cases, and since 1859 ministers of the U. S. have acted either as arbitrator or umpire in six. See also Moore's *Int. Arbitrations* in 6 Vols.

procured through fraud or corruption; when there has been a flagrant denial of justice; or when the terms of the award are equivocal. Bluntschli claims that it may also be disregarded, "if the arbitral decision is contrary to international law. But the decision of the arbitrators cannot be attacked under the pretext that it is erroneous or contrary to equity, save for errors of calculation."<sup>60</sup>

§ 358. **Permanent court of arbitration provided by Hague conference.**—In the outline heretofore drawn of the results of the Peace Conference at The Hague the fact was emphasized that the delegates, in dealing with the subject of arbitration, clearly understood that its practical application has been hindered by three obstacles: first, by the necessity of constituting a special court in each particular case; second, by the lack of power in such a court to define its own jurisdiction; third, by the lack of a settled code to regulate its procedure.<sup>61</sup> In the effort to remove the first of such obstacles the Conference undertook "to organize a permanent Court of Arbitration accessible at all times, and acting, unless otherwise stipulated by the parties, in accordance with the rules of procedure included in the present convention."<sup>62</sup> In furtherance of that design it was agreed that "each Signatory Power shall select not more than four persons, of recognized competence in questions of international law, enjoying the highest moral reputation, and disposed to accept the duties of arbitrators. The persons thus selected shall be enrolled as members of the court, upon a list which shall be communicated by the Bureau to all the Signatory Powers. Any alteration in the list of arbitrators shall be brought to the knowledge of the Signatory Powers by the Bureau. Two or more Powers may unite in the selection of one or more members of the court. The same person may be selected by different Powers. The members of the court shall be appointed for a term of six years, and their appointment may be renewed."<sup>63</sup>

#### **International Bureau and Permanent Administrative Council.**—

<sup>60</sup> *Völkerrecht*, § 495: "If, however, the arbitrators, by pronouncing a sentence evidently unjust and unreasonable, should forfeit the character with which they are invested, their judgment would deserve no attention; the parties had appealed to it only with a view

to the decision of doubtful questions." Vattel, II, c. xviii, § 329. See also Heffter, § 109; Phillimore, iii, § iii; Calvo, §§ 1512-32; Fiore, §§ 1478-91; Hall, § 119.

<sup>61</sup> See above, p. 49.

<sup>62</sup> First Convention, Art. xx.

<sup>63</sup> *Ibid.*, Art. xxiii.

In order to provide the Court with an administrative organ it was stipulated that "an International Bureau shall be established at The Hague, and shall serve as the record office for the Court. This Bureau shall be the medium of all communications relating to the Court. It shall have the custody of the archives and shall conduct all the administrative business. The Signatory Powers agree to furnish the Bureau at The Hague with a certified copy of every agreement of arbitration arrived at between them, and of any award therein rendered by a special tribunal."<sup>64</sup> As a means of establishing such a Bureau, and of directing and controlling its action, it was further provided that "a permanent administrative Council composed of the diplomatic representatives of the Signatory Powers accredited to The Hague, and of the Netherlands Minister of Foreign Affairs, who shall act as President, shall be constituted in that city as soon as possible after the ratification of the present Act by at least nine Powers. This Council shall be charged with the establishment and organization of the International Bureau, which shall remain under its direction and control. It shall notify the Powers of the constitution of the Court and provide for its installation."<sup>65</sup>

**How arbitral tribunal shall be constituted—Resort to arbitration not compulsory.**—"Whenever the Signatory Powers wish to have recourse to the permanent Court for the settlement of a difference that has risen between them, the arbitrators selected to constitute the Tribunal which shall have jurisdiction to determine such differences, shall be chosen from the general list of members of the Court. If such arbitral Tribunal be not constituted by special agreement of the parties, it shall be formed in the following manner: Each party shall name two arbitrators, and these together shall choose an umpire. If the votes shall be equal, the choice of the umpire shall be intrusted to a third Power selected by the parties by common accord. If an agreement is not arrived at on this subject, each party shall select a different Power, and the choice of the umpire shall be made by the united action of the Powers thus selected. The tribunal being thus constituted, the parties shall communicate to the Bureau their decision to have recourse to the Court, and the names of the arbitrators. The Tribunal of arbitration shall meet at the time fixed by the parties. The members of the Court, in the discharge of their

<sup>64</sup> First Convention, Art. xxii.

<sup>65</sup> *Ibid.*, Art. xxviii.

duties, and outside of their own country shall enjoy diplomatic privileges and immunities.”<sup>66</sup> It thus appears that the members of the permanent Court constitute a general staff of judges, under the protection of international law, out of which an arbitral tribunal can be constituted in each particular case by any one of the methods indicated. As explained heretofore the Conference was careful to leave the resort to arbitration purely voluntary, unless a kind of moral coercion was contemplated by the following provisions: “The Signatory Powers consider it their duty in case a serious dispute threatens to break out between two or more of them, to remind these latter that the permanent Court of arbitration is open to them. Consequently, they declare that the fact of reminding the parties in controversy of the provisions of the present convention, and the advice given to them, in the higher interests of peace, to have recourse to the permanent Court, can only be considered as an exercise of good offices.”<sup>67</sup>

**Arbitral procedure: Jurisdiction; Rehearing.**—The arbitral tribunal at Geneva, which finally settled the famous controversy between Great Britain and the United States, came to the very verge of failure, after the two governments had stated their “cases,” because of the lack of a clearly recognized power to define its own jurisdiction under the terms of submission. It may therefore be said that all other regulations made at The Hague as to arbitral procedure become comparatively unimportant in the presence of that one which declares that, “the Tribunal is authorized to determine its own jurisdiction, by interpreting the agreement of arbitration or other treaties which may be quoted in point, and by the application of the principles of international law.”<sup>68</sup> Leaving that vitally important matter out of view, the remaining provisions rest upon a recognition of the fact that all forms of procedure in arbitration should be so designed as to facilitate two distinct objects—instruction and debate. The former consists of the transmission by the agents of the litigating powers to the opposite party, and to the members of the Tribunal itself, of all records and other documents, whether written or printed; the latter, of verbal elaborations of the contentions held. After the conclusion of debate, and after deliberation behind closed

<sup>66</sup> First Convention, Art. xxiv.

<sup>68</sup> *Ibid.*, Art. xlvi.

<sup>67</sup> *Ibid.*, Art. xxvii.

doors, "the award shall be made by a majority of votes, and shall be accompanied by a statement of the reasons upon which it is based. It must be drawn up in writing and signed by each of the members of the Tribunal. \* \* \* The award duly pronounced and notified to the agents of the parties in litigation shall decide the dispute finally and without appeal."<sup>69</sup> The parties may, however, reserve in the agreement of arbitration the right to demand a rehearing of the case. In that event, "and in the absence of any stipulation to the contrary, the demand shall be addressed to the Tribunal which has pronounced the judgment; but it shall be based only on the discovery of new facts, of such a character to exercise a decisive influence upon the judgment, and which at the time of the judgment were unknown to the Tribunal itself and to the parties demanding the rehearing."<sup>70</sup> The Conference wisely refused to accept the proposal that, in the absence of any special stipulation, every decree of arbitration shall be subject to revision if, within three months after the announcement of it, there shall be discovered a new fact which, in the judgment of the Tribunal, is of a nature to exercise a decisive influence upon it.<sup>71</sup>

§ 359. Diplomatic negotiation and mediation.—Two methods of amicable settlement are generally invoked before there is an appeal to arbitration. In case of conflict contending states are expected to resort in the first instance to diplomatic negotiation in the hope of adjusting by mutual concession and compromise pending differences. In that way Great Britain and the United States settled their notable boundary controversies, and the prolonged disputes as to the rights of fishery on the banks of Newfoundland and in the Gulf of St. Lawrence, in the treaties of 1818, 1854 and 1871.<sup>72</sup> When the parties themselves cannot agree some common friend often interposes his good offices in the spirit of mediation so as to bring about a friendly understanding by reconciling conflicting claims and opinions.<sup>73</sup> In the hope of promoting that

<sup>69</sup> First Convention, Arts. lii, liv.

<sup>70</sup> *Ibid.*, Art. lv.

<sup>71</sup> For the debate upon the proposition, and the adoption of M. Asser's amendment, see Holls, *The Peace Conference at The Hague*, pp. 286, 287, 303.

<sup>72</sup> See above, p. 133 seq.

<sup>73</sup> In its first stage mediation is a mere offer of advice or assistance in the settlement of a controversy which either party has a perfect right to refuse. After the offer has been accepted, however, by both parties, it becomes both the right and the duty of the mediat-

method of settlement the plenipotentiaries who united in the making of the Protocol of the Treaty of Paris, 1856, declared that they did "not hesitate to express, in the name of their governments, the wish that states between which any serious misunderstanding may arise should, before appealing to arms, have recourse, as far as circumstances might allow, to the good offices of a friendly power."

§ 360. Preliminary means of settlement invigorated by Hague conference.—Title I of the first Hague convention, "On the maintenance of the general peace," declares that "with a view to obviating, as far as possible, recourse to force in the relations between states, the Signatory Powers agree to use their best efforts to insure the pacific settlement of international disputes." As means to that end Title II provides for "Good Offices and Mediation;" Title III for "International Commissions of Inquiry;" Title IV for "International Arbitration." After redefining and supplementing general mediation as heretofore practiced, the Conference, on motion of Mr. Holls, undertook to give to it a new and broader significance by declaring that "the Signatory Powers are agreed in recommending the application, when circumstances allow, of special mediation in the following form:

"In case of a serious difference endangering the peace, the states at variance shall each choose a Power, to whom they intrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations. During the period of this mandate, the term of which, unless otherwise stipulated, cannot exceed thirty days, the states in conflict shall cease from all direct communication on the subject of the dispute, which is regarded as having been referred exclusively to the mediating Powers, who shall use their best efforts to settle the controversy. In case of a definite rupture of pacific relations, these Powers remain charged with the joint duty of taking advantage of every opportunity to restore peace."<sup>74</sup>

ing power to interpose its advice with a view to the settlement of the difficulty. As a party to the negotiation it then has the right to go that far, although without the authority to constrain either contestant to accept its opinion. While it is under no obligation to guar-

antee the performance of the treaty concluded under its influence, in point of fact, it frequently does so. Klüber, *Droit des Gens*, pt. ii, tit. 2, § 1; c. 2, § 160; Dana's Wheaton, § 288.

<sup>74</sup> First Convention, Art. viii.



§ 361. **Power of a state to contract; where it resides.**—Every sovereign state is capable of entering into a contract with another to do any acts not forbidden, or to refrain from any acts not enjoined by the law regulating its international relations. When a state is only part-sovereign its contracting power is further limited to the extent to which it has been deprived of its full capacity by being confederated with, protected by, or subordinated to another state or states.<sup>75</sup> All contracts entered into in excess of such limitations are void. In any event the fundamental law of each state must determine in whom is vested the power of negotiating and contracting treaties with foreign states.<sup>76</sup> In absolute monarchies like Russia, or even in constitutional systems like that of Great Britain, such power is usually vested in the ruling sovereign; in republics, in a single chief magistrate, or in a council, subject or not, as the case may be, to ratification by some other Power. The agents appointed by a sovereign or chief magistrate to negotiate or contract in his name must be duly empowered in some one of the several forms heretofore set forth.

§ 362. **International compacts require only limited freedom of consent.**—While it may be true in a certain sense that compacts between states in order to be valid must be executed with freedom of consent, such freedom is far removed from that required by private law when engagements are entered into between private individuals. From the very necessities of the case international law is often obliged to admit the validity of treaties even when the suffering party has been compelled to execute them through the application of force and intimidation. Otherwise treaties made to end wars or to avert them could seldom be consummated. As Phillimore has well expressed it compacts thus entered into must be upheld in the same way that private law upholds contracts entered into to avoid or end litigation, although executed under the dread of a certain expense and an uncertain issue.<sup>77</sup>

§ 363. **Certain limits not to be exceeded.**—And yet, if certain limits are exceeded, force and intimidation may vitiate the agreement. When, for instance, a state is coerced in that way

<sup>75</sup> Vattel, II, c. XII, § 155; Grotius, *De Jure Belli ac Pacis*, II, Bluntschli, § 403; Calvo, § 681. c. XIV, §§ 4-12; Martens, *Précis*, §

<sup>76</sup> See above, p. 197.

49; Klüber, § 141; Dana's Wheat-

<sup>77</sup> Int. Law, ii, 62, 63. See also on, 267.

into parting with its independence, it will be assumed that it did not voluntarily commit suicide as a means of reparation or as a measure of protection to another. In any event a treaty is void if the sovereign of a state, a commander or an agent authorized to negotiate a treaty, is forced through personal fear to enter into it. While a state lying at the mercy of another cannot avail itself of that condition of things, its representative may, if he is subjected to violence or intimidation. Upon that ground was repudiated the cession extorted from Ferdinand VII by Napoleon at Bayonne, in 1808.<sup>78</sup> Neither does freedom of consent exist where the contract is concluded under false impressions produced by the fraud of the party benefited, as in the case of a boundary treaty in which one of the parties was induced to agree to the adoption of a certain line through the use of a map that turned out to be a forgery.<sup>79</sup>

**§ 364. When constitutions require that treaties must be ratified.**—When the constitution of a state, like that of the United States, provides that any treaty or convention made by its diplomatic agents cannot become binding until it has been ratified by a senate or a similar body, there can be no question that an express ratification is necessary, because the other contracting party is charged with the duty of informing himself of the extent of the powers of those with whom he negotiates.<sup>80</sup> In such a case the ratifying power has the right to reject the provisional compact as a whole, or to amend it by the addition of new proposals.<sup>81</sup> It then remains for the other party to assent or not to what is really a new treaty.

**§ 365. When no right of rejection is reserved—Old and new rule.**—A different state of things exists when the executive, armed with the entire treaty-making power, is called upon to ratify a convention made in his name by diplomatic agents acting under full powers, in which is reserved no right of rejection whatever. In that event the older writers, such as Grotius, Puffendorf<sup>82</sup> and Vattel, proceeding upon the analogies

<sup>78</sup> Fyffe, *Modern Europe*, I, 367-370; Hall, § 108.

<sup>79</sup> Heffter, § 85; Klüber, § 143; Bluntschli, § 408-9. For the controversy as to the map of Northeastern Territory used by Commissioners of 1783, see Wharton, *Int. Law Dig.*, § 150e.

<sup>80</sup> See above, p. 158.

<sup>81</sup> Bluntschli, § 413; Calvo, §§ 707-8; Wharton, *Int. Law Dig.*, § 131.

<sup>82</sup> Grotius, *De Jure Belli ac Pacis*, II, c. 11, § 12; Puffendorf, *De Jure Naturae et Gentium*, III, c. 9, § 2.

of the Roman law respecting the contract of mandate or commission, held that so long as the plenipotentiary did not exceed the limits of his credentials, "every promise which he makes, within the terms of his commission, and within the extent of his powers, binds his constituent;"<sup>84</sup> and that view has received a certain amount of support from a few modern authorities.<sup>85</sup> But the obvious lack of analogy between international conventions and private contracts, and the immense risk of injury to vast and complicated interests entailed by such a rule, gave rise to a usage, clearly recognized by Bynkershoek, to the effect that a ratification by the sovereign is necessary in every instance to give validity to treaties concluded in his name, except in the very rare case where the entire instructions are contained in the patent full-power.<sup>86</sup> Such usage has gradually developed into the modern rule that express ratification, in the absence of special agreement to the contrary, is requisite in every case in which a treaty is concluded by negotiations in the name of another no matter how ample their powers.<sup>87</sup>

§ 366. Treaty concluded in due form not to be rejected capriciously.—It must not be assumed, however, that any school of publicists has ever held that the ratification of a treaty, concluded in conformity with a full power, can be honorably rejected by one of the contracting parties from mere caprice, in the absence of cogent or substantial reasons. As Vattel has expressed it, "before a sovereign can honorably refuse to ratify that which has been concluded in virtue of a full-power,

<sup>84</sup> *Droit des Gens*, II, c. 12, § 156.

<sup>85</sup> Klüber, § 142; Phillimore, ii, § lii; Heffter, § 87. The last named thinks a state is morally bound under such circumstances.

<sup>86</sup> "Sed rarum est, quod publica mandata sint specialia; rarius, quod arcanum mandatum publico sit contrarium; rarissimum verò, quod legatus arcanum posterius spernat, et ex publico priori rem agat. *Quaest. Jur. Pub.*, lib. ii, c. 7. Bynkershoek is careful to criticise Wicquefort's condemnation of the conduct of princes who had refused to ratify the acts of ministers on the ground of their contra-

vening secret instructions (*L'Ambassadeur*, ii, § 15).

<sup>87</sup> Marten's *Précis*, § 48; Dana's *Wheaton*, § 259; Hall, § 110; Schmalz, *Völkerrecht*, c. iii, 53; Ortolan, *Diplomatie de la Mer*, I, c. v; Calvo, § 697. Vattel (II, c. 12, § 156) admits that "it is customary to place no dependence on their (princes') treaties till they have agreed to and ratified them." The statement made in the text does not include of course a treaty directly and personally concluded by a sovereign or other person exercising the sole treaty-making power of a state.

he must have strong and solid reasons, and in particular he must show that his minister has deviated from his instructions." In defining the grounds upon which a state may justly withhold its ratification, M. Guizot, in defending the refusal of the French government to ratify a treaty made in 1841 for the suppression of the slave trade, went so far as to say that "ratification is a real and substantial right; no treaty is complete without being ratified; and if, between the conclusion and the ratification, important facts come into existence—new and evident facts—which change the relations of the two powers and the circumstances amidst which the treaty is concluded, a full right of refusal exists."<sup>88</sup> Scarcely less ample is Bluntschli's subsequent declaration that "the refusal, even without cause, to ratify a treaty, can, under certain circumstances, be regarded as contrary to propriety, affecting very gravely the credit of the state, and jeopardizing the relations of friendship existing between the contracting parties; but this refusal should never be considered as a violation of law, even when the person charged with the negotiations has acted within the limits of his powers and has executed the treaty in conformity with the instructions that he has received."<sup>89</sup> To prevent all controversy it is now usual for sovereigns to expressly reserve the right to ratify whatever is concluded by their agents in their names, either in the full power or in the treaty itself.

§ 367. **Ratifications, express and tacit.**—An express ratification is completed through the exchange of written instruments identical in form signed by the persons clothed with the supreme treaty-making power; or, where that power resides in a body of persons, by their duly authorized agent. In such ratifications, if the provisions of the treaty are not recited textually, the title, the preamble, the date and names of the plenipotentiaries should be set forth so clearly as to leave no doubt that the agreement embodied in the text of the treaty is that referred to.<sup>90</sup> When a minister, who usually acts under

<sup>88</sup> *Moniteur*, Feb. 1, 1843.

<sup>89</sup> *Völkerrecht*, § 420.

<sup>90</sup> The ratification should not embody a new condition or any modification of the treaty as agreed on. If, however, one of the parties to a treaty annexes, at the time of its ratification, a written

declaration explaining ambiguous language in the instrument or adding a new and distinct stipulation, and the treaty is afterwards constitutionally ratified by the other party, and the ratifications duly exchanged, the declaration thus annexed is a part of the treaty, and

the immediate orders or as the mouthpiece of the treaty-making power, enters, while within the limits of his authority, into agreements in notes or in any other informal way for which express ratification is not required by custom, tacit ratification may take place, if the supreme power capable of binding the state fails to repudiate such agreements as soon as it acquires knowledge of them.<sup>91</sup>

§ 368. **When treaties become effective.**—Not until the formality of ratification has been completed does the treaty come into full operation; and then, unless there is an express agreement to the contrary, it becomes effective between the parties from the time it is signed, and not from the time of ratification. As an exception to the first rule may be cited the convention concluded at London, July 15th, 1840, for the pacification of the Levant, in which it was provided in a reserved protocol of the same date that certain preliminary measures should be put into execution immediately (*tout de suite*), without waiting for the exchange of ratifications.<sup>92</sup> As an exception to the second, may be cited the treaty of Paris, 1856, in which it was agreed that it should come into force from the moment of its ratification.<sup>93</sup>

§ 369. **Stipulations to be performed between signature and ratification.**—When stipulations are entered into to be performed between the signature and the ratification of a treaty, the rights and obligations of the parties cannot be fully determined until the fact is settled whether or no the ratification is to take place. If it does, the party who has failed to exe-

as binding and obligatory as if it were inserted in the body of the instrument. *Clark v. Braden*, 16 Howard, 635.

<sup>91</sup> Hall, § 110, citing Wheaton, *Elem.*, pt. iii, ch. ii, § 4; Halleck, i, 230. This statement can have no application, of course, to treaties negotiated by the agents of a state whose constitution vests the power of ratification in a senate. If such notes affect the treaty in any way they must be communicated to the senate as a part of the compact. For that reason the diplomatic agents of the United States are not willing to sign or receive declara-

tions or other notes in connection with a treaty. See discussion of the subject in connection with Clayton-Bulwer Treaty, where the British Minister, in exchanging ratifications, sent a note of explanation to Mr. Clayton, to which the latter replied. Cf. Dana's note, No. 138, to Wheaton.

<sup>92</sup> Martens (N. R. G.) I, 156.

<sup>93</sup> Holland, *European Concert in the Eastern Question*, p. 244. Treaties of cession are also an exception to the general rule, because they only take full effect from the actual cession (*traditio*) of the territory itself. Twiss, I, § 233.

cute such intermediate stipulations is already guilty of an infraction of the treaty; if it does not, then a party who has performed in whole or in part is entitled to be put in his original position, or to receive an equivalent compensation.<sup>94</sup>

§ 370. **Legislation to carry treaties into effect.**—When the treaty-making power of a state has concluded a convention within its province to make, what is the nature of the obligation thus imposed upon the legislature to enact all laws necessary to carry its provisions into full effect? The constitution of the United States (art. vi, § 1) provides that “all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land;” and Washington, in his special message of March 3, 1796, declared “it is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty.”<sup>95</sup> If that is the true nature of the treaty-making power in this country, when a convention has been concluded and ratified by the proper authorities, it becomes obligatory upon the state as a whole, and upon each and every department of its government, including the legislature, whose duty it is to enact all laws, and to make all appropriations necessary to carry it into complete effect. The obligation, moral and legal, is complete; and it is no sufficient answer to another state, in the event of a breach of the contract, to aver that one department of the government has refused to perform its legal duty.<sup>96</sup>

§ 371. **Controversy with France as to treaty of 1831.**—Such was the principle asserted by the government of the United States against France, when the Chamber of Deputies refused to make appropriations to carry out the treaty of 1831 providing for the payment of the spoliation claims, whose settlement brought the two countries to the verge of war.<sup>97</sup> In express-

<sup>94</sup> Bluntschli, § 421; Heffter, § 87; Hall, § 110. As to acts performed in the interim, in contravention of the stipulations of the compact, see case of *U. S. v. D'Auterive*, 10 Howard, 609.

<sup>95</sup> Special message on Jay's treaty.

<sup>96</sup> Despite a contrary contention, as old as the government itself, Congress has almost invariably acted upon the principle that it is

bound to carry into effect all treaties duly executed by the President and Senate,—notably in 1796, with respect to the treaty of 1794 with Great Britain; in 1816, as to the commercial convention with the same power; in 1842-43 with respect to the treaty of Washington; and, in 1853-54, with respect to the convention with Mexico.

<sup>97</sup> Wharton, *Int. Law Dig.*, §§ 131a, 318.

ing himself on that subject Mr. Wheaton, then United States minister at Copenhagen, said: "Neither government has anything to do with the auxiliary legislative measures necessary, on the part of the other state, to give effect to the treaty. The nation is responsible to the government of the other nation for its non-execution, whether the failure to fulfill it proceeds from the omission of one or the other of the departments of its government to perform its duty in respect to it. The omission here is on the part of the legislature; but it might have been on the part of the judicial department—the court of cassation might have refused to render some judgment necessary to give effect to the treaty. The king cannot compel the Chambers, neither can he compel the courts; but the nation is not the less responsible for the breach of faith thus arising out of the discordant action of the international machinery of its constitution."<sup>1</sup>

§ 372. **Right of Parliament to reject necessary legislation.**—In the English constitutional system the treaty-making power is vested in the crown alone. After that organ of the Empire, acting through a responsible minister, has executed a convention it requires no formal sanction or ratification by Parliament as a condition precedent to its validity.<sup>2</sup> And yet there was a time when Parliament claimed the right to reject legislation necessary for the purpose of so modifying existing laws of trade and navigation as to adapt them to the stipulations of treaties.<sup>3</sup> Out of that condition of things grew, no doubt, the practice of stipulating in treaties requiring auxiliary legislation, that they shall not be binding until the necessary laws are passed or the necessary appropriations made to carry them into effect.<sup>4</sup>

<sup>1</sup> Mr. Wheaton, Minister at Copenhagen, to Mr. Butler, Attorney General, Jan. 20, 1835, and quoted with approval in Meier's *Ueber den Abschluss von Staatsverträgen*, Leipzig, 1874, p. 168. See also Lawrence's Wheaton (1863), 459; Kent, Com., I, 285; Heffter, § 84; Halleck, 854; Bello, *Derecho Internacional*, pt. 2, c. 9, § 6.

<sup>2</sup> See above, p. 162, and authorities cited.

<sup>3</sup> Todd, Parl. Govt., i, 133; Forsyth, Const. Law, p. 369; Hertslet,

Map of Europe by Treaty, ix, p. 1064 seq.; Lord Mahon, Hist. of England, i, p. 24. "Thus, the commercial treaty of Utrecht, between France and Great Britain, was never carried into effect, the British parliament having rejected the bill," etc. Halleck, 191.

<sup>4</sup> Where it appears on the face of a treaty that its operation, in whole or in part, depends upon legislation as a prerequisite, it does not bind as to such provisions, until the requisite legislation

§ 373. Claim of House of Representatives as to Alaska purchase.—Animated by that idea the House of Representatives,—when the time came to make the necessary appropriation to carry out the purchase of Alaska perfected in the treaty with Russia ratified by the Senate, May 28, 1867,—attempted to revive its ancient pretensions by coupling with its grant a reservation of its right to approve or disapprove in all cases in which its action is necessary for the execution of a treaty. Such claim was embodied in the following terms in the amended act making the appropriation: “Whereas, the subjects thus embraced in the stipulations of said treaty are among the subjects which by the constitution of the United States are submitted to the power of Congress, and over which Congress has jurisdiction; and it being for such reason necessary that the consent of Congress shall be given to the said treaty before the same shall have full force and effect, having taken into consideration the said treaty, and approving of the stipulations therein to the end that the same may be carried into effect, therefore, Sec. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the assent of Congress is hereby given to the stipulations of said treaty.” After the Senate had restored the bill to its original form by rejecting the clauses asserting the claim of the House that the consent of Congress as a legislative body is necessary to the payment of money and the incorporation of territory, when provided for in a treaty, the contention was hushed by the substitution in conference of a colorless preamble reciting that “Whereas, said stipulations cannot be carried into full force and effect except by legislation to which the consent of both houses of Congress is necessary, therefore, Be it resolved, etc.”<sup>5</sup> The perfecting

takes place, though, from the time it is proclaimed, it may take effect as a national compact. 8 Opinions of Attys. Genl. U. S. 750.

<sup>5</sup> Congressional Globe for 1867, 4031, 4159, 4392. “This measure, which was adopted in the House by a vote of 91 to 48, has the features of compromise strongly impressed upon it. . . . The question, therefore, which was agitated in 1796, whether Congress can, under the Constitution, refuse, in its

legislative capacity, to pass acts for the execution of treaties duly ratified, remains still open. Yet two positions may be regarded as accepted in the practical working of our government. One is that without a Congressional vote there can be no appropriation of money which a treaty requires to be paid. The other is that it should require a very strong case to justify Congress in refusing to pass an appropriation which is called for by a



of the English ministerial system, through the transfer of the treaty-making power of the crown to a majority of the House of Commons, has practically eliminated from English politics such unseemly conflicts of authority as those in question.<sup>6</sup> Let it be hoped that a more mature and enlightened understanding of our federal constitution will eliminate them in future from the politics of the United States.

§ 374. **International agreements may be verbal or written.—Languages employed.**—International agreements, like private contracts, may be either verbal or written; and as custom has prescribed no set forms, their meaning may be expressed either by words or signs which clearly indicate the concurrence of two or more minds as to one and the same thing. No matter what the means employed the moment that consent on both sides is clearly established a convention exists whose binding force is complete.<sup>7</sup> Thus in time of war certain signs, having a well understood meaning, are often employed in the making of military conventions. By the exhibition of white flags, for example, by two opposing armies a truce may be established.<sup>8</sup> Usually, however, such agreements are reduced to writing in solemn form, and signed by the contracting parties, or by persons duly authorized to act for them. Until about the beginning of the eighteenth century treaties between the European powers were, as a general rule, written in Latin. Since that time it has become customary for the representatives of countries speaking different languages to prepare treaties in the tongue of each of the contracting parties in parallel columns. As an exception to the general rule most of the treaties of the United States with Russia are written in French. Those with Great Britain are signed in the English language only.<sup>8a</sup>

§ 375. **Protocols.**—Negotiations, more or less prolonged, necessarily precede the conclusion of international agreements, and, to the end that an enduring memorial may be preserved of the results of each discussion as the negotiation proceeds, it is usual to record the several resolutions arrived at in a document called a protocol, which, if the subject under discussion is specially important, is generally signed by

treaty duly ratified." Wharton, Int. Law Dig., § 131a.

<sup>6</sup> Cf. The Origin and Growth of the Eng. Const., ii, 548 seq.

<sup>7</sup> Martens, *Précis*; Klüber, § 143; Heffter, § 87; Phillimore, ii, § 1.

<sup>8</sup> Martens, *Précis*, § 65, Bluntschli, § 422; Hall, § 109.

<sup>8a</sup> Mr. Fish, Sec. of State, to Miss Fraser, Nov. 18, 1874. Wharton, Int. Law Dig., § 130.

the negotiators themselves. The record thus made of the effort to arrive at an agreement has, of course, no binding effect if no conclusion is reached, as its obligation in law depends upon the ultimate success of the negotiation as a whole.

§ 376. **Distinction between a "treaty" and a "convention"—Use of the alternat.**—Leaving out of view such military arrangements as cartels, truces, capitulations and sponsions, the compacts that remain are known either as treaties or conventions,—the former term being usually employed to describe the more serious political and commercial contracts, the latter, those of more limited scope or of lesser dignity. When the rank of contracting states is equal or undetermined, in order to prevent controversy as to precedence in the execution of treaties and conventions, it has become the practice to vary the order of naming the parties in the preamble, and of affixing the signatures of the plenipotentiaries themselves in the several counterparts of the same agreement. The signers thus *alternate* in a regular order, or in one determined by lot. In that way each state may be first named, and its plenipotentiaries may sign first in the copy possessed and published by itself.<sup>9</sup> Such controversies as to precedence are sometimes avoided by another expedient consisting of the signing in the order of the French alphabet of the names of the representatives of the several contracting states.<sup>10</sup>

§ 377. **Construction and interpretation of treaties—Distinction between the two.**—In view of the fact that some of the most serious wars in history have arisen out of conflicting opinions as to the real meaning of treaty stipulations, it is not strange that publicists and jurists, from the time of Grotius down to our own, should have made every effort to formulate a set of rules designed to remove, at least in part, the difficulties incident to their construction and interpretation. While it seems to be universally admitted that it is next to impossible "to prescribe any system of rules of interpretation for cases of ambiguity in written language that will really avail to guide the mind in the decision of doubt,"<sup>11</sup> the conviction is

<sup>9</sup> Annex xvii to the Vienna Congress Treaty of June 9, 1815, provides that in acts or treaties between those powers which admit the alternity, the order to be observed in the signatures of ministers shall be decided by ballot.

Hertslet, *Map of Europe by Treaty*, I, pp. 62, 63.

<sup>10</sup> Klüber, *Uebersicht der Diplomatischen Verhandlungen des Wiener Congresses*, § 164.

<sup>11</sup> Potter's *Dwarris on Stat. and Const.*, p. 176.

equally well established that such principles of construction as are generally recognized have done much to remove the chaos that would have existed if an unfettered and arbitrary discretion had been permitted to preside in each particular case. The only real advance made in that direction has been by those who, disregarding metaphysical distinctions, arbitrary formulas and minute and confusing subdivisions, have contented themselves with simply adapting to the purposes of international law, as far as applicable, such general principles as have been developed and approved by experience in the construction of statutes and private contracts. And here reference should be made to the important distinction between "construction," the process through which the general sense of a treaty is derived by the application of the rules of logic to what appears upon its face, and "interpretation," the process through which the meaning of particular terms is explained by reference to local circumstances and idioms the framers had in the mind at the time.<sup>12</sup> Only to that extent can matters *aliunde* the treaty be employed to explain its meaning. No court or other expounder can supply a *casus omissus* in a treaty any more than in a law.<sup>13</sup> With this preface clearly in view, the attempt will be made to formulate such of the rules<sup>14</sup> in question as are most general in their application.

§ 378. **General rules: Instrument to be taken as a whole.**—As the primary object of all construction is to discover the common thought in which the minds of the contracting parties met, the entire instrument containing the agreement, no matter whether a contract between individuals or a treaty between nations, must be taken as a whole, and construed according to the natural, fair, and received acceptance of the

<sup>12</sup> See Dr. Lieber's *Legal and Political Hermeneutics*, c. 1, § 8; ch. 3, § 2, 4 and c. 5; Parsons on *Contracts* (7th ed.), ii, p. 623 (a).

<sup>13</sup> The *Amiable Isabella*, 6 Wheaton, 1.

<sup>14</sup> The foundations of the existing system of rules for the interpretation of treaties were laid by Grotius, ii, c. xvi. After his day they were revised and reproduced by Puffendorf (v, c. xii), by Domat (Cushing's ed., I, p. 108), by Vattel (ii, c. xvii), and by Ruther-

forth (ii, c. 7). For a convenient restatement of the best parts of the work of each, see Potter's *Dwarris on Statutes and Constitutions*, pp. 121-146; and also Wildman's *Institutes of Int. Law*, i, 176-186. For the best recent expositions, see Heffter, § 95; Phillimore, ii, c. viii; Calvo, §§713-22; Fiore, §§1117-31; Hall, §§ 111, 112; and Savigny's exposition of "fundamental rules of interpretation" in his *Römischen Rechts* (vol. i, ch. iv, § xxxiii).

terms in which it is expressed. Despite Cicero's suggestion, quoted by Grotius, that "when you promise, we must consider rather what you mean, than what you say," it is only from the words actually used that such meaning can be drawn. And yet, in the effort to discover the common intention the spirit rather than the letter should govern,—in the words of Dr. Paley, "where the terms of promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended at the time the promisee received it."<sup>15</sup>

When the language of a treaty, each word being accorded its ordinary meaning, yields a plain and reasonable sense, it must be taken in that sense, provided that the same does not involve an absurdity, or draw the contract into conflict with fundamental principles of settled law. A treaty must be so construed as to exclude fraud and to make its operation consistent with good faith.<sup>16</sup> Any construction that would render it null and void should be rejected.

§ 379. **When general terms are obscure or equivocal.**—If general terms are used which are obscure or equivocal they must be given the sense most suitable to the subject or matter to which they relate. If, however, he who has expressed himself in such a manner in one place has expressed himself more clearly elsewhere on the same subject, he is the best interpreter of himself. And yet a word or phrase may be used in a treaty several times without requiring the same meaning to be attached to it each time, the sense corresponding with the end sought to be attained in each case.

§ 380. **Extrinsic evidence to explain objective obscurity.**—If special terms are used which are obscure or equivocal because they must be explained by local circumstances and by idioms the framer of the instrument had in mind when they were used, interpretation may be invoked in order that extrinsic evidence may be taken for the purpose of explaining objective obscurity.

§ 381. **When a term used in a treaty between several states has a special meaning in each.**—When a term used in a treaty between two or more states has in each a special and local legal meaning, it must be applied to the affairs of each in the sense given it by its national law. Such was the rule applied

<sup>15</sup> Moral Philos., 126.

<sup>16</sup> The Amistad, 15 Peters, 518.

to the construction of the word "inhabitant" used in the treaty of 1866 between Austria and Italy,—in the former, the word signifying such persons only as are domiciled according to Austrian law; in the latter, every person living in a commune and registered as a resident.<sup>17</sup>

§ 382. **Technical terms, or terms of art and science.**—Technical terms, or terms of art and science, should be construed according to the definitions given them by the masters of the several branches of knowledge or art or science to which they belong.

§ 383. **When recourse must be had to general spirit and purpose of a treaty.**—When the language of a treaty, each word being accorded its ordinary meaning, fails to yield a plain and reasonable sense, recourse must be had to its general spirit and purpose as manifested by the provisions of the instrument as a whole, or by the context of the ambiguous, improper, incomplete or obscure passages. The dominant and controlling principle then is that the treaty was not made to perish through inherent defects, but to stand as a harmonious whole;<sup>18</sup> and when such a general result is once attained nothing short of convincing proof of intention will give to any particular provision a construction in conflict with the rest.

§ 384. **Clauses in favor of justice and humanity.**—Clauses which favor justice, equity and humanity are to be construed broadly. While odious clauses, involving cruelty or hard conditions for one party, are to be construed so strictly as to confine their operation to the narrowest limits.

§ 385. **Presumption in favor of a state.**—As it will not be presumed that any state desires to divest itself of its sovereignty, its property or its right of self-preservation, no such result can be established by implication. It must be clearly expressed.

§ 386. **Incidents of substantive rights and obligations.**—As the valid grant of a substantive right, or the assumption of a substantive obligation, is supposed to carry with it all the incidents necessary to the enjoyment of the one or the performance of the other, such incidents will be presumed to have followed tacitly whenever such substantive right or obligation has been given or imposed by treaty.

<sup>17</sup> Fiore, § 1121.

by the parties, will be preferred.

<sup>18</sup> That construction most favorable to its execution, as designed

U. S. v. Payne, 2 McCrary, 289; 8 Fed. Rep., 883.

§ 387. **Rules regulating certain preferences.**—What will suffer no delay ought to be preferred to what may be done at another time; and in all cases where a thing only permitted is found incompatible with what is prescribed, the latter should have the advantage.

§ 388. **Where two meanings are admissible—Interpretation clause.**—Where two meanings are admissible that is to be preferred which is least for the advantage of the party for whose benefit the clause is inserted, the presumption being that he who secures a special privilege will see that it is expressed as fully as it was intended. Any special advantage conceded by a party under any one article is supposed to be in consideration of all the advantages enjoyed by the same party under that and all other articles.<sup>19</sup> A well founded distrust of the practical efficacy of the foregoing rules often prompts the insertion into treaties, prior to their ratification, of an interpretation clause in which the contracting parties agree to remove any ambiguity that may have occurred in the original text.

§ 389. **Special rules: A general permission overcome by imperative provision.**—In addition to the difficulties already enumerated, which the general rules of construction and interpretation are designed to remove, there is a special class arising out of conflicting clauses of the same treaty, or out of conflicts between different treaties, for whose reconciliation the following special rules have been made: A general permission is overcome or limited by an imperative provision, general or specific. For example, a concession of a right of fishing in certain territorial waters, to which the right of curing and drying on the spot is an essential incident, must yield to a prohibition forbidding the persons to whom the substantive right is granted to enjoy the incidental. On the same principle a special permission overcomes a general imperative provision,—the latter being taken as a general rule to which the former is an exception.

§ 390. **Precedence between conflicting prohibitive provisions.**—As penal sanctions are supposed to give additional force to obligations, when prohibitive provisions conflict, and there is a penalty attached to the one and not to the other, the former takes precedence; or, when a more severe penalty attaches to the one than the other, the former takes precedence. When

<sup>19</sup> 6 Opinions of Attys. Genl. U. S. 148.

there is no penalty attached to either, that one takes precedence which is most precise in its commands.

§ 391. **When stipulations so identical that no priority can be assigned.**—When stipulations are so identical in their nature and sanctions that no priority can be assigned to either, the most important must be discharged by the party bound, unless the promisee, who has the right of selection, sees fit to demand the performance of the less important.

§ 392. **When most recent of two treaties takes precedence.**—When two treaties between the same states conflict, the one of most recent date takes precedence, because the supposition is that it was intended as a substitute for its predecessor. If, however, the later of two conflicting treaties is made by an inferior though competent authority, it must yield to a prior one executed by a higher authority.<sup>20</sup>

§ 393. **Prior treaty prevails over subsequent one in conflict with it.**—As it is unlawful after a compact has been made with one party to attempt to divest the rights vested under it, without the consent of the beneficiary, a prior treaty made with one state or states will prevail over any subsequent convention with another in conflict with its provisions. Upon that elementary principle was resisted the preliminary treaty of peace signed by Russia and Turkey at San Stefano, March 17, 1878. As Prince Bismarck expressed it at the opening of the Berlin Congress, the plenipotentiaries there assembled met for the purpose of submitting that treaty “to the free discussion of the cabinets, signatories of the treaties of 1856 and 1871,” because it attempted to modify without their consent “the state of things as fixed by former European conventions.”<sup>21</sup>

<sup>20</sup> This apparent exception rests upon an admission of precedence due to a prior convention made under the following circumstances: In 1800 Piacenza with its garrison was surrendered, at three in the afternoon, to the French by the Austrian commandant, who from the nature of his command, had the right to make such a capitulation. At eight o'clock in the morning of the same day Generals Berthier and Melas had concluded a convention, providing for the re-

tirement of the entire Austrian force behind the Mincio, and for the surrender of Piacenza to the French, but with its garrison withdrawn. Upon the ground that the prior agreement was concluded by a higher authority, it was claimed and at once admitted that it should have precedence. *Corresp. de Nap.*, i, vi, 365. Hall, § 112.

<sup>21</sup> Holland, *European Concert in the Eastern Question*, pp. 221-22, quoting Count Schouvaloff's admission that the treaty in question

§ 394. A treaty may become voidable through subsequent events.—An effort has been made heretofore to explain the antecedent conditions upon which the validity of a treaty depends, consisting in the main of the capacity of the parties to contract, of the authority of the agents acting in their name, of consent freely given, of ratification, and, last and most of all, of conformity of the objects of the treaty with the fundamental principles of the law of nations. After the validity of an international agreement has been firmly established, by the concurrence of such antecedents, it may become voidable through the operation of subsequent events, which might not have such an effect in the case of private contract.<sup>22</sup> So unstable are the conditions of international existence, and so difficult is it to enforce a contract between states after the state of facts upon which it was founded has substantially changed, that all such agreements are necessarily made subject to the general understanding that they shall cease to be obligatory so soon as the conditions upon which they were executed are essentially altered.

§ 395. Russia's contention as to treaty of Paris.—In 1870, when Russia determined to repudiate some of the vital provisions of the Treaty of Paris relating to the Black Sea,<sup>23</sup>—by which she had been fettered at the close of the Crimean War, and which her subsequent development had rendered unbearable,<sup>24</sup>—she rested her case, in part, upon that ground in the circular addressed to the powers asserting that “the treaty of the 18/30 March, 1856, had not escaped the modification to which most European transactions have been exposed, and in the face of which it would be difficult to maintain that the written law, founded upon the respect for treaties as the basis of public right and regulating the relations between states, retains the moral validity which it may have possessed at other times.” This instance is given simply as an illustration

was “a preliminary convention, having obligatory force only on the contracting parties, by which Russia intended to let the Turkish government know beforehand the demands she would formulate later before Europe.” See *Parl. Papers*, 1878, Turkey, No. 39, pp. 12, 137, 242.

<sup>22</sup> For the leading distinctions between treaties and private con-

tracts, see Wharton, *Com. Am. Law*, § 157.

<sup>23</sup> See above, p. 124.

<sup>24</sup> Bluntschli (§§ 415 and 456) maintains that a state may hold any treaty to be null, if incompatible with its development; and he seems to regard the propriety of Russia's action in denouncing the treaty of 1856 as an open question.



of what the general nature and scope of the doctrine in question is, and not as an expression of opinion that Russia was right in her contention that essential modifications of original conditions had actually been brought about in that particular case, (1) by the acquiescence of the great powers in the union of the Danubian provinces through "a series of revolutions equally at variance with the spirit and letter" of the treaty; (2) through the opening of the Straits to foreign vessels of war in violation of the terms of the treaty; and (3) through changes in naval warfare incident to the use of ironclads which exposed the Russian ports in the sea to sudden attacks from enemies forcing a passage through the Straits. Russia contended not only that the natural course of events had worked a material change in the conditions which were in contemplation when the treaty of 1856 was made, but that it had been violated through the positive failure of the parties to observe some of the essentials.<sup>25</sup>

§ 396. **Treaties affected by changes in internal life of a state.**—If a treaty is consistent at the outset with the right of self-preservation it is an implied condition that it shall remain so. While a state may surrender by compact its natural right to independence, such an intention will never be inferred, it must be clearly expressed. Therefore a treaty, which was not intended to be a menace to the life or independence of a state at the time of its execution, becomes voidable the moment subsequent events invest it with that character. In the same way if a compact is made in contemplation of the continuance of a particular form of government in one or both of the contracting states, either may terminate it whenever internal constitutional changes render it inapplicable to the new circumstances. It is also an implied condition of the continuing obligation of a treaty that the parties to it shall retain their freedom of will with respect to its subject-matter. For example, if a state, independent at the time of the execution of a convention, subsequently becomes subordinate to another through the fortunes of war or enters into a confederation whose constitution restrains its liberty of action, its obligation to per-

<sup>25</sup> For the best statements of the matter, including the text of the treaty of London, of March 13, 1871, see Holland. *European Concert in the Eastern Question*, pp. 220-276; and Hertslet's *Map of*

*Europe by Treaty*, 1256-7, 1892-8, 1904. For the protocols of the conferences held at London from Jan. 17th to March 4th, 1871, see Martens (*N. R. G.*) xviii, 273; *British State Papers*, 1871, p. 7.

form the prior agreement becomes subordinate to its restraints and obligations involved in its new relations. Such a case constitutes an exception to the general rule that a prior treaty takes precedence of a subsequent one.<sup>26</sup>

§ 397. **Dangerous contentions of Heffter and Fiore.**—The foregoing recognized and legitimate grounds upon which a valid treaty may become voidable through subsequent events, are too ample to justify the effort to open wider the door of temptation through such contentions as that of Heffter, who says that a state may repudiate a treaty, where it conflicts with “the rights and welfare of its people;”<sup>27</sup> or that of Fiore, who maintains that “all treaties are to be looked upon as null, which are in any way opposed to the development of the free activity of a nation, or which hinder the exercise of its natural rights.”<sup>28</sup> If such dangerous assumptions were tenable it would be difficult to understand why treaties of a certain kind should be made at all.

§ 398. **When will a breach of conditions by one party render treaty voidable at instance of the other.**—It is a difficult matter to determine what kind of a breach in the conditions of a treaty by one party will render it voidable at the instance of the other. It is undoubtedly true that the binding force of every international compact rests upon the implied condition that it shall be observed by both parties to it, and some authorities hold that its stipulations are inseparable and consequently that they must stand or fall together;<sup>29</sup> while others, after distinguishing between principal and secondary articles, maintain that only infractions of the former are sufficient to destroy its binding force.<sup>30</sup> As every promise made in a treaty by one party enters into the consideration in return for which essential parts of the agreement are undertaken by the other, who shall say that one of the contracting parties shall be armed with the power to determine what is or is not essential in the eyes of the other? In the midst of such difficulties, from

<sup>26</sup> Martens, *Précis*, §§ 52, 56; Dana's *Wheaton*, § 275; Bluntschli, §§ 458, 460; Hall, pp. 373-4; Phillimore, iii, 661.

<sup>27</sup> *Völkerrecht*, § 98.

<sup>28</sup> *Nouv. Droit Int.* I, p. ch. IV.

<sup>29</sup> Vattel (II, c. xiii, § 202 maintains that the violation of an arti-

cle in a treaty may cancel the whole, citing Grotius, II, c. xv, § 15. To the same effect, Heffter, § 98; Calvo (§ 729), assents to the doctrine, but with a qualification. See also Klüber, § 155.

<sup>30</sup> Wolf, *Jus Gentium*, § 432; Martens, *Précis*, § 59.

which there is no escape, "all that can be done is to try to find a test which shall enable a candid mind to judge whether the right of repudiating a treaty has arisen in a given case. Such a test may be found in the main object of a treaty. There can be no question that the breach of a stipulation which is material to the main object, or, if there are several, to one of the main objects, liberates the party other than that committing the breach from the obligations of the contract; but, it would be seldom that the infraction of an article which is either disconnected from the main object or is unimportant, whether originally or by change of circumstances, with respect to it, could in fairness absolve the other party from performance of his share of the rest of the agreement, though if he had suffered any appreciable harm through the breach he would have a right to exact reparation, and an end might be put to the treaty as respects the subject-matter of the broken stipulation."<sup>31</sup> The failure of one of the strongest and most original minds which has of late years grappled with the vexed questions of international law to offer anything more definite or more practical as a rule to determine what kind of a breach will render a treaty voidable, is perhaps conclusive of the fact that all that can be said is that when a breach occurs the party availing himself of it, if he fails to demonstrate that he has been deprived of something really material to at least one of the main objects he had in view, exposes himself to the suspicion of bad faith.<sup>32</sup>

**§ 399. Several other circumstances by which a treaty may be extinguished.**—Apart from the grounds already enumerated a treaty may be extinguished by the expiration of the term to which its existence was originally limited; by the complete destruction of the thing which constituted its subject-matter; by the completion of every obligation contained therein if an executory convention; by the performance of a condition upon which its existence was made to depend, such, for instance, as the payment of a definite sum of money; by the express renunciation of one of the parties in interest; by mutual agreement of the contracting parties; by the execution of a new treaty, inconsistent with a previous one; by circumstances

<sup>31</sup> Hall, pp. 368-9.

<sup>32</sup> Lawrence (Principles of Int. Law, p. 288) holds that "when, and under what conditions, it is

justifiable to disregard a treaty, is a question of morality rather than of law."

rendering its execution impossible; or by a declaration of war suspending or entirely destroying its effect.<sup>33</sup>

§ 400. How treaties may be extended or renewed. Difference between the two.—Treaties once extinguished may be either extended or renewed by express or tacit consent. Unless they are thus extended or renewed they expire at the end of the term for which they were contracted. At the close of a war it is usual to renew expressly the treaties in force at the time of its beginning; and when a treaty is thus expressly renewed it is the same as if a new one were concluded in all respects similar to the former. If a treaty is renewed or extended tacitly the acts from which the purpose to do either is inferred must place the intention of the parties beyond question or mistake.<sup>34</sup> As Vattel<sup>35</sup> has well expressed it: “According to the circumstances and nature of the acts in question, they may prove nothing more than a simple continuation or extension of the treaty, which is very different from a renewal, especially as to the term of duration. For instance, England has entered into a subsidiary treaty with a German prince, who is to keep on foot, during ten years, a stated number of troops at the disposal of that country, on condition of receiving from her a certain yearly sum. The ten years being expired, the king of England causes the sum stipulated for one year to be paid; the ally receives it; thus the treaty is indeed tacitly continued for one year; but it cannot be said to be renewed; for the transaction of that year does not impose an obligation of doing the same thing for ten years successively. But, supposing a sovereign has, in consequence of an agreement with a neighboring state, paid her a million of money for permission to keep a garrison in one of her strongholds during ten years, if, at the expiration of that term, the sovereign, instead of withdrawing his garrison, makes his ally a tender of another million, and the latter accepts it, the treaty is, in this case, tacitly renewed.”

<sup>33</sup> Klüber, § 164; Bluntschli, §§ Wharton, Int. Law Dig., § 137a.

450, 454; Calvo, § 610; Creasy, Int. <sup>34</sup> Heffter, § 99; Calvo, § 616; Law, pp. 40-43; Halleck, I, pp. 242, Fiore, §§ 1133-5.

268; Davis, Int. Law, pp. 179-80; <sup>35</sup> *Droit des Gens*, § 199.

## CHAPTER VI.

### RIGHT OF SELF-PRESERVATION.

§ 401. **Defensive forms of self-preservation.**—In the corporate person of every state is vested the inherent right of self-preservation which, when exercised in a defensive form, embraces not only all those means through which each independent political community guards its territory from actual invasion, and the person and property of its citizens, at home and abroad, from injustice and violence, but also those permissible measures through which such a community may take defensive action either within foreign territory or in non-territorial waters when either is unlawfully employed as a starting point for attacks against it.

§ 402. **Invasion of Mexico by U. S., 1836.**—It is the duty of every state so to administer its laws in time of peace as to prevent private persons from organizing and arming upon its soil for the purpose of invading a neighboring state. When the government of a state in which such an enterprise is pending fails after warning to prevent it, or when the exigencies of the case are such as to compel action without warning, the government of the threatened state may send troops across the border in order to check the invasion; or, after it has been actually made, it may pursue the offenders and punish them within the territory of the state from which they came.<sup>1</sup> “Temporary invasion of the territory of an adjoining country, when necessary to prevent and check crime, ‘rests upon principles of the law of nations entirely distinct from those on which war is justified—upon the immutable principles of self-defense—upon the principles which justify decisive measures of precaution to prevent irreparable evil to our own or to a neighboring people.’”<sup>2</sup>

§ 403. **Invasion of U. S. by British subjects, 1838.**—It was

<sup>1</sup> Vattel, III, c. 3, §§ 44, 49, 50; c. 7, § 133; Phillimore, i, § 213; Klüber, § 44; Twiss, i, § 102; Hall, 84. Some other writers, while admitting the right of self-preservation by means of acts violating the sovereignty of another state, deny

that it is a *pacific* right. They regard any invasion of a state's territory as “imperfect war.” See Halleck, i, 95; Calvo, §§ 203-4.

<sup>2</sup> Mr. Forsyth, Sec. of State, to Mr. Ellis, Dec. 10, 1836. MSS. Inst. Mexico.

this plain right of self-defense so emphatically asserted by the United States against Mexico in 1836, that Great Britain invoked to justify the acts of those of her subjects who, during the Canadian rebellion of 1838, crossed by her command the American frontier, boarded a steamer called the *Caroline* and sent her adrift down the falls of Niagara in order to prevent her use by insurgents armed upon American soil for the invasion of British territory. Under such circumstances the United States called upon Great Britain "to show a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation."<sup>3</sup> In the Senate Mr. Calhoun said: "It is a fundamental principle in the law of nations that every state or nation has full and complete jurisdiction over its own territory to the exclusion of all others, a principle essential to independence, and therefore held most sacred. It is accordingly laid down by all writers on those laws who treat of the subject, that nothing short of *extreme* necessity can justify a belligerent in entering with an armed force on the territory of a neutral power, and, when entered, in doing any act which is not forced on him by the like necessity which justified the entering."<sup>4</sup> As invasion was imminent Great Britain found no difficulty in making a case of self-defense forced upon her by "instant, overwhelming" necessity; and so the matter ended with an admission from her that although the invasion was justifiable, an apology was due for it.<sup>5</sup> While it is undoubtedly true that a state may treat any violation of its territory as an act of war, when such violation occurs without any hostile intention, and with the purpose of preventing events which might lead to war, the invaded state should under such circumstances regard such preventive measures rather as friendly than as hostile acts.

§ 404. When a state may defend itself in its own or in non-territorial waters. Case of *Virginius*.—When the intent is evident and the emergency great, a state threatened with an attack from the sea by persons on board a vessel sailing under the flag of another state may, as an act of self-defense, search and capture such vessel either in its own waters or in non-territorial waters, despite the general rule which denies the

<sup>3</sup> See Mr. Webster's report of Jan. 7, 1843, giving correspondence to that date in regard to the steamer *Caroline*, contained in Senate Doc. No. 99, 27th Cong., 3d sess.;

and also Parl. Papers, 1843, lxi, 46-51.

<sup>4</sup> Works, iii, 625.

<sup>5</sup> See President Tyler's message, transmitting the treaty of Wash-

right of visiting and seizing upon the high seas in time of peace vessels of a friendly power. Such right became the subject of serious discussion in the famous case of the *Virginus*, a steamer duly registered at the port of New York as a part of our commercial marine on the 26th day of September, 1870. After receiving, on the fourth of the following month, a certificate of the register in the usual form, the steamer sailed from the port of New York, and did not thereafter return to the territorial jurisdiction of the United States. Early in November, 1873, while sailing under the flag of the United States, the *Virginus* was captured by the Spanish war steamer *Tornado* in waters claimed by the Spanish authorities to be territorial, and conducted with her crew and passengers, amounting in all to nearly two hundred persons, into the port of Santiago de Cuba, where the prisoners were charged with piracy and connection with certain Cuban insurgents. The Attorney-General of the United States in a communication to the Secretary of State, dated December 17, 1873, admitted that, "Spain, no doubt, has a right to capture a vessel, with an American register, and carrying the American flag, found in her own waters assisting, or endeavoring to assist, the insurrection in Cuba, but she has no right to capture such a vessel on the high seas upon an apprehension that, in violation of the neutrality or navigation laws of the United States, she was on the way to assist said rebellion. Spain may defend her territory and people from the hostile attack of what is, or appears to be, an American vessel; but she has no jurisdiction whatever over the question as to whether or not such vessel is on the high seas in violation of any law of the United States."<sup>6</sup> Assuming the fact to be beyond all question that the *Virginus* was seized upon the high seas the gravamen of the American contention, at the outset, was that "American vessels on the high seas in time of peace, bearing the American flag, remain under the jurisdiction of the country to which they belong; and therefore any visitation, molestation, or detention of such vessel by force, or by the exhibition of force, on the part of a foreign power, is in derogation of the sovereignty of the United States."<sup>7</sup> Spain's reply was that the captured vessel really belonged not to American citizens, but

ington to the Senate, Aug. 11, 1842; S., p. 340. See also Parl. Papers. Webster's Works, vi, 355. lxxvi, 1874, 65.

<sup>6</sup> 14 Opinions of Attys. Genl. U. <sup>7</sup> See President Grant's fifth annual message, 1873.

to certain Cuban insurgent leaders who had fraudulently obtained, in violation of the municipal laws of the United States, a register which did not legally invest the ship with an American national character. The Attorney-General's rejoinder was that "Spain cannot rightfully raise that question as to the *Virginus*, but the United States may, and, as I understand the protocol, they have agreed to do it, and, governed by that agreement and without admitting that Spain would otherwise have any interest in the question, I decide that the *Virginus*, at the time of her capture, was without right and improperly carrying the American flag."<sup>8</sup> Upon that basis the matter was compromised, so far as the capture of the ship was concerned, and the *Virginus*, with the American flag flying, was delivered to the navy of the United States subject to an agreement which provided "that, should it be shown to the satisfaction of this government that the *Virginus* was improperly bearing the flag, proceedings should be instituted in our courts for the punishment of the offense committed against the United States. On her part, Spain undertook to proceed against those who had offended the sovereignty of the United States, or who had violated their treaty rights."<sup>9</sup>

§ 405. Register only *prima facie* evidence of nationality. Respect due to it as such.—The terms of a compromise entered into under circumstances of passion and excitement, naturally incident to the unlawful execution by the Spanish authorities of American citizens and British subjects found on board of the *Virginus*, should not mislead the minds of publicists as to the real issues involved in the capture of the ship itself, which are entirely separate and distinct from those involved in the subsequent proceedings under which many of the captured suffered death.<sup>10</sup> The decision of the Attorney-General of the United States, that the *Virginus* was fraudulently carrying its flag at the time of her capture upon the high seas, should certainly go far to discredit the unreasonable contention that the possession even of a fraudulent register is conclusive evidence to all the world of national character, as to which no state can inquire, except that one whose laws are violated through its procurement. The true doctrine is that such a register is only *prima facie* evidence of nationality, which any state may chal-

<sup>8</sup> 14 Opinions of Attys. Genl. U. S., p. 340.

<sup>9</sup> President Grant's special message, Jan. 5, 1874.

<sup>10</sup> Fifty-three of the passengers and crew of the *Virginus* were put to death. Those who were American citizens were certainly ex-



lence at its peril when its interests are involved.<sup>11</sup> As Mr. R. H. Dana, Jr., the able editor of *Wheaton*, well concluded at the time: "Nations having cause to arrest a vessel, would go behind such a document to ascertain the jurisdictional fact which gives character to the document, and not the document to the fact. \* \* The register of a foreign nation is not, and by the laws of nations is not, recognized as being a national voucher and guarantee of national character to all the world."<sup>12</sup> And yet such *prima facie* evidence should be treated with the greatest respect, and any attempt to overturn it should be attended with the greatest caution, and with a full consciousness of the fact that, in the event of its verity, full satisfaction must be given for any and all damages resulting from any unwarranted attack upon its genuineness.

§ 406. **Liability of *Virginius* to capture in any event.**—It must not be assumed, however, that a lawful American register would have shielded the *Virginius* from visit and capture on the high seas, provided the Spanish commander had a reasonable ground to believe that the vessel was then engaged in a hostile expedition against the territory of his country, and that the danger was pressing and imminent. Under such circumstances Spain had a clear "right of self-defense, which, springing from the law of nature, is as thoroughly incorporated into the law of nations as any right can be. No state of belligerency is needful to bring the right of self-defense into operation. It existed at all times—in peace as well as in war. The only questions that can arise about it relate to the modes and places of its exercise."<sup>13</sup> That positive exposition of the right made at the time by an eminent American jurist has been confirmed by another who, in defining the rules of international law illustrated by the case of the *Virginius*, has said: "That the right of self-defense authorizes a nation to visit and capture a vessel as well on the high seas as in its own waters, when there is reasonable ground to believe it to be engaged in a hostile expedition against the territory of such nation."<sup>14</sup>

§ 407. **Right of American and British citizens on board *Virginius* to lawful trial.**—Admitting that the *Virginius* was

executed without due process of law.

<sup>11</sup> See above, p. 310.

<sup>12</sup> In a *Boston Journal* of January 6, 1874.

<sup>13</sup> Mr. George T. Curtis's examination of "The Case of the *Virginius*, Considered with Reference to the Law of Self-Defense."

<sup>14</sup> Woolsey, § 214.

legally captured on the high seas as a precautionary defensive measure, the fact remains that the right of Spain either to try or punish the American citizens on board of her was subject to all the limitations imposed by the general rules of international law, and by the special provisions of the treaty of 1795, guaranteeing that the courts of justice shall be open alike to citizens of each power, with all the privileges of counsel and trial according to the ordinary forms of law.<sup>15</sup> While the expedition may have been illegal, it cannot be maintained that any piratical acts had been committed prior to the moment of capture; and, even if the vessel and crew had been taken in territorial waters while in the act of landing the passengers, that act could not have been considered piratical in the absence of all means of enforcing invasion with violence.<sup>16</sup> Spain did not therefore attempt to defend the summary proceedings of her officials for whose illegalities she responded with a prompt indemnity. The British government, which likewise received compensation for the families of British subjects executed under the same circumstances, while it did not complain of the seizure of the vessel, or of the detention of the passengers and crew, claimed that after that precaution had been taken "no pretense of imminent necessity of self-defense could be alleged; and it was the duty of the Spanish authorities to prosecute the offenders in proper form of law, and to have instituted regular proceedings on a definite charge before the execution of the prisoners." It was further claimed that, in that event, it would have been found that "there was no charge either known to the law of nations or to any municipal law, under which persons in the situation of the British

<sup>15</sup> The treaty of 1795 (Art. 7) provided "the courts of justice should be open alike to citizens of each power; that seizures of the persons of its citizens of one power by the authorities of the other, within its jurisdiction, were to be made and prosecuted under the ordinary forms of law, and that the persons so arrested were to have the right to employ such advocates or attorneys as they pleased, who were to have the right of access to them, and of being present at all examinations

and trials, all of which engagements have since been entered into with other powers." J. C. Bancroft Davis, *Notes on Treaties of the U. S.*, 1873.

<sup>16</sup> "She offered, and was capable of offering no resistance to search or capture. Her passengers, at the instant of capture, were not armed or organized, and so were incapable of levying war against the authority of Spain, whatever may have been their ultimate intention." Davis, *Int. Law*, pp. 391-2.

crew of the *Virginus* could have been justifiably condemned to death.”<sup>17</sup>

§ 408. **Great Britain's seizure of Danish fleet as a permissible measure of self-preservation.**—As a permissible measure of self-preservation, Great Britain justified her action in demanding that the Danish fleet should be delivered into her custody when, in 1807, Napoleon threatened to force Denmark to take part in the war against her. By secret articles in the Treaty of Tilsit, of which the British government was cognizant, it was provided that France should be at liberty to take possession of the Danish fleet and use it against Great Britain, in which event the former “would have been placed in a commanding position for the attack of the vulnerable parts of Ireland and for a descent upon the coasts of England and Scotland.” As the Danes were possessed of no military force capable of resisting an attack from the French army then massed in the north of Germany, Great Britain felt compelled to prevent the use against her of the naval power of a neutral state, which had been deprived of its free agency, by despatching to the Baltic both a fleet and an army capable of checking the designs of the French. Not until she had offered means of defense against France and a guarantee of the whole Danish possessions, did Great Britain demand the custody of the Danish fleet under the following conditions: “We ask deposit—we have not looked for capture; so far from it, the most solemn pledge has been offered to your government, and it is hereby renewed, that, if our demand be acceded to, every ship in the navy of Denmark shall, at the conclusion of a general peace, be restored to her in the same condition and state of equipment as when received under the protection of the British flag.” When Denmark refused to accede to the demand, even in that form, upon the ground that she was both able and willing to maintain her neutrality, an English army landed at Copenhagen and laid siege to the city, and in that way compelled the Danish government to surrender its entire naval force as the price of safety. The result of the seizure was such exasperation upon the part of the Danes that they threw themselves completely into the

<sup>17</sup> Parl. Papers, lxxvi, 1874. “It is clear from this language that the mere capture of the vessel was an act which the British govern- ment did not look upon as being improper, supposing an imminent necessity of self-defence to exist.” Hall, § 86.

arms of the French, and at once declared war against England.<sup>18</sup>

§ 409. **Attack of the U. S. upon Amelia Island, 1817.**—The government of the United States likewise appealed to the right of self-preservation as a justification for its attack upon Amelia Island, situated at the mouth of St. Mary's River, and a part of the territory of Spain, when it became necessary to expel a band of buccaneers that had seized it in 1817 under the direction of an adventurer named McGregor, who, in the name of the insurgent colonies of Buenos Ayres and Venezuela, undertook to prey indiscriminately upon the commerce of Spain and the United States. When the government of the former proved either unable or unwilling to suppress the nuisance, President Monroe directed a vessel of war to drive out the marauders and to destroy their vessels and works.<sup>19</sup>

§ 410. **Notable interventions on religious grounds.**—Having now reviewed the several defensive forms of the right of self-preservation, the attempt will be made to describe its one offensive form generally known as intervention, a term difficult to confine within the limits of a precise and exhaustive definition. In view of that fact an outline has been heretofore drawn of its origin and growth in the European system, with the belief that illustrations of the manner in which intervention has been actually applied in notable cases will be found to be the most reliable and helpful indications of its real character.<sup>20</sup> From what has thus been said it appears that in the Peace of Westphalia, for so long a time the basis of the modern public law of Europe, was embodied a provision that France and Sweden, its chief beneficiaries, should be given the right to intervene in the internal affairs of Germany, as a means of upholding the provisions of a settlement whose primary purpose was to secure the religious

<sup>18</sup> Alison, *Hist. of Europe*, vi, 474-5; De Garden, *Hist. des Traités de Paix*, x, 238-43, and 325-31; Lanfrey, *Hist. de Napoléon Ier*, iv, 146-9; Mahan's *Influence of Sea Power Upon the French Revolution and Empire*, ii, 277.

<sup>19</sup> See President Monroe's first annual message, 1817; Parton's *Life of Jackson*, ii, 421 ff. "When an island is occupied by a nest of

pirates, harassing the commerce of the United States, they may be pursued and driven from it by authority of the United States, even though such island were nominally under the jurisdiction of Spain, Spain not exercising over it any control." Mr. Adams, Sec. of State, to Mr. Hyde De Neuville, Jan. 27, 1818; MSS. For. Leg. notes.

<sup>20</sup> See above, pp. 110, 111, 117, 118.

equality of the Catholic, Lutheran and Reformed churches, as originally guaranteed by the Treaty of Passau, and by the religious Peace of Augsburg. It thus became a recognized principle from the very beginning that the Great Catholic and Protestant powers could legitimately intervene for the protection of their co-religionists in the bosom of rival states. Upon that basis it was that Austria and Spain repeatedly interfered in favor of the Catholic party in France, Germany and England, while the Protestant powers were equally watchful of their adherents in France, Germany and the Netherlands.<sup>21</sup>

§ 411. **Notable interventions on political grounds.**—The right to intervene in the internal affairs of a state on religious grounds became a convenient precedent for the right to intervene on political grounds when, in 1772, Russia, Austria and Prussia resolved to interfere in the internal affairs of Poland, ostensibly to protect neighboring nations against the internal discords of the smaller state. The right of political intervention so mercilessly applied in the case of Poland was then taken as a precedent to guide those states that deemed it their duty to interfere in the internal affairs of France when the principles of the French Revolution threatened to extend themselves to all other European countries. The successful intervention of the allied powers in the affairs of France, involving as it did unusually intimate relations between a few of the greater ones, seems to have suggested to the Emperor of Russia the idea of uniting Austria, Prussia and Russia in the mystic bonds of the Holy Alliance, formed not only for the purpose of intervention in the affairs of those European states in which the cause of legitimacy was endangered by the rising tide of popular freedom, but also for the suppression of the republican governments that had arisen upon what had once been Spanish soil in Central and South America. No sooner was that attempt frustrated by the joint action of Great Britain and the United States than the former intervened in the affairs of Portugal, whose internal disorders, beginning in 1826 with the death of John VI., were composed by the Quadruple Alliance concluded in 1834. Before that result was reached Great Britain, France and Russia felt called upon by the events of 1827 to intervene in the affairs of Greece, in order to deliver that country from the dominion

<sup>21</sup> Cf. Wheaton, *Hist. Law of Nations*, Part I, §§ 2, 3, pp. 80-88.

of the Ottoman Porte. The year 1830 witnessed the beginning of the intervention of the five great powers for the purpose of composing the Belgic revolution, whose object was to dissolve the union of Belgium with Holland brought about at the Congress of Vienna in 1815. In 1854 Great Britain and France intervened in the affairs of Turkey, primarily to preserve the balance of power in Eastern Europe, and incidentally to vest in the European Concert the protection of the Christian peoples subject to Turkey assumed prior to that time by Russia alone. In 1863 Prussia intervened in the affairs of Denmark; and, after the co-operation of Austria had been secured, their united armies, early in the next year, crushed that country and forced her to execute the Peace of Vienna, wherein Schleswig-Holstein and Lauenburg were ceded to the victors, subject to such arrangements as they might make with each other. To the foregoing summary of the European history of the right of intervention will be added a few notable and recent illustrations drawn from the history of the New World, before any attempt will be made to deduce from the data thus presented, such general principles regulating the exercise of this right as may be said to have been established by usage.

§ 412. **Intervention of France, Great Britain and Spain in Mexico. Ultimate motive of Napoleon III.**—A notable intervention of three monarchical European powers in the internal affairs of a republican American state was provided for in a convention<sup>22</sup> made at London, October 31st, 1861, between Great Britain, France and Spain for the declared purpose of enforcing the payment of certain claims against Mexico held by citizens of the contracting powers, and of securing for the future more perfect protection for their persons and property. While the allies disavowed any purpose to acquire territory, or “to exercise in the internal affairs of Mexico any influence of a nature to prejudice the right of the Mexican nation to choose and constitute the form of its government,” plain provision was made for a war of conquest and for a military occupation subject only to the limitation that the conquered should be permitted ultimately to set up such a civil regime as they might deem best. In December of 1861 the army of the allies occupied Vera Cruz; and on the 3rd of the following July the Emperor of the French, in a letter commanding General Forey to march upon the Mexican capital, disclosed the

<sup>22</sup> De Clercq, *Recueil des Traités de la France*, viii, p. 318.

fact that his real and ultimate motive in intervening was to prevent the United States from becoming the sole dispenser of the products of the New World by checking her extension southward through the restoration of the prestige of the Latin races in America. The interests and influence of France were to be advanced through the gratitude and sympathy which would be extended to her by any new government that might be established in Mexico under her patronage.<sup>23</sup> A shrewd Frenchman admitted at the time that the probable expectation of all three of the allies was "the overthrow of the system of government established in Mexico since its independence, and the substitution of a monarchical system."<sup>24</sup> The over-eagerness of France to attain that end soon deprived her of both her coadjutors. At a conference held at Orazaba, April 9th, 1862, the English and Spanish commissioners refused further co-operation upon the ground that the French had exceeded the terms of the convention in extending military aid to the faction in favor of the establishment of an imperial government. Thus left alone Napoleon protected that faction in their effort to create an Assembly of Notables, selected even without the pretence of a general vote of the Mexican people, which undertook to establish an imperial government by offering the throne to Maximilian, an archduke of Austria, whose authority France at once acknowledged in a convention guaranteeing military aid. The new emperor arrived at Vera Cruz at the end of May, 1864.<sup>25</sup> So far the intervention of the allied powers in the affairs of Mexico has been considered from the point of view of their interests only. When thus considered its justification must rest upon the specific grounds set up in the terms of the original convention, and in its general declaration that the object of the contracting parties was "to demand more efficacious protection for the persons and property of their subjects, as well as a fulfillment of the obligations contracted towards their majesties."

<sup>23</sup> Archives Dipl., 1863, II, pp. 328-330.

<sup>24</sup> M. Chevalier in *Révue des Deux Mondes*, April, 1862. Despite the Emperor's disclaimer of any intention to force a government on Mexico, he instructed General Forey "to establish either a monarchy, if it be not incompatible with the national sentiment of the

country, or, at all events, a government which promises some stability."

<sup>25</sup> On April 8th, 1864, before leaving Europe, Maximilian signed the treaty of Miramar in which France undertook to furnish certain military aid upon certain pecuniary considerations. De Clercq, ix, p. 18.

§ 413. **An intervention to end an intervention. Mr. Seward's protest.**—When such intervention is considered in reference to the interests of the United States a new principle comes into view,—a principle which permits one state to intervene in order to prevent or terminate the intervention of another state or states when the same is illegal or unjustifiable. By virtue of the primacy or overlordship over the New World vested in it through the growth of the Monroe Doctrine, the government of the United States, so soon as its freedom of action was assured by the successful termination of the civil war, undertook to indicate to France that there existed profound national discontent by reason of the fact “that the French army which is now in Mexico is invading a domestic republican government there, which was established by her people, and with whom the United States sympathized most profoundly, for the avowed purpose of suppressing it, and establishing upon its ruins a foreign monarchical government, whose presence there, so long as it shall endure, could not but be regarded by the people of the United States as injurious and menacing to their own chosen and endeared republican institutions.”<sup>26</sup> So efficacious was this intervention, interposed to terminate an intervention, that an agreement was soon arrived at “between this government and the Emperor of France, to the effect that he will withdraw his expeditionary military forces from Mexico in three parts: the first of which shall leave Mexico in November next, the second in March next, and the third in November, 1867, and that upon the evacuation being thus completed, the French government will immediately come upon the ground of non-intervention in regard to Mexico, which is held by the United States.”<sup>27</sup>

§ 414. **Intervention of U. S. in affairs of Venezuela.**—When near the close of 1895 it became necessary for the government of the United States to intervene in the boundary controversy then pending between Great Britain and the Republic of Venezuela, the President declared in a special message to Con-

<sup>26</sup> Mr. Seward, Sec. of State, to Mr. de Montholon, Dec. 6, 1865. MSS. Notes, France. For the preceding correspondence, beginning in 1861 with the refusal of the United States to take part with France, Spain and Great Britain, against Mexico, see Wharton, Int.

Law Dig., § 58; British and Foreign State Papers for 1861-2, vol. 52. Cf. also Calvo, §§ 118-126; Dana's Wheaton, note 41.

<sup>27</sup> Mr. Seward, Sec. of State, to Mr. Campbell, Oct. 25, 1866. MSS. Inst., Mex.



gress<sup>28</sup> that, "if a European power by an extension of its boundaries takes possession of the territory of one of our neighboring republics against its will and in derogation of its rights, it is difficult to see why to that extent such European power does not thereby attempt to extend its system of government to that portion of this continent which is thus taken. This is the precise action which President Monroe declared to be 'dangerous to our peace and safety,' and it can make no difference whether the European system is extended by an advance of frontier or otherwise." As the right of intervention was thus made to rest upon the Monroe Doctrine, and as Great Britain had contended in her reply<sup>29</sup> to the original suggestion of arbitration, that that doctrine does not embody any principle of international law which "is founded on the general consent of nations," and that "no statesman, however eminent, and no nation, however powerful, are competent to insert into the code of international law a novel principle which was never recognized before and which has not since been accepted by the government of any other country," it became necessary for the President to declare that, "practically the principle for which we contend has peculiar, if not exclusive, relation to the United States. It may not have been admitted in so many words to the code of international law, but since in international councils every nation is entitled to the rights belonging to it, if the enforcement of the Monroe Doctrine is something we may justly claim, it has its place in the code of international law as certainly and as securely as if it were specifically mentioned; and when the United States is a suitor before the high tribunal that administers international law the question to be determined is whether or not we present claims which the justice of that code of law can find to be right and valid."

§ 415. **Primacy of U. S. as defined by President Cleveland and Prof. Lawrence.**—When that point was reached the only remaining difficulty was that involved in the restatement of the Monroe Doctrine in such a form as to warrant the contention that the United States, by virtue of its primacy or overlordship in the New World, has the right to act as final arbiter and to carry out its decrees by force, if necessary, whenever a

<sup>28</sup> Dec. 17, 1895. Messages and Papers of the Presidents, ix, 655.

the British Prime Minister to Sir Julian Pauncefote, British ambassador at Washington.

<sup>29</sup> Such reply was embodied in two communications addressed by

controversy is pending between a European power and an American state, whose consequences threaten an extension of the European system in this hemisphere. In order fully to develop that idea the President maintained that "if the balance of power is justly a cause for jealous anxiety among the governments of the Old World, and a subject for our absolute noninterference, none the less is an observance of the Monroe Doctrine of vital concern to our people and their government." Thus, in a clear and consistent form was finally reached the conclusion that the same supreme directing and arbitrating power, which in the Old World is vested in the Concert of Europe, is, in the New, vested in the government of the United States acting alone. While Great Britain, whose interests in these Continents are far vaster than any other European power, frankly admitted, as a matter of fact, that such a primacy is vested in the United States by accepting the arbitration upon which its government insisted, one of the most notable of English publicists has recently admitted, as a matter of theory, that "the Great Powers of Europe, as they are called, have gradually obtained such a predominant position as to render untenable the proposition that there is no distinction between them and other sovereign states; and the position they hold in Europe is held by the United States on the American continent. \* \* International law gives the Great Powers no more right in their individual capacity than the smallest and weakest of their fellows. But collectively they act in the questions over which they have gained control pretty much as the committee of a club would act in matters left to it by the rules of the club. \* \* If it be true that there is a primacy in America comparable in any way with that which exists in Europe, it must be wielded by her (the United States), and by her alone. There is no room for that machinery of conferences, congresses, and diplomatic communications which play so large a part in the proceedings of the great powers. The supremacy of a committee of states and the supremacy of a single state cannot be exercised in the same manner. What in Europe is done after long and tedious negotiations, and much discussion between representatives of no less than six countries, can be done in America by the decision of one cabinet discussing in secret at Washington." 30

<sup>30</sup> Lawrence, Principles of Int. Law, pp. 65, 66, 247.

§ 416. Intervention of U. S. in affairs of Cuba. Community of interests.—In the famous letter<sup>31</sup> directed by Mr. Jefferson to President Monroe, October 24, 1823, in which the former laid the foundations of the doctrine which has since borne the name of the latter, the following passage occurs: “But we have first to ask ourselves a question. Do we wish to acquire to our own confederacy any one or more of the Spanish provinces? I candidly confess that I have ever looked on Cuba as the most interesting addition which could ever be made to our system of states. The control which, with Florida Point, this island would give us over the Gulf of Mexico and the countries and isthmuses bordering on it, as well as all those whose waters flow into it, would fill up the measure of our political well-being.” Since that time every American Secretary of State has kept clearly before his eyes the fact that the geographical position of Cuba places that island in such special relations to the United States as to preclude the idea of its transfer, either by purchase or conquest, to any one of the more powerful of the European nations. On October 25, 1825, Mr. Clay, Secretary of State, wrote to Mr. Brown that “you will now add that we could not consent to the occupation of those islands (Cuba and Porto Rico) by any other European power than Spain under any contingency whatever;” and, on October 2, 1829, Mr. Van Buren, Secretary of State, wrote to Mr. Van Ness that “the government has always looked with the deepest interest upon the fate of those islands, but particularly of Cuba. Its geographical position, which places it almost in sight of our southern shores, and, as it were, gives it the command of the Gulf of Mexico and the West Indian seas, its safe and capacious harbors, its rich productions, the exchange of which for our surplus agricultural products and manufactures constitutes one of the most extensive and valuable branches of our foreign trade, render it of the utmost importance to the United States that no change should take place in its condition which might injuriously affect our political and commercial standing in that quarter.”<sup>32</sup> With such interests to protect the United States necessarily became deeply concerned in the successive insurrections in Cuba against the dominion of Spain, extending over a period of nearly fifty years, during which time the government of the former was subjected to great expense through the enforce-

<sup>31</sup> See above, p. 142.

<sup>32</sup> MSS. Inst. Ministers, 1825 and 1829.

ment of neutrality laws, while its people, shocked by the spectacle of almost incessant strife, were forced to bear enormous pecuniary losses incident to the interruption of trade and commerce.

§ 417. **Intervention as a contingent necessity. Views of Presidents Grant and Cleveland.**—The condition of things brought about by the great war, which began at Yara in 1868 and ended ten years later with the Treaty of Zanjon, prompted Mr. Fish to direct Mr. Schenck, November 27, 1875, to explain to Great Britain “that intervention is not contemplated as an immediate resort, but as a contingent necessity in case the contest be prosecuted and satisfactory adjustment of existing griefs be not reached;”<sup>33</sup> and in his seventh annual message directed to Congress in the same year President Grant said that “in such event, I am of opinion that other nations will be compelled to assume the responsibility which devolves upon them, and to seriously consider the only remaining measures possible, mediation and intervention.”<sup>34</sup> During the final revolt, which began in February, 1895, the devastation incident to the policy of concentration, inaugurated by the Captain General’s bando of October 21, 1896, became so destructive of American interests, that President Cleveland, in his fourth annual message, informed Congress “that it cannot be reasonably assumed that the hitherto expectant attitude of the United States will be indefinitely maintained. While we are anxious to accord all due respect to the sovereignty of Spain, we cannot view the pending conflict in all its features, and properly apprehend our inevitably close relations to it and its possible results, without considering that by the course of events we may be drawn into such an unusual and unprecedented condition as will fix a limit to our patient waiting for Spain to end the contest, either alone and in her own way, or with our friendly co-operation.”<sup>35</sup>

§ 418. **Precipitated by destruction of Maine.**—After the destruction of the *Maine* at Havana during the night of the 15th of February, 1898, had demonstrated the fact that the government of Spain could no longer assure the safety and security of a vessel of the American navy visiting that port on a mission of peace, President McKinley was called upon

<sup>33</sup> MSS. Inst., Gr. Brit.

<sup>35</sup> Messages and Papers of the

<sup>34</sup> Messages and Papers of the Presidents, ix, p. 721.  
Presidents, vii, p. 339.

to determine whether or no the time had arrived for the forcible intervention of the United States. President Cleveland, in the message just referred to, had said that "when the inability of Spain to deal successfully with the insurrection has become manifest and it is demonstrated that her sovereignty is extinct in Cuba for all purposes of its rightful existence, and when a hopeless struggle for its re-establishment has degenerated into a strife which means nothing more than the useless sacrifice of human life and the utter destruction of the very subject-matter of the conflict, a situation will be presented in which our obligations to the sovereignty of Spain will be superseded by higher obligations, which we can hardly hesitate to recognize and discharge." After quoting that passage President McKinley in his special message of April 11, 1898, informed Congress that in his judgment the time had come for forcible intervention, and requested authority "to use the military and naval forces of the United States for these purposes."

§ 419. **Grounds of intervention as defined by President McKinley.**—In defining the grounds of such proposed action he said: "The forcible intervention of the United States as a neutral to stop the war, according to the large dictates of humanity and following many historical precedents where neighboring states have intervened to check the hopeless sacrifices of life by internecine conflicts beyond their borders, is justifiable on rational grounds. It involves, however, hostile constraint upon both the parties to the contest, as well to enforce a truce as to guide the eventual settlement. The grounds for such intervention may be briefly summarized as follows: First. In the cause of humanity and to put an end to the barbarities, bloodshed, starvation, and horrible miseries now existing there, and which the parties to the conflict are either unable or unwilling to stop or mitigate. It is no answer to say this is all in another country belonging to another nation, and is therefore none of our business. It is specially our duty for it is right at our door. Second. We owe it to our citizens in Cuba to afford them that protection and indemnity for life and property which no government there can or will afford, and to that end to terminate the conditions that deprive them of legal protection. Third. The right to intervene may be justified by the very serious injury to the commerce, trade and business of our people and by the wanton destruction of property and devastation of the island. Fourth, and which is of

the most importance. The present condition of affairs in Cuba is a constant menace to our peace and entails upon this government an enormous expense.”<sup>36</sup>

§ 420. *Intervention justified by general principles of international law.*—Leaving the Monroe Doctrine entirely out of view, the foregoing grounds justified the intervention of the United States under the generally recognized principles of international law. “The right of self-defense incident to every state may in certain circumstances carry with it the necessity of intervening in the relations, and to a certain extent of controlling the conduct of another state; and this where the interest of the intervener is not immediately and directly but mediately and indirectly affected. This remark brings us to the consideration of the doctrine of intervention.”<sup>37</sup> While Great Britain protested in connection with the Neapolitan Revolution of 1820 against the improper exercise of the right, in that case, she at the same time stated that “no government could be more prepared than the British government was to uphold the right of any state or states to interfere where their own immediate security or essential interests are seriously endangered by the internal transactions of another state,” provided the exercise of such right is “justified by the strongest necessity, and to be limited and regulated thereby.”<sup>38</sup> In 1827 the right of intervention in favor of Greece as against Turkey was emphatically asserted in a treaty<sup>39</sup> signed on the 6th of July of that year, between Great Britain, France and Russia, whose preamble declared that the three contracting parties were “penetrated with the necessity of putting an end to the sanguinary contest which, by delivering up the Greek provinces and the isles of the Archipelago to all the disorders of anarchy, produces daily fresh impediments to the commerce of the European states, and gives occasion to piracies, which not only expose the high contracting parties to considerable losses, but, besides, render necessary burdensome measures of protection and repression.” A more graphic description could hardly have been drawn of the intolerable conditions imposed by the anarchy in Cuba upon the people of the United States.

<sup>36</sup> Messages and Papers of the Presidents, x, p. 147.

<sup>37</sup> Phillimore, i, p. 554.

<sup>38</sup> Circular Despatch of Lord Castlereagh, Jan. 19, 1821. British and Foreign State Papers, 1820-21,

p. 1160; Hertslet's Map of Europe by Treaty, i, pp. 664-666; Ghillany, ii, 253.

<sup>39</sup> Martens (N. R.), vii, 282 and 463.

§ 421. Can the right to intervene in the affairs of one state be vested in another by a contract of guarantee?—Having now considered the leading cases in which intervention is authorized by the general principles of international law, the question must be asked, whether or no the right or duty of intervention in the internal affairs of one sovereign state can be lawfully vested in another state or states by virtue of an express contract in the form of a guarantee that certain internal conditions shall remain unimpaired. As stated heretofore, when the foundations of the modern international system were laid in the provisions of the Peace of Westphalia, as a means of upholding or guaranteeing them, the right was vested in France and Sweden of perpetual interference in the internal affairs of the German Empire; and in the treaties in which the Peace of Utrecht was embodied sixty-five years later guaranties were given that the crowns of France and Spain should never be united on the same head, and that the Protestant succession as established by law in England should be maintained and defended.<sup>40</sup> By such compacts a state undoubtedly surrenders certain attributes of sovereignty, as in the case of engagements not to maintain fortifications upon certain parts of the territory and the like.<sup>41</sup> If the latter are valid, why not the former?<sup>42</sup> In any event such guaranties when given by sovereign or part-sovereign states come within the purview of international law, and for that reason must be distinguished from the constitutional guaranties given by a federal state to the members composing it, which do not come within its purview, because such protected states are not such persons as international law can recognize.

§ 422. When intervention is asked by both parties to a conflict, or by one only.—In the event of civil war, if both parties to the conflict ask the intervention of one or more powers as a means of settlement, certainly no objection can be urged against the

<sup>40</sup> See above, pp. 97, 106.

<sup>41</sup> As to negative servitudes of that class, see above, p. 299.

<sup>42</sup> The right of intervention under a treaty of guarantee is upheld by Martens (*Précis*, § 78), Klüber (§ 51), and Heffter (§ 45). Hall (§ 93), on the other hand, makes the very forcible suggestion that "the doctrine that intervention on this ground is either due or per-

missive, involves the assumption that independent states have not the right to change their government at will, and is really a relic of the exploded notion of ownership on the part of the sovereign." Twiss (I, § 231), and Halleck (i, 85), maintain the same view. Vattel (II, c. xii), and Phillimore (ii, § 56), are too doubtful to be ranged on either side.

justice or legality of such a proceeding. If, however, the invitation comes from one only of the contestants, can such an invitation of itself in any case legalize the intervention? Despite Phillimore's declaration that intervention under such circumstances "can hardly be asserted to be at variance with any abstract principle of international law, while it must be admitted to have received continual sanction from the practice of nations,"<sup>43</sup> the only view logically consistent with the theory of the right of every state to independence seems to be that embodied in Halleck's contention, that "if the invitation be from one only of the contestants, it can, by itself, confer no rights whatever against the other party."<sup>44</sup> The obvious answer to Bluntschli's claim<sup>45</sup> that a state has the right to intervene in a civil war in behalf of an established government so long as it remains the real organ of the state, and to Heffter's,<sup>46</sup> that a state may intervene in favor of whichever contestant appears to be in the right, is that whenever a state undertakes to intervene on either ground it should do so subject to the same considerations that would govern its action in the event of a recognition of belligerency or independence. As stated heretofore, when a foreign power desires to recognize the independence of a community struggling to free itself from a parent state, before it is ready to do so, caution should be exercised, for the reason that a premature or unjustifiable recognition either of belligerency or independence is really an act of intervention, which the parent state may meet by a declaration of war.<sup>47</sup>

§ 423. Intervention defined in the light of authoritative precedents.—Intervention, when viewed in the light of the leading cases that have taken place in the Old World and the New since the modern international system began, may be defined to be the right of a single state or a group of states forcibly to interfere in the affairs, internal or external, of one or more states, irrespective of their consent, in order to maintain or alter actual conditions, whenever the intervening power or powers determine that such action is necessary under the principle of self-preservation. As intervention is a hostile act, which the state interfered with may treat as an act of war, the intervening power must neces-

<sup>43</sup> Int. Law, i, § 395.

<sup>44</sup> Int. Law, i, 87.

<sup>45</sup> *Völkerrecht*, §§ 476-7.

<sup>46</sup> *Völkerrecht*, § 46.

<sup>47</sup> See above, pp. 188, 192.



sarily assume the right of final judgment and the burden of proving that such judgment is justified by the facts of the particular case. The fundamental difficulty in the matter arises out of the necessity of reconciling two apparently irreconcilable principles. The theologian or metaphysician who is called upon to harmonize the doctrines of free-will and predestination is confronted with a dilemma scarcely more perplexing than that imposed upon the publicist when he attempts to reconcile the right of independence, which confers upon every sovereign member of the family of nations complete liberty to live its own life and to manage its affairs in its own way, with that higher law which authorizes one or more states, under certain conditions, to compel another to do something which, if left to itself, it would not do, or refrain from doing something which, if left to itself, it would do. Against the theoretical difficulty stands, however, the fact that the higher law actually exists, and has been enforced during a long period of time in a series of cases, some of which are now generally accepted as authoritative precedents. Therefore when the question is asked upon what grounds can one state or a group of states legally intervene in the affairs of another, the only answer that can be given is that, in the light of such precedents, a state or group of states may in the following cases resort to intervention as a branch of the general right of self-preservation:

§ 424. **Intervention as a means of preserving the balance of power.**—In the modern international system, whose primary purpose has ever been the maintenance of the balance of power, was embedded at the outset the right of intervention as a means of preserving such balance; and, from the middle of the seventeenth century down to the Congress of Berlin, that means has been invoked whenever the system of balance has been threatened by a disturbance of the international equilibrium of forces.<sup>48</sup> It is hard to reconcile the fact that the Concert of Europe, or a combination of several of its

<sup>48</sup> While the outlines of the system of balance were drawn in the terms of the Peace of Westphalia (1648), its express recognition, as a *de facto* system, dates from the Peace of Utrecht (1713) concluded expressly, according to the recital in the treaty between Great

Britain and Spain, "Ad formandam stabiliendamque pacem ac tranquillitatem Christiani orbis Justo Potentiæ Aequilibro." Schmauss, *Corp. Jur. Gent. Academicum*, p. 1419; Twiss, I, § 104; Lawrence, *Essays on Some Disputed Questions*, etc., No. 5.

greater members, intervened in the affairs of Greece in 1827; in the affairs of Belgium in 1830; in the affairs of Turkey in 1856; in the affairs of Denmark in 1864; and in the affairs of Russia and Turkey in 1878, with the statement that "of late years it (intervention for the preservation of the balance of power) has fallen into disrepute, and those who still maintain it set it forth in a greatly modified form."<sup>49</sup> Certainly no such observation is likely to be made as to the corresponding overlordship asserted of late years in the New World by the government of the United States. And, so far as the Concert of Europe is concerned, present indications give no reason for the belief that its existence will become less necessary for the future maintenance of the general peace; or that there will be a disposition to take away from it a range of intervention somewhat wider than that possessed by individual states.

§ 425. **Intervention for protection of indirect interests not too remote.**—A state may intervene for its own protection in the affairs of another when by acts of omission or commission the offending state actually interferes with or threatens the institutions, good order, or safety, internal or external, of the intervening state,—“and this where the interest of the intervenor is not immediately and directly but mediately and indirectly affected.”<sup>50</sup> Austria, Russia and Prussia intervened in the affairs of Poland upon the ground that their security was imperiled by the internal discords of the smaller state; and that precedent guided all of the European states that deemed it their duty to interfere with the internal affairs of France when the principles of the French Revolution threatened to disturb the institutions of all monarchical countries.<sup>51</sup> While intervention may thus be justified by the indirect consequences of certain acts of omission or commission upon the part of the offending state, it cannot be extended so far as to embrace merely the indirect consequences of a certain form of government, or the prevalence of ideas opposed to those of the intervening state.<sup>52</sup>

<sup>49</sup> Lawrence, *Principles of Int. Law*, pp. 126-7.

<sup>50</sup> Phillimore, i, p. 554.

<sup>51</sup> See above, p. 111.

<sup>52</sup> Martens, *Précis*, § 74; Phillimore, i, § 387-88; Dana's *Wheaton*, Pt. ii, ch. 1; Halleck, i, 83, 465; Bluntschli, § 474, note, and 478;

Mamiani, 100-1; Fiore, i, 421-55; Hall, § 91. The right of one state to interfere in the affairs of another is confined to narrower limits by Vattel (II, c. iv, § 54), Heffter (§§ 30-1 and 44-5), and Calvo (§§ 141-2).

§ 426. **Intervention to ward off an imminent danger.**—The most obvious ground of intervention, and the one least exposed to criticism, is of course that presented by the necessity which impels a state to ward off an imminent and pressing danger. Thus when in 1804 the English government discovered that Spain was preparing a naval armament at Ferrol, in order to carry out an agreement to assist France, then at war with Great Britain, hostilities were begun against the offending state after the remonstrances of the intervening state were disregarded.<sup>53</sup>

§ 427. **One state may intervene to prevent or terminate illegal intervention of another.**—One state may intervene in order to prevent or terminate the illegal intervention of another state or of a combination of states in the affairs of a neighbor or friend, so as to secure to it its freedom of action.<sup>54</sup> In that event the power intervening to terminate such intervention must justify its action upon some ground justifiable as between itself and the power or powers against whom it is asserted. A convenient and recent illustration is presented by the action of the government of the United States in terminating the intervention of France in the internal affairs of Mexico upon grounds which have been fully explained already.<sup>55</sup>

§ 428. **Intervention under treaties of guarantee. Case of Belgium.**—As a state may undoubtedly contract itself out of some of its common law rights, it may part with certain attributes of sovereignty in treaties of guarantee binding it to maintain a particular dynasty or a particular form of government; or granting the reversion to another dynasty in the event of the extinction of its own;<sup>56</sup> or stipulating for its permanent neutralization. When during the Franco-Prussian war of 1870 it was suspected that both France and Prussia contemplated a violation of the neutrality of Belgium, Great Britain at once

<sup>53</sup> Annual Register for 1805, pp. 20-27.

<sup>54</sup> Heffter, § 96; Bluntschli, § 479; Mamiani, 104.

<sup>55</sup> See above, p. 414.

<sup>56</sup> Martens, *Précis*, § 75; Heffter, § 45; Phillimore, i, § 400; Bluntschli, § 479. "The latest occasions on which any question of intervention on the above ground seems to have arisen were in 1849, when,

according to Phillimore, Austria meditated, but did not carry out, an intervention in Tuscany; and in 1860, when Spain appears to have intervened diplomatically, on behalf of the Duchess of Parma, on the occasion of the annexation of Parma to the kingdom of Italy by a popular vote." Hall, p. 301, note 1.

intervened by concluding two conventions, the first between Belgium, Prussia and herself, the second, between Belgium, France and herself,—each stipulating for joint action to uphold the guarantee in the event of its infraction by either belligerent.<sup>57</sup>

§ 429. **Humanitarian interventions to prevent cruelty and tyranny.**—The foregoing are generally described as legal grounds<sup>58</sup> of intervention in contradistinction to those which rest upon a moral basis only. As international public law professes to deal solely with the relation of states to each other, and as such immoral acts of a particular state in its internal dealings with its own subjects as result in massacres, brutalities, and religious persecutions do not fall within the scope of such relations, many contend that the right of intervention cannot be legally invoked for their redress or repression. The jurisdiction of international law over what are known as humanitarian interventions rests upon no stronger foundation than the theory that as each state composing the family of nations is a moral being, and as such clothed with moral duties and responsibilities, any act upon its part so grossly immoral as to amount to a public scandal may be dealt with as an offense against the entire body of states considered as a single society. Such right of intervention when approved by the whole body of civilized nations should therefore stand upon a far firmer foundation than in the case of its assertion by one state only. From the incomplete treatment of the subject by modern publicists, whose opinions are conflicting, it is difficult to draw precise and definite conclusions as to the circumstances and conditions under which an intervention for the prevention of cruelty and tyranny may be properly undertaken. Vattel holds

<sup>57</sup> Hertslet, *Map of Europe by Treaty*, III, 1886-1891. The British guarantee of the neutrality of Belgium had been given in the treaties of 1831 and 1839.

<sup>58</sup> Some authorities maintain that all interventions belong properly to the domain of politics, and not to that of international law. Sir Wm. Vernon Harcourt, in the letters published originally in the *London Times* under the title of "Historicus," and afterwards in a separate form over his own name,

says (p. 14), "it (intervention) is above and beyond the domain of law, and when wisely and equitably handled by those who have the power to give effect to it, may be the highest policy of justice and humanity." And again (41) he says, "nevertheless it must be admitted that in the case of intervention, as in that of revolution, *its essence is its illegality*, and its justification its success." See also Pomeroy, *Int. Law*, p. 244; Lorimer, *Institutes*, ii, ch. viii,

intervention permissible for the succor of a people oppressed by its sovereign;<sup>59</sup> Calvo and Fiore, that it may be used to put an end to crimes and slaughter;<sup>60</sup> Mamiani, Bluntschli and Wheaton, that it may be applied as the means of aiding an oppressed race.<sup>61</sup> On the other hand, Heffter denies that it can be rightfully invoked for the repression of tyranny. When France and England suspended diplomatic relations with Naples, in consequence of the inhumanity with which the kingdom was ruled, the Russian government issued a circular declaring "that as a consequence of friendly forethought one government should give advice to another in a benevolent spirit, that such advice might even assume the character of exhortation; but we believe that to be the furthest limit allowable. \* \* To endeavor to obtain from the king of Naples concessions as concerns the internal government of his state by threats, or by a menacing demonstration, is a violent usurpation of his authority, an attempt to govern in his stead; it is an open declaration of the right of the strong over the weak."<sup>62</sup> Against that effort to limit the right to a mere exhortation may be balanced the claim that "should the cruelty be so long continued and so revolting that the best instincts of human nature are outraged by it, and should an opportunity arise for bringing it to an end, removing its cause without adding fuel to the flame of the contest, there is nothing in the law of nations which will condemn as a wrong-doer the state which steps forward and undertakes the necessary intervention."<sup>63</sup>

### § 430. Interventions to end religious persecutions in the Orient.

—Despite the fact that interventions for the purpose of putting an end to religious persecutions within civilized states are not generally sanctioned by publicists, they seem to be regarded as legitimate when employed by Europe as a means of protecting Christians within the limits of the Orient, upon the general ground that the Eastern Question constitutes an exception, a case apart.<sup>64</sup> One of the motives of the interven-

<sup>59</sup> *Droit des Gens*, I, c. 4, § 51.

<sup>60</sup> *Droit Int.* § 166; *Nouveau Droit Int.*, i, 446. Mamiani (112) denies that intervention may be employed for that purpose.

<sup>61</sup> *Nuovo diritto*, p. 86; *Völkerrecht*, § 478; *Elements*, § 69, Dana ed.

<sup>62</sup> Martin, *Life of the Prince Consort*, iii, 510.

<sup>63</sup> Lawrence, *Principles of Int. Law*, p. 120.

<sup>64</sup> See the views of M. Rolin Jaequemyns expressed in regard to the Greco-Turkish conflict of 1885-6 in *Rev. de Droit Int.*, xviii, 603.

tion that resulted in the Crimean War was to vest in the European Concert the protection of the Christian peoples subject to Turkey, assumed prior to that time by Russia alone; and by virtue of the authority thus assumed the Great Powers intervened to stop the persecution and massacre of Christians in the Mount Lebanon district in 1860.<sup>65</sup> In commenting upon such an intervention, undertaken for the purpose of preventing and terminating barbarous and scandalous cruelty, it is usual for text writers to declare that it is "a high act of policy above and beyond the domain of law;"<sup>66</sup> or that "from the point of view of law, it is always to be remembered that states so intervening are going beyond their legal powers. Their excuse or their justification can only be a moral one."<sup>67</sup> How vague and unmeaning such artificial distinctions really become when the fact is remembered that international law is not positive law at all,—only a body of rules that dominate "a province half way between the province of morals and the province of positive law."<sup>68</sup>

<sup>65</sup> For the two protocols signed on August 3, 1860, in the conference of the representatives of the Five Powers held at Paris, see Holland, *European Concert in the Eastern Question*, pp. 207-8.

<sup>66</sup> The Letters of Historicus on some Questions of International Law, I.

<sup>67</sup> Hall, p. 308.

<sup>68</sup> See above, p. 83.

## PART IV.

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# RIGHTS AND DUTIES OF STATES IN TIME OF WAR.

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### CHAPTER I.

#### FORCIBLE MEANS OF REDRESS SHORT OF ACTUAL WAR.

§ 431. Preliminary forms of redress classified.—Before attempting to define what war really is or to discuss its consequences, a brief consideration should be given to the forcible means of redress sometimes employed in the effort to terminate differences between nations without a resort to actual hostilities. When one state injures another either directly or by injuring or permitting an injury to a citizen of the other, and fails or refuses to grant redress in the amicable methods heretofore discussed, the offended state may pursue one of several courses not necessarily involving acknowledged war. Such methods of peaceable redress have been variously classified. Wheaton's application of the generic name of reprisals to all forms of redress short of actual war is confusing because that term is generally associated, in a narrower sense, with certain well known procedures to which it is limited by usage. It is more convenient to divide the remedies in question into such as are negative, expressing rather displeasure than exacting redress; and into such as are positive, threatening retaliation or asserting force closely akin to that employed in actual war. To the first division belong severance of diplomatic connection and other like expressions of national displeasure; to the second, embargoes and non-intercourse, retorsions, reprisals, sequestrations, military and naval demonstrations and pacific blockades. In no event should force be used until all other means have been exhausted.<sup>1</sup>

<sup>1</sup> Wheaton, Elements, 210; 1 Opin. Attys. Genl., p. 30; Heffter, § 111, G. n. 6.

§ 432. When an injured foreigner should resort to local courts.—An injured foreigner is expected to resort to the remedies provided by the local courts before appealing to his government, unless there is a state of anarchy or the condition of the courts for other reasons renders their procedure a mockery of justice. Even then the government appealed to should, in ordinary cases, protest (*protestatio facto contraria*) before intervening.<sup>2</sup>

§ 433. Withdrawal of diplomatic agents.—As permanent ministers and ambassadors are maintained as the best mediums through which views may be exchanged and business amicably adjusted between nations, a refusal to settle just claims within a reasonable time may become a sufficient cause for the withdrawal of a diplomatic agent from the offending capital. Under such circumstances the representative may retire, leaving the business of his embassy or legation in the hands of a *chargé d'affaires*; or the mission may be entirely closed, and the envoy of some friendly power requested to look after the interests of citizens. Thus in 1827 the American *chargé* at Rio de Janeiro, when "his representations in behalf of the rights and interests of his countrymen were disregarded and useless, deemed it his duty, without waiting for instructions to terminate his official functions, to demand his passports and return to the United States." Not until the Brazilian government promised "that indemnity should be promptly made for all injuries inflicted on citizens of the United States, or their property, contrary to the laws of nations," did President Adams authorize the renewal of diplomatic intercourse. In 1834 when France failed to pay the indemnity due under the spoliation treaty like pressure was applied; and when in 1858 a tax was imposed by Mexico, which unduly discriminated against citizens of the United States, it was deemed such an unfriendly act that the American minister, under instructions, suspended diplomatic relations with that country.<sup>3</sup> A notable repetition of the same procedure recently occurred during the boundary controversy between Great Britain and Venezuela. Mild as this remedy appears to be, it is often efficacious, especially when the injury results from mere delay rather than from hostile intention.

§ 434. Embargo and non-intercourse.—A more decided step is taken when there is a suspension of commercial intercourse

<sup>2</sup> Heffter, § 107.

<sup>3</sup> Wharton, Int. Law Dig., § 317.



with the offending nation. This breaks the bond which unites nations most strongly and enlists that influential class, the merchants, in securing an adjustment of the point in controversy. It may assume either or both of two forms,—an embargo which prevents our own shipping, and perhaps that of the other state, from leaving our ports, or a non-intercourse law, prohibiting citizens of the offending state from coming to our country or trading with our citizens. Both forms have appeared in American history, and, as often happens in practice, the two have sometimes run into each other in their effects. Embargo (a Spanish law term meaning sequestration) may be domestic, applying only to the shipping of the state imposing it, or it may be hostile, having for its object the prevention of the exit of the enemy's vessels. Even the former may injure the enemy by preventing export to him of food or other necessary articles. When his vessels are seized, it is by way of attachment or sequestration, and they are held, not condemned. Should war result, they become subject to prize jurisdiction as of the date of the original seizure; otherwise they will be released on adjustment of the matters in dispute.<sup>4</sup> In an extreme case they might be confiscated at once, a course formerly usual at the outbreak of war; but under modern tendencies as to exemption of private property that is unlikely now. In no event can compensation be claimed when the right of detention really exists.<sup>5</sup> Passing over the temporary embargo of the United States in 1794, special reference must be made to the pacific or domestic one of 1807.<sup>6</sup> Stung by the British claim and practice of search and impressment of seamen, the attack on the Chesapeake, and Napoleon's continental policy, America kept her ships at home for the double purpose of protecting her commerce from British and French aggressions, and, by cutting off supplies, of coercing both of those gigantic belligerents.<sup>7</sup> More domestic than foreign suffering

<sup>4</sup> The *Boedes Lust*, (1804), 5 Rob. 233; Twiss, War, §§ 12, 59; Wharton, Int. L. D., § 320.

<sup>5</sup> Geffcken, in note 4, contradicting the text of Heffter, § 112.

<sup>6</sup> Under the act of December 22, 1807; 2 U. S. Statute at Large 451, with sundry amendments in succeeding years.

<sup>7</sup> 2 Schouler's U. S., 186; 2 Gallatin Writings, 492. The principal

5 decisions under the embargo laws are as follows: United States vs. Hall and Worth, 6 Cranch, 176; Dourousseau vs. The United States, 6 Cranch, 307; The Schooner Good Catharine vs. The United States, 7 Cranch, 349; Crowell et al. vs. McFaddon, 8 Cranch, 94; United States vs. Gordon et al., 7 Cranch, 287; The William King, 2 Wheat. 148; Otis vs. Walter, 11 Wheat.

resulted, however, from that expedient, which was followed, March 1, 1809, by a non-intercourse act directed against Great Britain alone.<sup>8</sup> As war with that country resulted from such measures, Gallatin was convinced that they are *per se* inefficient. In 1839 England placed a hostile embargo upon the shipping of the Two Sicilies, and when that kingdom retaliated the embargo gave way to reprisals. Although many vessels were captured and Sicilian vessels detained at Malta, the British minister did not withdraw from Naples. The matter was finally adjusted through the mediation of France, and the offensive sulphur monopoly, granted by the Italian authorities to Taix, Aycard, and Cie., was rescinded. Thereupon all ships were released. Had war followed they would have been considered captured from the date of seizure, and condemned or not according as the enemy did or did not condemn.<sup>9</sup> There is perhaps a third form of embargo, a general one, detaining all shipping to prevent information from getting out, or for some other military reason. That form is, however, peculiar to a state of war or to circumstances indicating its approach.<sup>10</sup>

§ 435. **Retorsions: retorsio juris.**—Retaliation in a broad sense covers any and all positive acts in return for unfriendly acts of another country. It relates more specifically, however, to the return by one state in substantially the same form of an injury done to it by another. Such retaliations in kind, or retorsions, have been variously and perhaps fancifully subdivided. *Retorsio juris*, or *retorsio de droit*, is generally applied to a negative form of retaliation used after a violation of comity. It is the name for acts placing citizens of the offending state under the same disabilities as those to which it subjects the citizens of the retorting state. It is a hostile reciprocity, applicable to tariffs, comity, imperfect obligations and general policy.<sup>11</sup> If China should put Americans under the

192; *The Sally*, 1 Gallis, C. C. R. 58; *The Ann*, 1 Gallis, C. C. R. 62; *The Brig William Gray*, Paine's C. C. R. 16; *United States vs. Hall et al.*, 2 Wash. C. C. R. 366.

<sup>8</sup> 2 U. S. Statutes at Large, 528; 379; *Wharton Int. Law Dig.*, § 319. The principal decisions under the non-intercourse laws are as follows: *The Brig Penobscot vs. The United States*, 7 Cranch, 356; *The Schooner Hoppet vs. The United*

*States*, 7 Cranch, 389; *The Schooner Anne vs. The United States*, 7 Cranch, 570; *The Ship Richmond vs. The United States*, 9 Cranch, 102; *The cargo of the ship Fanny*, 9 Cranch, 181; *The Edward*, 1 Wheat, 261; *The Sally and cargo*, 1 Gallis, C. C. R. 58.

<sup>9</sup> *The Santa Cruz*, 1 Rob. 42.

<sup>10</sup> Geffcken, in Heffter, *Völkerrecht*, § 112, note 3.

<sup>11</sup> Hall, § 120; Martens, § 254;

same disabilities that her subjects suffer in the United States, there would be an example. Illustrations of what are called tariff wars, not infrequent in modern times, may be found in recent dealings of Germany with Russia and of Canada with the United States. That kind of retaliation seldom if ever leads to war between civilized countries, even when it does not bring the offending state to terms,—the principle being clearly recognized that each state has the fullest right to regulate its internal and foreign commerce as it pleases, short, perhaps, of a total prohibition of it. It is odd to find Grotius declaring the contrary rule for his day of restricted intercourse.<sup>12</sup>

**Retorsio facti**, as Klüber has it, is the positive form<sup>13</sup> of retaliation, and in one sense embraces all species of active punishment of an offending state, short of war. An extreme instance of the exercise of this right was Napoleon's imprisonment of English travelers in France in 1802 in retaliation for captures of French vessels without a declaration of war. There is some evidence that this was intended to be limited to British soldiers and officials; but as carried out it affected others, and some of the thousands imprisoned are said to have been still in confinement when the Allies entered Paris in 1814. Personal retaliation was also practiced by Frederick II, after the imprisonment of the Prussian Stackelberg by the Empress of Russia. Such acts, when legitimate, should, however, be classed as reprisals. To lessen the confusion often arising out of the use of identical terms in different senses, it will be well to confine retorsion to the return in kind of wrongs done to us. If it be necessary to indicate degrees, retaliation of violations of comity should be called *retorsio juris*; retaliations of violations of rights *retorsio facti*.<sup>14</sup>

§ 436. **Reprisals classified.**—Reprisals (old French, *reprisalles*, later *reprailles*, Latin *pignoratio*, *repressaliae*, *clari-gatio*) extend to persons and property, and are a kind of international set-off.<sup>15</sup> They have been divided by Klüber, Wheaton and Phillimore, according to their origin, into negative, when

Bluntschli, § 505; Martens, *Précis*, viii, ch. 1, § 2; Heffter, *Völkerrecht*, § 110, and n. 111, opposing Wurm's contention.

<sup>13</sup> Wheaton, *Elements of Int. Law*, p. 210.

<sup>14</sup> Heffter, § 110, n.

<sup>12</sup> Grotius, *De Jure Belli ac Pacis*, Bk. II, ch. 2, sec. 13, 18; Martens, *Précis*, III, ch. 2, § 1.

<sup>15</sup> Twiss, *supra*, § 20; Wharton, *Commentaries on Am. Law*, § 206; Vattel, *Droit, etc.*, II, ch. 18, § 342.

due to refusal of a right, and positive, when due to an injury. Or as Field has expressed it, basing the distinction upon character rather than origin, "a reprisal which consists in the refusal to perform a perfect obligation, or to permit the enjoyment of a right, is termed a negative reprisal. A reprisal which involves the seizure or detention of persons or property in violation of the provisions of this Code, or without authority of law, is termed a positive reprisal." Grotius, Wolf, Vattel and Heffter limit reprisals to acts of force, and classify the negative kind as retorsions. Retorsions are, however, properly retaliation in kind, and reprisals are attachments by way of set-off. In 1834, during the controversy between France and the United States as to the payment of the spoliation claims, President Jackson, in his sixth annual message, said: "It is my conviction that the United States ought to insist on a prompt execution of the treaty, and, in case it be refused, or longer delayed, take redress into their hands. \* \* \* It is a well settled principle of the international code that where one nation owes another a liquidated debt, which it refuses or neglects to pay, the aggrieved party may seize on the property belonging to the other, its citizens or subjects, sufficient to pay the debt, without giving just cause of war. This remedy has been repeatedly resorted to, and recently by France herself toward Portugal under circumstances less unquestionable."

§ 437. **Origin and growth of reprisals.**—The origin of reprisals, which should never be resorted to except in case of a palpable denial of justice,<sup>16</sup> is to be found in the right of individuals to exact reparation for private debts or wrongs. Such hostile action is not confined to the individual wrong-doer, as in the common law process of *Withernam*; it is permitted against any and all persons, and property of the offending nation, on the idea that the state, in which all its members are merged, is responsible *in solidum* for wrongful acts for which it does not make reparation. When goods are thus seized they are sold and the proceeds applied to the indemnification of the injured party, as Cromwell did with the proceeds of French ships sold to pay for a Quaker's vessel confiscated in France, and the States General for debts due their citizens by the Venetian minister at Naples.<sup>17</sup> Such reprisals were once as

<sup>16</sup> Grotius, *De Jure B. ac Pacis*, III, c. 2, § 14; Bynkershoek, *Quaest. Jur. Pub.*, I, ch. 24; Vattel, *Droit des Gens*, II, c. 18, § 343.

<sup>17</sup> Twiss, *Law of Nations, War*, §§ 11, 21; Vattel, *Droit des Gens*, II, ch. 18, § 346 et seq.; Valin, *Traité des Prises*, p. 321; Pres.

common on sea as private wars on land, and have an interesting history which connects them with the ancient procedure in which the plaintiff himself arrested the defendant and exacted his due, and with the almost equally ancient practice of piracy. Self-help is the first impulse of all who are wronged and was the natural recourse of man in primeval times when there was no recognized superior, or when such superior was too weak to guarantee adequate redress. Private reprisals, for public and private injuries, were known to the Greeks, and were common in the middle ages.<sup>18</sup> It is said that in 1292 at Bayonne an Englishman stabbed a Norman sailor and escaped, which led to reprisals on an English ship, and this to counter-reprisals. In the end, thousands of lives were lost and the result was a public war between France and England. In France the right to authorize reprisals was vested in the parliament until, in 1484, it was confined to the king, the earliest letters being of 1596. Its exercise was finally regulated by the Ordinance of the Marine of Louis XIV, in 1681. This directed that a person injured should have his damage estimated by a court of admiralty before petitioning for letters, and that these should not be granted until security was given by petitioner and application to the offending sovereign had proved fruitless.<sup>19</sup> Reprisals really gave rise to the prize court, and became a leading subject of its jurisdiction. The authorities concede the right to exist even after a prize adjudication, if that be plainly unjust,—*in re minime dubia*, as Grotius has it.<sup>20</sup> The authorization to commit reprisals is embodied in what is called letters of marque and reprisal from the sovereign; although, as a general rule, a capture without a commission is good against the enemy, leaving the captor liable to punishment by his own government. Great Britain, however, treats such conduct in an enemy as piracy. The word *marque*, though French in form, is probably akin to the German *mark*, English *march*, and indicates the right to pass the boundaries. While it does not occur in treaties until the 14th century, the propriety of reprisals is fully recognized by them up to the last century.

Jackson's 6th Annual Message, 1834; 2 Azuni, II, ch. iv, art. II.

<sup>18</sup> The oldest Greek form was *ανθεοληψία*, seizure of hostages. Geffcken, in Heffter, *Völkerrecht*, § 111, n. 2. See for classic re-

prisals, Iliad XI, 697, and Livy II, c. 34, § 4.

<sup>19</sup> *Ordonnance de la Marine*, August, 1681, 1, 3, tit. 10; 2 Azuni, II, ch. v, art. II, note.

<sup>20</sup> *De Jure B. ac Pacis*, III, ch. 2, sec. 5.

The division of reprisals into public and private must be kept steadily in view. Thus, the right may be granted to persons who have been injured to inflict special reprisals; while general reprisals, as Grand Pensionary De Witt is said to have observed, amount practically to open war.<sup>21</sup> Technically they do not constitute war, for none is declared and battles do not occur; but, as Lord Hale says, they "many times in process of time grow into a very formal war."<sup>22</sup> Jefferson thought that general letters of marque and reprisal had an advantage over formal war, because their "revocation restores peace without the delays, difficulties and ceremonies of treaties."<sup>23</sup> Clay, on the other hand, has declared that such a procedure never failed to result in war when the state assailed dares to engage in it.<sup>24</sup> Reprisals cannot properly be made in any form for injuries done to a third nation not an ally.<sup>25</sup>

§ 438. **Privateering.**—A privateer<sup>26</sup> (*armateur, la course, corsaire, kaperschiff*) is a private vessel acting under a government commission or letter of marque (not of reprisal) to capture vessels of the enemy. As regular troops antedate standing armies, so privateering antedates regular navies. The practice can be traced back to the troubled era after the fall of the Roman Empire, and received some regulation by the 13th century. Ducange even quotes a commission of 1152. Privateering was much relied on for several centuries and is closely connected with the subject of reprisals. In the 14th century it was settled that the privateer must have the authorization of his sovereign; by the next that he must bring his captures into an admiralty court for adjudication; and in the latter part of that century treaties provide for exacting sureties (*idoncam cautionem*) from the masters or owners.<sup>27</sup> Such provisions are explicitly set out in Queen Elizabeth's proclamation of 1602, and the existing rules are largely those compiled by Jenkins and others under the Order of Council of 1664. In 1761 the prizes of two uncommissioned French vessels were confiscated.<sup>28</sup>

<sup>21</sup> Twiss, Law of Nations, War, § 17 and note; Vattel, *Droit des Gens*, II, ch. 18, § 346.

<sup>22</sup> Pleas of the Crown, 1623. Geffcken accordingly denies that there can be any "état de représailles" such as France tried to establish against China. Heffter, § 111, n.

<sup>23</sup> 5 Jefferson's Works, 387.

<sup>24</sup> Wharton, Int. Law Dig., § 318.

<sup>25</sup> Heffter, § 111 and n.

<sup>26</sup> The word is English and apparently first used by Sir Leoline Jenkins in 1665. (Twiss, Law of Nations, War, § 187, § 14.)

<sup>27</sup> Twiss, *supra*, § 188, Martens, *Précis*, VIII, ch. i, § 6.

<sup>28</sup> 2 Azuni, II, ch. v, art. III, note.

During the colonial wars over four hundred American privateers roved the West Indies and even the French coast, and in the Seven Years' War French privateers from Martinique took 1,400 English merchantmen, and French privateers the world over took 2,500.<sup>29</sup> In 1776 New England privateers captured 342 British vessels, and by 1778 the prizes were nearly 1,000, valued at £2,000,000. In the war of 1812 Americans fitted out some five hundred, and the Edinburgh Review estimates their prizes at over 1,700. Mexico in 1845 and the Confederate States in 1861 proclaimed their readiness to grant letters of marque against the United States, but in neither case did a neutral apply. It is doubtful whether a neutral so acting would not be a pirate.<sup>30</sup> While during the civil war there were a few vessels on the Confederate side like the Savannah, the Alabama, Sumter, and Florida were regular ships of war. Privateers were in general use by the French and English in the Napoleonic wars, against the protest of Nelson and Codrington. The latter declared their proceedings nothing short of piracy, and that they hoisted either flag to make a capture.<sup>31</sup> Many states now treat privateers as pirates, but this has not become an international rule, except where they act under commission from both sides.<sup>32</sup>

**Commission and bond.**—The commander of a privateer is commissioned and the owners must give bond, the American law to that effect dating from the hostilities with France in 1789. Even an enemy may be commissioned to act against his own country.<sup>33</sup> While there is no international rule on the subject, the British law requires privateers to carry a special jack; the American does not.<sup>34</sup> The commander must be on board at the time a capture is made, although it seems the lieutenant may act when the captain is dead.<sup>35</sup> If the commission be not on board the capture is void, although its loss after that event is not material if the fact be satisfactorily shown and explained.<sup>36</sup> In a civil war a commission issued by

<sup>29</sup> Mahan's Sea Power, 314, 317.

<sup>30</sup> Heffter, § 124a, and G. n. 6.

<sup>31</sup> Napier, Penins. War, App. 497; Mahan's Nelson, 610.

<sup>32</sup> Field, Int. Code, § 742; Wharton, Int. Law Dig., § 385; Heffter, § 124a.

<sup>33</sup> The Mary & Susan, 1 Wheaton, 57. The American instructions in the War of 1812 are given in

Wharton, Int. Law Dig., § 385.

<sup>34</sup> 2 Wheaton, App., p. 80, 112;

Twiss, Law of Nations, War, § 197.

<sup>35</sup> The Charlotte, 5 Ch. Rob. 280; Twiss, Law of Nations, War, § 195, note 43.

<sup>36</sup> Twiss, Law of Nations, War, § 190; United States vs. Palmer, 3 Wheaton, 644; The Estrella, 6 Wheaton, 304.

either side will be recognized by foreign states.<sup>37</sup> It will be revoked by proceedings in a court of admiralty if the commander offends against the law of nations. If fraudulently obtained this avoids a capture, and its misuse will render the owners liable, jointly and severally. The bond is the limit of liability of the sureties, but not of the owner, except in the case of unauthorized piratical acts. In general, privateers are not within the law limiting recoverable damages to the ship and freight.<sup>38</sup> Unless, as in France, municipal law otherwise declares, liability is commensurate with the injury, and each owner is liable not *pro tanto*, but for all.<sup>39</sup>

§ 439. Privateering virtually abolished.—As privateering is liable to abuse, it has gradually fallen into disfavor; and since the formation of regular navies the necessity for it has decreased. As early as 1675 Sweden and Holland concluded a treaty which not only abolished the practice as between those countries, but bound them to endeavor to persuade their respective allies to abandon it. The next effort in that direction was embodied in the treaty made in 1785, largely through the efforts of Franklin, between Prussia and the United States, securing exemption of private property from capture at sea, followed by the effort of France during its Revolution to abolish privateering. From that time the government of the United States has been striving to secure for that rule of exemption the approval of all nations.<sup>40</sup> Of the subsequent treaties abolishing privateering as between particular countries, the most important is the Declaration of Paris, 1856, in which "*La course est et demeure abolie.*" The parties to that agreement were Great Britain, France, Austria, Prussia, Italy and Turkey, the United States declining to accede unless it was also provided that private property be

<sup>37</sup> 3 Opinions Attys. Genl., 120.    ing see Talbot vs. Janson, 3 Dall.

<sup>38</sup> The Mariamne, 5 Ch. Rob. 10; 133; The Thos. Gibbons, 8 Cranch, The Gibbons, 8 Cranch, 428; The Karasan, 5 Ch. Rob. 292; Paris vs. Captain Martine (1675), 2 Stair, 239; The Experiment, 8 Wheat. 261.

<sup>39</sup> Del Col vs. Arnold, 3 Dallas, 333; 1 Wheaton, 259; 1 Paine, 111; The Karasan, 5 Rob. 291; the Anna Maria, 2 Wheaton, 327; Bynkershoek, Q. J. P. 151. As to other points decided on privateer-

ing see Talbot vs. Janson, 3 Dall. 133; The Thos. Gibbons, 8 Cranch, 421; The Astrea, 1 Wheaton, 125; The Amiable Nancy, 3 Wheat. 546; The Estrella, 4 Wheat. 298; The Nuestra Senora, 4 Wheat. 497. As to commissions by unrecognized insurgents, see subject of Pirates.

<sup>40</sup> The capture of the Spanish Santa Yago by the French privateer Dumourier, and her recapture by the British sloop Edgar in 1793 led to Martens' celebrated es-



exempt from capture at sea. While France, Prussia, Italy and Russia were willing to assent to that amendment, England was not. In 1861-2 a bill was introduced in the Congress of the United States to authorize the president to issue letters of marque, but it failed through the fear that it might be construed to be a recognition of the Southern Confederacy as a foreign power.<sup>41</sup> During the recent Spanish-American war, although between parties not bound by the Declaration, the United States expressly adopted all of its rules, while Spain adopted all except that as to privateering. As a matter of fact neither side issued letters of marque. The French insisted during the Franco-Prussian war that the vessels composing the Prussian Volunteer Navy were no more than privateers in disguise, but the British government decided otherwise upon report of Sir Travers Twiss and its other law officers. Such vessels, to be supplied by private citizens, were to be regularly officered, commissioned and regulated.<sup>42</sup> Although this German "Seewehr" was never actually organized, a similar fleet was equipped in Russia during the threatened war with England in 1877 and still exists. No navy, however provided, which is to be manned and officered by the state, can offend against the rule forbidding privateering. Nor can just objection be made to the subvention system, under which Great Britain in 1887 agreed with the Cunard and White Star lines to pay an annual subsidy as compensation for the right to buy or lease their vessels in the event of war. The United States made a similar arrangement in 1892 with the American Line, and under it acquired and used, without objection, during the war with Spain, the Paris, New York, and St. Paul as war vessels.

§ 440. **Survival of public reprisals.**—It must not be understood, however, that the virtual abolition of privateering, and of letters of marque and reprisal has resulted in the extinction of public reprisals. It is still open to a state acting through its own agents on its own waters, on the high seas or on foreign soil, to enforce satisfaction of claims out of goods of another country. The best recent illustration occurred when Nicaragua refused to pay a claim of Great Britain's and the latter power, after seizing the seaport of Corinto, collected

say on Privateers. As to U. S. (670), etc.; Wharton, Int. Law policy, see documents in Wharton, Dig., § 385.  
Int. Law Dig., § 385.

<sup>42</sup> Hall, Int. Law, § 547; Whar-

<sup>41</sup> Bluntschli, *Mod. Kr.* secs. 170 ton, Int. Law Dig., § 384.

the customs in order to satisfy herself. While that expedient produced the desired result in that case, there is no reason to believe that it will be often resorted to except as a means of ending disputes between nations of unequal strength. And yet such a proceeding may be perfectly legitimate, and, as an overt act revocable without the formalities of treaty-making, has some theoretical advantages at least.<sup>43</sup>

**A public debt not the subject of reprisal.**—A public debt is not the subject of reprisal; it is inviolable, and interest cannot be stopped on it as a means of redress. Frederick II threatened, in 1753, as retaliation for seizure by England of Prussian ships engaged in prohibited trade, to confiscate English interests in a Silesian loan which he had guaranteed; and in opposition to this was presented with an admirable memorial of English jurists, penned principally by Murray, afterwards Lord Mansfield. Although Montesquieu characterized the famous paper as *réponse sans réplique*, it seems to be frequently overlooked that Frederick did not yield to the English contention until he had received £20,000 sterling indemnity for the confiscated vessels. Bluntschli has been charged with sanctioning the seizure and Geffekin clearly does. It is more correct to say that the former was less inclined to approve Frederick's action than to criticise the English seizures which led up to it. It is now generally conceded, as a matter of policy, if not of principle, that a public debt is secure against reprisals in peace and war.<sup>44</sup>

§ 441. **Military and naval demonstrations.**—Consideration must next be given to such forcible means of redress as are involved in the use of the armed forces of an injured nation in or about the territory of the offending state. Such demonstrations are usually made by naval forces, and are frequently effective. They consist in the appearance and deploying of war vessels before the capital, or a seaport of the offending country, with or without instructions to bombard in case of further refusal of redress. A display of force of this character was made by the United States against the Barbary Powers in the early part of the last century, and against Japan in 1852. The same kind of pressure has been several times applied during recent years to Turkey when she was derelict. In fact, it is usually the first step taken by a state when injury

<sup>43</sup> 5 Jefferson Works, 164, 387.      ject are given in 2 Martens'

<sup>44</sup> Many of the papers on the sub- *Causes Célèbres, Droit des Gens*, 1.

is threatened to its subjects at any foreign port. Thus a German ship was recently sent to Hayti to protect German interests; and the *Vixen* to Bluefields to protect American interests. The *Maine* was dispatched to Havana harbor on a like errand, although present there ostensibly as a courtesy. Greytown or San Juan was actually bombarded by the United States sloop *Cyane* in 1854, because of the impossibility of otherwise obtaining satisfaction for injuries inflicted on American citizens.<sup>45</sup>

§ 442. **The armed neutralities of 1780 and 1800.**—An interesting form of naval demonstration, of more than ordinary historic interest, grew out of the Armed Neutralities of 1780 and 1800, a term usually employed to describe certain alliances entered into between the northern powers in opposition to maritime claims then asserted by Great Britain in derogation of the rights of neutral nations. As these alliances contributed no little to the development of the laws of neutrality they will be made the subject of further consideration under that head. They deserve, however, a passing mention here because the outcome of them was a series of joint naval demonstrations on the high seas which were to a certain extent successful. In order to guarantee to their merchant marine the protection they claimed for them, the allies prepared extensive fleets and sent them to sea, in the Baltic and elsewhere, with instructions to go, as the Empress Catharine expressed it, "wherever honor, interest and need require," without failing to maintain a strict neutrality between England and her enemies.

§ 443. **Counter demonstrations. Neutralization of Great Lakes.**—Whenever there appears to be unusual military or naval preparation near its borders, a state is perfectly justified in inquiring into the cause, and, in the event of an unsatisfactory reply, in making corresponding preparations. When Spain complained not long ago of the massing of an American fleet at Key West, in striking distance of Cuba, the fleet was promptly recalled despite the then strained relations between the two countries. In order to prevent such demonstrations on either side of the Canadian border, was made the agreement of 1817, a happy arrangement originally suggested perhaps by the instructions of Castlereagh to the British commissioners at the Ghent treaty negotiations. The immediate

<sup>45</sup> Calvo, vol. ii, p. 131; Wharton, *Int. Law Dig.*, §§ 50d, 224a, 321.

proposal of the disarmament came, however, from James Monroe when Secretary of State under Madison. That proposal finally matured into the agreement ratified by the United States Senate April 16, 1818, limiting the naval force of each country to one vessel on Lake Ontario, two upon the upper lakes, and one on Lake Champlain, each not to exceed 100 tons burthen, and to carry only one 18-pound cannon.<sup>46</sup> Apart from the prevention of the expense and hostile feeling generally incident to rival armaments, this arrangement, although not applying in terms to forts, has actually prevented the erection of fortifications on any large scale. The neutralization of the great lakes was the earliest of such agreements, and has had much to do with the preservation of friendly relations between Canada and the United States.

§ 444. **Pacific blockade.**—Blockade is a step in advance of demonstration. It goes beyond forcible menace and is generally designed to suspend the commerce of the offending state. Whether neutral trade can thus be suspended depends largely upon the temper of the neutral, as there can be no legal blockade as to neutrals except in war. The English government realizing that its own conduct at the La Plata was incorrect, refused to permit the French fleet to coal at Hong Kong during the later Formosan blockade, on the assumption that the French proceedings really amounted to war with China. The so-called Pacific Blockades of the nineteenth century, during which they originated, may be summarized in order of date as follows: In 1827 came the first, in which the Greek provinces of Turkey were blockaded by the combined fleets of Great Britain, France and Russia, as a means of compelling concessions. This resulted in the battle of Navarino and open war. Then in 1831 occurred France's blockade of the Tagus in order to coerce Portugal; and, in 1833, that of Holland by France and Great Britain in order to compel the recognition of Belgium. In the New World there occurred in 1836 the pacific blockade of New Granada by England, and in 1838 that of Mexico by France, resulting finally in war. The blockade of La Plata by France lasted from 1838 to 1840, followed, from 1845 to 1848, by like action by both France and England. In 1850 Greece was blockaded by England; and in 1860 Sicily by Sardinia and the revolutionists of Naples. In 1862 Rio de Janeiro was blockaded by England;

<sup>46</sup> J. M. Callahan, *Neutrality of American Lakes*, 84; Wharton, *Int. Law Digest*, §§ 31, 40, 150.

and in 1879 Chili by Bolivia, a proceeding resulting in war between the two republics. In 1880 Dulcigno was blockaded by the powers in order to compel Turkey to execute a treaty; and in 1884 pacific blockade assumed a new form in the hands of France who went so far as to bombard the arsenal of Foo Chow on Formosa as a part of policy called by Ferry "intelligent destruction." Finally, in 1886, Greece was blockaded by all the great powers except France and Spain; and in 1897 Crete was subjected to a like discipline by the Powers, who used cannon vigorously. As a general rule such blockades have been instituted by stronger countries against weaker ones, and amount certainly to a threat of war. Woolsey, who opposed the practice, considered it neither more nor less than war;<sup>47</sup> and in 1874 the Institut de droit international condemned it. It is now generally admitted, however, that neutral commerce is not to be disturbed during pacific blockades; and, in that form, approved by Fiore, it may be said that this substitute for embargo has become a part of international law.<sup>48</sup> In no event can there be a confiscation in connection with a pacific blockade, as that is an incident peculiar to war alone.

§ 445. *Satisfaction.*—When clearly in the wrong no civilized state should refuse satisfaction. Great Britain apologized promptly for the attack on the *Prometheus* in 1851 when attention was called to the matter.<sup>49</sup> On the other hand, after President Jackson's message of 1834 advocating reprisals against France for not paying an agreed claim, it required the active mediation of Great Britain to prevent a rupture.<sup>50</sup> The form of satisfaction to be rendered, varying with the offense, has been treated under other heads. As a general rule, it may be said to consist of a disavowal or apology, with a salute to the flag; and, when possible, of a restoration of affairs to their original condition, or of compensation to the sufferers from the wrong in question. Thus after an affront in 1854 to the French consul at San Francisco, the French flag was saluted; and in like manner the Brazilian after the American seizure of the *Florida* at Rio Janeiro. In the Trent affair the Confederate commissioners were restored to English protection,

<sup>47</sup> Int. Law, § 118. It has been approved (Sept. 7, 1887) by the Institut de droit international, provided neutrals are not affected.

<sup>48</sup> Heffter, *Völkerrecht*, § 112 and note.

<sup>49</sup> Wharton, *Int. Law Dig.*, § 315d.

<sup>50</sup> *Ib.* § 318.

just as the British government in 1811 restored the seamen taken from the Chesapeake in 1807,<sup>51</sup> with compensation to the wounded and to families of the sailors killed in the action. The *Virginus*, restored to the United States in 1873 at Bahia Honda, sank on her homeward voyage off Cape Fear.<sup>52</sup> When it is impracticable to restore the *status quo ante*, as in case of loss of life, satisfaction generally embraces a salute and payment of an indemnity, either in money or in the shape of a cession of territory.

§ 446. **Limits of forcible redress.**—It must be confessed that most, if not all, of the above mentioned methods of forcible redress are not, strictly speaking, international remedies because international law presupposes equality between the states affected. The greater part of the proceedings cited occurred between a powerful and a weak state, or between a concert or league and a small country. Such was the case with most of the pacific blockades. Could a blockade of Liverpool by a French fleet for any purpose, or of Hamburg by English ships possibly result in anything but war? While honor, which has caused almost as much bloodshed as ambition, may be a misleading term, in the form of national self-respect it must be upheld at any cost. No nation can yield to menace without loss of prestige abroad, and without national humiliation at home,—a result declared by President Cleveland in his Venezuelan message to be worse than war with all its horrors. As between equal nations there can be no peaceful remedies which involve force. Remonstrance, withdrawal of representatives, embargo and non-intercourse may occur without breaking the peace; but retorsions and reprisals involving force will inevitably bring nations of equal power to the very verge of hostilities, while demonstrations, blockades and sequestrations will be held tantamount to a declaration of war. National sensitiveness, which did not exist to the same extent perhaps a century ago, has grown with the intensification of nationality itself. Measures savoring of force must therefore be reserved, in the present state of public opinion, for the coercion of inferior powers who cannot resent them. And yet unjust as the employment of such remedies may seem to be, they are certainly more humane than actual bloodshed, when it becomes necessary for greater states to coerce or discipline weaker ones.

<sup>51</sup> Wharton, Int. Law Dig., §§ 27, 315, 315b, 325, 328, 374.      <sup>52</sup> Wharton, Int. Law Dig., § 327.

## CHAPTER II.

### COMMENCEMENT OF WAR, AND ITS IMMEDIATE CONSEQUENCES.

§ 447. **Arrangement of subjects.**—According to Talleyrand and Montesquieu international law is founded on the principle that in peace nations should do each other as much good and in war as little harm as possible.<sup>1</sup> Since then the idea has certainly gained ground that in war the primary object is to disable the enemy with as little human suffering as practicable. But, no matter whether its conduct be humane or inhumane, acknowledged war must be considered from three points of view. The first relates to active hostilities, and covers forces, instruments, captures, intercourse and methods. The second, to the persons of the enemy, and embraces prisoners, non-combatants and neutralized foes. The third, to property of the enemy, whether public or private, and its administration under martial law. As a matter of convenience naval warfare will be treated separately, because of the rules peculiar to it. In addition to these four subjects special consideration will be given to the commencement of war and its consequences; to the limitations, suspension and conclusion of hostilities; to military occupation and administration, and to the termination of war by treaty or otherwise. While a number of questions arise incidentally, logically the main divisions of the laws of war fall under these heads which will be treated in corresponding chapters.

§ 448. **Usages called Laws of War.**—The parties to a war are called belligerents, and among civilized nations they conduct hostilities in accordance with usages called laws of war which are based on certain very ancient principles. Even Polybius speaks of *οἱ τοῦ πολέμου νόμοι*, and Livy of *quaedam belli jura*.<sup>2</sup> At this late day few will follow the German General Von Hartmann and possibly Von Moltke in saying that there are no laws of war, only force tempered by custom.<sup>3</sup> Sir James Mackintosh stated the matter correctly when he said

<sup>1</sup> *Moniteur*, Dec. 5, 1806; *Esprit des Lois*, I, ch. 3.

<sup>3</sup> *Militärische Nothwendigkeit und Humanität*, 1877; Heffter,

<sup>2</sup> Polybius, V, 9, 11; Livy, II, § 113, Geffcken, note 2.

12, XXXI, 30.

that "in the present century a slow and silent, but very substantial mitigation has taken place in the practice of war, and in proportion as that mitigated practice has received the sanction of time, it is raised from the rank of mere usage and becomes part of the law of nations."<sup>4</sup> Before entering upon the special examination of such laws or usages, the attempt will first be made to consider in this chapter what war really is,—its nature, causes, and kinds; how it is begun and announced; and what are its effects.

§ 449. **The state of war defined.**—The greatest masters of the art of war, such as Caesar, Napoleon and Frederick, have left memoirs and descriptions of warfare, strategy and tactics, but no clear-cut definition of the relations of states to each other while their generals are in the field. War as defined by Cicero is a dispute by force, and the United States Supreme Court has called it a suit prosecuted by the sword,—an idea also advanced by Bluntschli, but sharply criticised by Von Hartmann and Geffcken. Such in effect is the view advocated by Grotius, who, after so extending the idea as to embrace the whole relation of the actors, defines war to be the state of those who dispute by force of arms.<sup>5</sup> He includes, however, individual and private hostility, called feud or vendetta, now under the ban of civilization. Bynkershoek declares war to be the state of things incident to a contest between independent persons striving by force or fraud to assert their rights. Vattel defines war as that state in which nations prosecute their rights by force, and Bacon calls it a high trial of right between nations.<sup>6</sup> David Dudley Field in his proposed international code designates it as a hostile contest at arms between nations or communities claiming sovereign rights. Bluntschli calls it armed self-help of political powers, and so does Heffter after him. The latest writer, Lawrence, regards it as a contest carried on by public force between states<sup>7</sup> or quasi-states, which is in effect a translation of the *armorum publicorum justa contentio* of Alberico Gentilis, almost the

<sup>4</sup> 1 Miscellaneous Works, 360.

<sup>5</sup> *De Off.*, Bk. 1, ch. II; *De Jure Belli ac Pacis*, Bk. I, ch. 1, sec. II; Harcourt vs. Gaillard, 12 Wheaton, 523, 528, (per Justice Johnson); Heffter, § 113, Geffcken, note 2.

<sup>6</sup> *Droit des Gens*, Bk. III, ch. 1; Twiss, *Int. Law, War*, §§ 27, 99, and

preface; Bynkershoek, *Quaestiones Juris Publici*, ch. 1.

<sup>7</sup> *Int. Code*, section 704, edition of 1876; Lawrence, *Int. Law*, § 155; Bluntschli, *Mod. Kriegrecht*, sec. 1; Grotius, *De Jure Belli*, I, ch. II; Heffter, § 113.



earliest publicist. The British Manual (compiled by Lord Thring), and Clausewitz, likewise define it as an armed contest between independent nations.<sup>8</sup>

§ 450. **Meaning of war in its broader sense.**—The foregoing definitions, excepting those of Bynkershoek and Grotius, are defective in limiting the term war to the acts of belligerents. While such acts constitute warfare, war has a broader meaning.<sup>9</sup> It embraces warfare, its effects and incidents,—it is the whole state or condition of a contest of nations by arms. This is indicated by Burlamaqui and in Woolsey's rather negative definition of war as an interruption of a state of peace for the purpose of attempting to procure good or prevent evil by force.<sup>10</sup> A modern definition of war might be *the condition accompanying an armed contest between belligerent communities neither of which recognize de facto any political superior.*<sup>11</sup> Such a definition excludes private hostilities and includes civil war. In all cases war can be made (*jus belli* in the subjective sense) only by the supreme power of the community or state.<sup>12</sup> While a mere horde of pirates cannot be considered as such a community, the Barbary powers are recognized as states for many purposes.<sup>13</sup> The state need not necessarily have a fixed territory, for the Romans constantly considered the wandering German tribes as entitled to the rights of civilized war.<sup>14</sup> Every association claiming to be a state should, however, have a land basis of some kind. When, in 1893, the Brazilian fleet without any such basis revolted and attempted to blockade Rio, it was prevented by the warships of the United States and other powers. Such precarious and short-lived associations have no right to ask recognition as states.

§ 451. **How far war is a relation of states and not of individuals.**—The theories of international law vary from decade to decade, and practice differs of course somewhat from theory. As this is a mark of progress, it cannot be a subject of regret.

<sup>8</sup> Maine, *Int. Law*, 131; Heffter, § 115n.

<sup>9</sup> Rutherford distinguishes the acts from the state of war in *Institutes*, Bk. II, ch. 9, § 22.

<sup>10</sup> Martens, *Précis*, VIII, ch. 2, § 1; Woolsey, *Int. Law*, § 115; 2 Burlamaqui *Nat. and Pol. Law*, IV, ch. 1.

<sup>11</sup> See Twiss, *Law of Nations, War*, § 191.

<sup>12</sup> Wheaton, *Elements Int. Law*, 212.

<sup>13</sup> Bluntschli, *Mod. Kriegsrecht*, sec. 4 (514).

<sup>14</sup> Bluntschli, *Mod. Kriegsrecht*, sec. 3. (512).

So far as war is concerned, much depends on the interpretation of its definitions. In the wars of ancient times every citizen was expected to do all the harm he could to every citizen of the hostile country. In modern times, since the advent of standing armies, there has been a differentiation between combatants and non-combatants, not as the result of any theory but because of the cruel and inconclusive results of the older practice. Vattel, in his time, could say that it had become the practice for "the troops alone to carry on the war, while the rest of the nation remain in peace."<sup>15</sup> The theory of war was then so changed as to explain what had become the practice. Rousseau said war was a relation of states,<sup>16</sup> and Portalis startled all thinkers by his declaration, in almost the same words, on opening the French prize court in 1801 (14 Flor., Year VIII) that it is the relation of things, not persons,—“a relation of state to state, not of individual to individual. The private persons thereof are only enemies by accident; not as men, not even as citizens, but only so far as they are soldiers.” Talleyrand in a Napoleonic state paper of November 20th, 1806, uses almost the same language, declaring that three centuries of civilization had given Europe an international law to which that continent owed its prosperity, and according to which war did not extend to private persons or property. This may have been written according to the maxim attributed to this distinguished turncoat, that speech was given man to disguise thought, for Napoleon's practice was to make war pay for itself as long as he was in the enemy's country. The present British manual states both principles,—the old, that war makes the citizens of the respective states enemies, and the new, that they are enemies only as soldiers.<sup>17</sup> This is characteristic of English thought. Despite the inconsistency, the new does not at once drive out the old. The gradual increase of humanitarian feeling has led to the general adoption of the latter principle by publicists, and the trend of their teaching is to consider war as the affair of armies, which private citizens may regard with little personal interest. While the Romans distinguished *hostis* from *inimicus*, a public from a private foe, it is certainly true that the citizen is now differentiated from his state as he never was in ancient times.<sup>18</sup> As the American Regulations express it,—“protec-

<sup>15</sup> *Droit des Gens*, III, ch. 15, § 226.

<sup>17</sup> *Moniteur*, Dec. 5, 1806; Maine, *Int. Law*, 132.

<sup>16</sup> *Contrat Social*, I, ch. 4.

<sup>18</sup> Bluntschli, *Mod. Kriegsrecht*.

tion of the inoffensive citizen of the hostile country is the rule; privation, and disturbance of private relations, are the exceptions.”<sup>19</sup> Although he may have failed to carry the principle fully into practice, Wilhelm proclaimed, in 1870, that he made war only on French soldiers and would protect French citizens. International practice has so far ameliorated the conditions of war as to induce many to believe that we are approaching the quasi-millennial time when the unarmed population of traders, peasants and workmen shall go on undisturbed in their occupations; when private cargoes may be transported anywhere without risk, leaving armies and navies to carry on their work of injuring each other as little as possible. Can the new theory ultimately prevail against the fact that states and their governments are merely representatives of the people? Calvo<sup>20</sup> cogently opposes to Pinheiro-Ferreira’s elaboration of the new idea the “absolute solidarity of government and nation.” As an illustration it may be said that during the recent conflict between France and Germany not only were the two governments at war, but all Frenchmen as such, and all Germans as such, represented by them, although as mere men they were not. Under the new conception as thus stated proper scope will remain to humanity for the alleviation of the horrors of war, and to patriotism, which no theory should attempt to annihilate.

§ 452. **Just causes of war.**—Grotius, quoting Camillus’s declaration against the Gauls, adopts as just causes of war defense, recovery of one’s own, and punishment of an enemy,—*omnia quae defendi, repetique, et ulcisci fas est*. This Grotius condenses and says the only reasonable cause of war is an injury received, or, as Heffter expresses it, an injury received or threatened. Bluntschli widens the view so as to embrace any hindrance to the true development of the state, but not mere convenience or interest.<sup>21</sup> Vattel has a great deal to say about a just war,<sup>22</sup> and its justice will undoubtedly attract the sympathy of the civilized world. When society disapproves of a man’s conduct it makes him feel it in one way or another. But this is forbidden to states as such. Although a war is unjust, all states not engaged must ordinarily treat the

sec. 21 (530), et seq; Field, Int. Code, § 705. c. 1, §§ I-II; Bluntschli, *Mod. Kriegsrecht*, sec. 7, (516), sec. 9,

<sup>19</sup> American Regulations, 24-25. (518); Heffter, § 113.

<sup>20</sup> Calvo, *Droit Int.* II, 109.

<sup>22</sup> *Droit des Gens*, III, ch. 3, § 40; ch. 12, § 190, etc.

aggressor and injured in the same way. While public opinion is apt to express itself through the usual channels, the governments must remain strictly neutral. This does not mean, however, that all wars are just. It must be a very flagrant case that will lead to an official interference or even remonstrance. Morally the motives as well as causes should be commendable, but the independence and equality of nations usually compel all besides the combatants to consider any public war as just on each side, and in general neither will be found entirely wrong.

§ 453. **Objects of war, political and military.**—The political object of a just war is forcible redress or prevention of a national injury and security against its repetition. The ultimate end in view is a better peace, as peace is the normal condition of states, war the exception.<sup>23</sup> The pretext for war often differs of course from the real reason.<sup>24</sup> A war offensive in fact may be defensive in right, and many of the wars of Europe to prevent one country from becoming too powerful, as heretofore discussed under the head of Balance of Power, were justifiable and defensive. Grotius, Vattel and Kent advocate alliances to prevent such danger, and the Dreibund and Franco-Russian *entente* in our own day have that object. From a military point of view the object of war, according to the British manual, is to procure the complete submission of the enemy at the earliest possible period with the least possible expenditure of men and money.<sup>25</sup> The attainment of that end should indicate or influence the means and methods of warfare. War for redress consists principally of reprisals against property of the enemy, but, unlike the reprisals heretofore discussed, does not stop with full satisfaction of the wrong and expenses. War uses similar methods with the view of crippling the enemy, but may go further than simple damages and include punishment or exemplary damages, even severe enough to prevent repetition of the wrong.<sup>26</sup>

§ 454. **How wars are classified.**—The classifications of war, so far as international law is concerned, are descriptive rather than fundamental.<sup>27</sup> The variations depend largely on the

<sup>23</sup> Heffter, § 130; American Regulations, 29; Woolsey, § 114, etc.; 2 Burlamaqui Nat. & Pol. Law, IV, ch. 2.

<sup>24</sup> 2 Burlamaqui, Nat. & Pol. Law, IV, ch. 2.

<sup>25</sup> Vattel, *Droit des Gens*, III, ch. 3, § 42; Livy, V, c. 49; Maine, *Int. Law*, 132; 1 Kent, *Comm.* 165.

<sup>26</sup> Twiss, *Law of Nations, War*, § 73.

<sup>27</sup> Calvo, *Droit International*, § 689 *et seq.*

point of view. Thus, military writers discuss offensive and defensive wars in relation to operations in the field, while historians consider rather the political objects in view. Publicists think generally of the status of the combatants and write of public, perfect, and solemn wars and their opposites. So from one point of view we have offensive, defensive, and auxiliary wars, the last being where allies aid. A war defensive in fact may be offensive in form because, as Geffcken truly says, he causes war who makes it unavoidable, whether he strikes the first blow or not.<sup>28</sup> Again, wars have been divided into private, public, and mixed, but as private wars—between subordinate parts of one state—are not now recognized, the distinction is without practical value. Where hostilities are localized or otherwise restricted as to time, place, and methods, the conflict is often called an imperfect war, as that of 1798-9 between the United States and France, wherein, without a declaration, captures were made and prisoners exchanged. An imperfect or *quasi* war also existed between the United States and Spain on the Mississippi River in 1793.<sup>29</sup> When wars are classified according to their motives or objects they are known as wars of independence, conquest, religion, intervention and the like. A war to recover independent nationality is often designated as a political or national war, while the term civil war is applied to a contest in which two parties strive for the possession of one government, or to such a conflict as occurred in America in 1861-65 in which one party strove to form an independent state and the other to keep the whole country united. Religious or civil wars are apt to be more cruel than foreign wars, but otherwise the variations involve questions rather of ethics or of strategy and tactics than of law. "A civil war," says Vattel, "produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge: constituting, at least for a time, two separate bodies, two distinct societies. On earth they have no common superior. They stand therefore in precisely the same predicament as two nations who engage in a contest, and, being unable to come to an agreement, have recourse to arms."<sup>30</sup> The old sovereign is apt to deny belligerent rights, to fine and punish occupied

<sup>28</sup> Heffter, § 113, Geffcken, note 335; Bas vs. Tingy, 4 Dall., 37, 4; 2 Burlamaqui, Nat. & Pol. Law, 40.

IV, ch. iii.

<sup>30</sup> *Droit des Gens*, III, ch. 18, §

<sup>29</sup> Wharton, Int. Law Dig., §§ 333, 293-4, and note.

districts, and exact useless oaths of allegiance,<sup>31</sup> but, as in the religious wars in France and the Netherlands, retaliation of his cruelty will generally bring him to terms. Such distinctions are in fact merely matters of convenience. Origin and object do not affect war rights or duties. The right of search, the treatment of prisoners and all else is the same in a just as in an unjust war, one of independence or religion. The nature of the conflict may arouse patriotism at home and even intervention from abroad. That is a political matter for each state to solve. But increase of number of combatants from these or any other causes does not change the laws governing the conduct of the war itself. It is all war, whatever its cause or object, and should all be conducted in a civilized way.<sup>32</sup> By claiming civilization a state agrees to live on friendly terms with all others making a similar claim, and that peace shall be the rule and war the exception. If this could be expressed in legal phrase, it would call for a liberal construction of everything relating to this general rule and for strict construction of everything relating to the exception.

§ 455. **Is a declaration of war necessary?**—According to modern usage a declaration of war is not necessary.<sup>33</sup> A state of war may exist without any formal declaration of it by either party and that is true of wars both foreign and civil. Calvo and Hautefeuille maintain that some solemn act is necessary to begin any war not of defense, and the former is disposed to reproach England and the United States for numerous examples of wars begun simply by the perpetration of acts of hostility.<sup>34</sup> There is never a formal declaration in a civil war. It has been held that the great civil conflict in the United States begun with the President's proclamation of blockade of April 27, 1861.<sup>35</sup> In 1846 President Pierce stated in his famous message that "war exists by the act of Mexico." Congress voted men and money, but it never declared war, and even the act of Congress came after the battles of Palo Alto and Resaca de la Palma. The United States did declare war against Great Britain in 1812 and against Spain on April 25,

<sup>31</sup> American Regulations, 156.

3 Adm. & Eccl. 394; L. R. 4 P. C.

<sup>32</sup> Wheaton, *Elements Int. Law*, p. 213; Bluntschli, *Mod. Kriegsrecht*, sec. 6 (515), sec. 10 (519), sec. 20 (529).

171.

<sup>34</sup> Calvo, *Droit Int.*, II, 30, 33.

<sup>33</sup> Sir Wm. Scott in the *Eliza Ann*; *The Teutonia* (1871), L. R.

<sup>35</sup> *Prize Cases*, 2 Black, 635, 667. The dissenting opinions date it from the act of Congress of July 13, 1861.

1898: but in the first instance the United States began active hostilities before the news could cross the ocean; and in the second, the declaration recognized that war had existed since April 21. England captured New York in 1664 before declaring war against Holland; and, before the Seven Years' War was declared, captured hundreds of ships and thousands of prisoners from France. Since the peace of 1763 the European practice has been even more irregular, and the necessity of a declaration is generally denied.<sup>36</sup> In 1870 the representatives of France at Berlin handed the German government a note simply declaring that "le gouvernement de S. M. Imp. se considère dès-à-présent comme étant en état de guerre avec la Prusse," and in 1877 a dispatch to the same effect was delivered to the representative of Turkey at St. Petersburg. Such are the survivals of the medieval practice according to which knightly honor forbade an attack until after full notice. In the 12th century letters of defiance (*literae diffidacionis*) under seal were exchanged, a form prescribed for private warfare in the Holy Roman Empire, as by the Golden bull of 1356. Later on heralds at arms were employed, the last examples of which practice occurred when French heralds declared war at Brussels against Spain in 1635, and in 1657 when Sweden sent a herald to Copenhagen for the same purpose.<sup>37</sup> Chivalry drew its rules from the Roman custom of sending the *fetiales* to demand redress, and these, when that was refused, threw a lance across the boundary, or, at a later time, in the direction of it. *Hostes hi sunt qui nobis aut quibus nos publice bellum decrevimus. Caeteri latrones aut praedones sunt.* The Romans were generally strict in the observance of forms, and to that Vattel attributes much of their subsequent greatness.<sup>38</sup> The Romans practice, however, was exceptional. Dion Chrysostom says that as a general rule war was not declared.

**A change in medieval theory and practice.**—The international development due to the Thirty Years' War, and the institution of permanent embassies about the time of Richelieu, wrought a great change in medieval theory and practice. A manifesto to neutral nations became as important as a declaration of war against the enemy. No declaration preceded Gustavus Adolphus' invasion of Germany, none the Spanish Armada,

<sup>36</sup> Martens, *Précis*, VIII, ch. 2, Bynkershoek, *Quaest. Jur. Pub.*, § 4.

<sup>37</sup> Twiss, *Int. Law, War*, § 32; <sup>38</sup> *Droit des Gens*, III, 4, § 51;

none Buckingham's descent on Spain, none the war between England and France when the latter aided the American revolt. While happily the action of Frederick II in seizing Silesia before his messenger could reach Vienna has found no advocates, nations for the last century and a half have generally contented themselves with a proclamation to their own citizens of the existence of war and a formal notice to neutral states. In the time of Queen Mary even the home proclamation was by herald. In these days of easy communication a declaration is an empty form.<sup>39</sup>

**The existing usage.**—Negotiations precede war and their nature warns the parties in interest of the probable outcome. The recall or dismissal of diplomatic representatives is generally the last step before actual hostilities, although this may occur without war. While the first act of hostility determines the commencement of the war so far as third parties or states are concerned, it has become usual for each government to issue a proclamation, or manifesto, in which it endeavors to show its own good faith and to expose the bad faith of the adversary.<sup>40</sup> Such manifestoes are loosely spoken of as declarations of war,<sup>41</sup> and usually fix the duties of neutrals. On account of the provision in its constitution giving power to Congress to declare war, formal declarations will probably remain usual with the United States and other nations with like institutions. The short-lived constitution under which Napoleon proposed to reign after his re-ascension in 1815 contained a similar provision. It thus appears that war may begin with a manifesto, declaration, or the first act of military force against the opposing state.<sup>42</sup> While a war *de facto* may arise without proclamation, declaration or notice of any kind, the beginning of hostilities is usually followed by some kind of notice or recognition. If war be notorious, neutral states and citizens are bound to take cognizance of it. The existence of war *vel non* was once said to depend on whether or no the courts were open; but, as war is the act of the political-powers, it is now held to depend on the acts or declarations of the government and courts cannot adjudicate the question on any

Livy, I, ch. 21; Bynkershoek, Q. J. P., ch. II.

<sup>39</sup> Bluntschli, *Mod. Kriegsrecht*, sec. 13 (522); Twiss, *supra*, § 32; To the same effect Lord Stowell in *The Eliza Ann*, 1 Dodson R. 247; *The Amy Warwick*, 2 Sprague, 123.

<sup>40</sup> Wheaton, *Elements*, 213; *Vattel*, V, III, ch. 2, § 64.

<sup>41</sup> As by Geffcken in note 1 to Heffter, § 120.

<sup>42</sup> Bluntschli, *Mod. Kriegsrecht*, § 18 (527).



other evidence.<sup>43</sup> As war is two-sided it is necessary that the declaration or manifesto be accepted by the opponent, who may do so by acts without a counter declaration or manifesto.<sup>44</sup>

§ 456. **A conditional ultimatum.**—One form of declaration is the conditional ultimatum in writing setting forth the essential demands succinctly and giving some certain limited time for compliance. If such terms are not acceded to within the time prescribed, war begins, as in the recent conflict between the Boer government and Great Britain. By what authority the declaration or manifesto shall be issued is purely a matter of municipal law. It must proceed, however, from functionaries wielding the supreme power of the state, a power which the state constitution may vest either in the executive or legislative department of the government.

§ 457. **When a recognition of belligerency should be made.**—A civil war presents some peculiar features. There cannot well be a declaration, because generally neither side recognizes the other as the true government, and for that reason embarrassing questions are presented to foreign states,—questions, as Canning has stated it, not so much of principle as of fact. If the disturbance is in the interior and of local importance, it should not be officially noticed except for the purpose of holding the general government liable for all damages to foreigners and their interests. If the revolt reaches the border, especially a seaport, the case is altered. Foreign interests, particularly of the neighboring state, are apt to be so involved as to force the sending of warships by different states for the protection of their citizens. In that event, if the insurrection is formidable and so organized and continued as to affect such interests, a recognition of belligerency should follow.<sup>45</sup> Such action places the two sides upon an equality so far as actual warfare is concerned, although it is not a rec-

<sup>43</sup> Earl of Lancaster's case, 1 *Pacis*, III, c. 3, § VIII. Burlam-Hale's Pleas of the Crown, C. 26, 344; Co. Litt. 249 b; Elphinstone vs. Bedreechund, Knapp, 316; Pelham Burke's case, 1 Edwards, App. D; 3 Camp. 62, 66; Blackburne vs. Thompson, 15 East 90; Milligan's case, 4 Wall. 2; Prize Cases, 2 Black, 667.

<sup>44</sup> Vattel, *Droit des Gens*, III, ch. 4, § 57; Grotius, *De Jure Belli ac*

qui correctly distinguishes a declaration from a publication or manifesto, 2 Nat. & Pol. Law, IV, ch. iv.

<sup>45</sup> Field's Int. Code, §§ 707-8; Message of Pres. Grant as to Cuba Dec. 7, 1875, in 7 Messages of Presidents, p. 64; later messages of Presidents Cleveland and McKinley,

ognition of independence or in any sense a prejudgment of the right of the case. By relieving the general or old government of responsibility for damages by the insurgents, and by giving it the right of search of foreign vessels, belligerency is a distinct advantage for it. While such recognition is generally resented by the parent state, its advantages are never repudiated.<sup>46</sup> Upon the insurgents it confers the right to capture contraband on a vessel belonging to the state which has recognized their belligerency, a principle illustrated by the case of the brig *Packet* in the Texan Revolution.<sup>47</sup> In a civil war each party practically recognizes the belligerency of the other by treating them as lawful enemies, but such recognition is not to be construed as an acknowledgment of independence.<sup>48</sup>

§ 458. **Belligerency of Southern Confederacy recognized.**—Probably the most famous recognition of belligerency was that by England during the American civil war,—a contest not a civil war in the ordinary sense, with two parties struggling for possession of the general government, but an actual geographical severance for a time of one country into two parts, the larger of which claimed to retain the sovereignty. The smaller section, composed of seven states at first, organized a government, complete in all its parts and undisputed in its operation. A military force was put in the field and, on April 11, 1861, they attacked the Federal post Fort Sumter, and captured it. On April 15th Mr. Lincoln called for 75,000 men in the northern states, and on April 17 Mr. Davis invited applications for letters of marque and reprisal. Then on April 19,<sup>49</sup> Mr. Lincoln issued his proclamation declaring a blockade of the ports within the revolted states “in pursuance of the laws of the United States and of the law of nations.” War existed, and appeal had even been made to international law.<sup>50</sup> England derived the bulk of her raw cotton from the seceding states, and at this very time millions of dollars of her cargoes were in the Southern ports. The British proclamation of neutrality issued May 14th was therefore proper. The courts have held that in Virginia, for instance, the war began with Mr. Lincoln’s proclamation April 27, 1861, of the intended blockade. Its beginning and ending differed according to proclamations applicable to the several states respectively.<sup>51</sup>

<sup>46</sup> Wharton, *Int. Law Dig.*, § 333.

<sup>49</sup> 6 *Pres. Messages*, pp. 13, 14.

<sup>47</sup> 2 *Opinions Attys. Genl.*, 1066.

<sup>50</sup> Heffter, § 115. Geffcken n. 4.

<sup>48</sup> Martens, *Précis*, VIII, ch. 2, §

<sup>51</sup> *Brown vs. Hiatts*, 15 Wall. 177; *The Protector*, 12 Wall. 700.

§ 459. **Closing of the ports of New Granada.**—A similar question had just been settled as to certain ports of New Granada. In consequence of civil war that government had attempted to close by order rebellious ports to the outside world. Lord John Russell considered such action an infringement of international law, saying that while in peace a nation could open or close its ports, it could not do so in war as to ports in hostile occupation, unless the closing was by the means of an effective blockade. The same principle has since been recognized by the United States in connection with the Colombian civil war of 1885, and may be regarded as accepted law.<sup>52</sup>

§ 460. **A civil war a public war.**—A civil war is a public war and must be carried on as such. Either belligerent may blockade the ports of the other;<sup>53</sup> prisoners are to be exchanged; and officers recognized by their titles. There is no distinction, from a military point of view, between a civil and a foreign war until after the final decisive battle. When the rebellion is subdued the rebels, if their terms of surrender do not forbid, may be proceeded against for treason,<sup>54</sup> as a matter of internal policy, not of international law. The United States courts have not been consistent as to the light in which they regard the Confederate government, probably the most *de facto* government that did not survive a war. Despite that fact, however, the courts have been unwilling to admit that the federal government did not exist in the South for any purpose. Probably the point of reconciliation of the decisions is that as to completed transactions the Confederate was a *de facto* government, but as to matters executory it was not.<sup>55</sup>

§ 461. **Effect of war on private citizens.**—From the standpoint of law war still places the private citizens of a contending state in hostility to those of the other, according to the old proclamation commanding every subject to attack the enemy, *courir sus aux ennemis*. Despite the modifications made in that rule by a more humane practice, war still breaks up all intercourse, in the way of trade or otherwise, between the combatants;<sup>56</sup> no contracts can be made that are enforceable during

<sup>52</sup> Hall, *International Law*, p. 37 n.

<sup>53</sup> *Prize cases*, 2 Black, 635; *U. S. vs. Palmer*, 3 Wheaton, 610; *Divina Pastura*, 4 Wheaton, 52.

<sup>54</sup> *Instructions for United States Army in Field*, 152-4.

<sup>55</sup> *Prize cases*, 2 Black, 635, 673, 674; *The Lilla*, 2 Sprague, 177; 2 Clifford, 169; *Thorington vs. Smith*, 8 Wall. 1, 7, 9, 10; *Ford vs. Surget*, 97 U. S. 594, 604, 605.

<sup>56</sup> *Barrick vs. Buber*, 2 C. B. (N. S.) 563; *Esposito vs. Bowden*, 7

or after the war, with the exception of ransom bills and the like. Heffter denies that war suspends trade, but Sir Wm. Scott's declaration in *The Hoop* that "a state in which contracts cannot be enforced cannot be a state of legal commerce" is sounder in principle and practice. That subject, however, concerns international private law rather than public. The old theory and practice regarded war as a state of force in which each nation and each man did as he saw fit,—a return to a Hobbeslike condition of strife, with survival of the strongest. Social development has, however, improved states as well as individuals. Civilization means that peace is the rule and that war is the exception. It means perhaps even more,—that war is a legal procedure, a *rechtshülfe*, for the purpose of securing a better peace.<sup>57</sup> Except in self defense, no one without a commission of some kind from the sovereign can now attack the enemy. We are thus returning to the rule of Cicero<sup>58</sup> and departing from that of Solon and the self-help of medieval times. But even now important questions arise after declaration of war as to effect on treaties, resident enemies and neutral states. The interests of neutrals have so expanded within a century by the increase of commerce and growth of nations as to deserve a separate title of equal importance even with those of War and Peace.

§ 462. **Effect of war on treaties.**—During a debate in the British House of Commons a minister said that it was unnecessary to consider the provisions of the Treaty of Paris of 1856 because in the event of war it would be abrogated. He was promptly contradicted, even by his colleagues, but the incident shows a not uncommon mental confusion on the subject. While war does abrogate treaties, so far as they relate to the matter in dispute, it clearly does not abrogate treaties relating to weapons and methods of warfare. It is not a complete lapse into barbarism. War does not break every bond of humanity, says Vattel,—all agree that people at war do not cease to be men.<sup>59</sup> There are, however, a vast number of cases

Ellis and B. 763; Phillips vs. Montgomery vs. U. S., 15 Wall. Hatch, 1 Dillon, 192. According to 395; White vs. Burnley, 20 How. Bynkershoek, *Quamvis autem* 249.

*nulla specialis sit commerciorum prohibitio ipse tamen jure belli* 57 Bluntschli, *Mod. Kriegsrecht*, sec. 20 (529).

*commercia sunt vetita. Quaest.* 58 *De Officiis*, lib. I, c. II.

*Jur. Pub.*, 1, 3; Am. Regulations, 59 *Droit des Gens*, II, ch. 15; III, 86; *The Rapid*, 8 Cranch, 155; ch. 10, § 174.

Wharton, *Int. Law Dig.*, § 337;

between the two extremes, as to some of which we have no judicial decisions, and as to others text books are not all in accord. The following may be accepted as general rules: (1) that war abrogates treaties, so far as they relate to the subject matter in dispute; (2) that it suspends those relating to the commercial intercourse of combatants; (3) that it does not affect those made to regulate war itself, (4) or which on their face are intended to be permanent.<sup>60</sup> It is often difficult of course to determine whether or no particular provisions fall within the one class or the other. The general principle is that all provisions are permanent except those which would conflict with rights and duties of a state of war or evidently relate only to a state of peace.<sup>61</sup> From one point of view war may be regarded as a means for compelling the offending state to a fulfilment of its treaty obligations.<sup>62</sup>

§ 463. **Effect of war on resident enemies.**—The effects of war on resident enemies have varied at different times. Magna Charta provided that foreign merchants in England should be attached, without harm to body or goods, until it was known how English merchants were to be treated by the enemy, when the same treatment was to be extended them. Edward III allowed forty days for merchants to leave, and a reasonable time has generally been given since in civilized countries. But aliens have sometimes been imprisoned, sometimes expelled and their property confiscated. Even during the late war with Spain President McKinley, acting under powers originally conferred by a statute of 1798, warned them by proclamation that they were objects of suspicion, and at the beginning of the Boer war many British were expelled from the Transvaal. Grotius, followed by Kent, holds that a state has the right to imprison all subjects of the enemy who are within its power until the end of hostilities. Thus, at the sudden outbreak of war after the Peace of Amiens, Napoleon imprisoned all the British in France, as retaliation, however, for the British seizure of French ships that had come during peace into English ports.<sup>63</sup> Vattel's view<sup>64</sup> has prevailed that as such foreigners are invited to the country, it is implied they

<sup>60</sup> Socy. Propagation vs. New Haven, 8 Wheaton, 494; Sutton vs. Regulations, 15.

Sutton, 1 Russ. & Mylne, 663. See Wharton, Int. Law Dig., §§ 135, 302. <sup>63</sup> *De Jure Belli ac Pac.*, III, c. 9, § IV, 1, 3; Kent's Commentaries I, § 56; Calvo, *Droit Int.*, II, 37.

<sup>61</sup> Heffter, § 122.

<sup>62</sup> Bluntschli, *Mod. Kr.*, Sec. 29

<sup>64</sup> *Droit des Gens*, III, ch. 4, § 63.

shall be permitted to leave with their property. Such was the provision of a treaty of Utrecht with Muyden and Weesp in 1463, and of a Hanse treaty with France twenty years later. During the next century, under the lead of France, such treaties became common. In 1756 French subjects were invited to remain in England despite the war; and that practice, repeated in the declaration against Spain six years later, has become more and more prevalent, with or without treaty provisions therefor. Calvo, however, admits an exception in the case of active soldiers, who may be detained in order to prevent their return for military purposes.<sup>65</sup> And yet during the Franco-Prussian war even German soldiers were permitted to retire, despite the fact that permission might have been refused because they were a part of the enemy's army.<sup>66</sup> Later on Germans were expelled from the department in which Paris lies, but that was an incident of the state of siege then imminent, and, as a military measure, can hardly be condemned, whatever may be said of the methods employed.<sup>67</sup> The alien and sedition laws, passed in the United States during the undeclared war with France in 1798, were unpopular, and probably led to the overthrow of the Federalists, the dominant political party at that time. The detention or expulsion of citizens of the enemy nation can be justified only for military reasons, and when expelled they must have safe conduct through the lines.

§ 464. **Confiscation of private property.**—It is not likely that any civilized nation would now confiscate the property of private enemies within its limits on the outbreak of war. Alexander Hamilton justly said that “whenever a government grants permission to foreigners to acquire property within its territories, or to bring and deposit it there, it tacitly promises protection and security.” The Roman law declared *quae res hostiles apud nos sunt, non publicae sed occupantium fiunt*,—assigning them to the first taker.<sup>68</sup> The United States Supreme Court has indeed declared confiscation to be a war right, not effective, however, until Congress enacts a statute for the purpose,<sup>69</sup>—something Congress has been careful never to do

<sup>65</sup> Calvo, *Droit Int.*, II, 37.

<sup>66</sup> Heffter, § 121, Geffcken, note 2.

<sup>67</sup> Heffter, § 121, note 4, Geffcken.

<sup>68</sup> L. 51, § 1 D, *De acq. res.*, etc.

<sup>69</sup> Letters of Camillus: Brown vs. U. S., 8 Cranch, 123. The opin-

ion is by Marshall; that of Story dissenting held the right to exist without legislation. *Wagner vs. The Juanita*, Newb. Adm. 352; *Ware vs. Hylton*, 3 Cranch, 199; *The Johanna Emilie*, Spinks 14.

except during the civil war. The same rule prevails in England, where confiscation is a right of the crown which may be exercised without the aid of additional legislation. There they attempt to distinguish between debts and other property, contending that private debts cannot be confiscated, although property can. When France seized both in 1793, Great Britain retaliated, and at last, in April, 1814, compelled the removal of sequestrations and the liquidation of claims. In 1807, in retaliation for condemnation of Danish property in British ports as droits of the admiralty, £1,265,000 in value, Denmark sequestered debts due from Danish to British subjects hardly amounting to £300,000. The court of King's Bench denied the validity of the Danish sequestration, endeavoring to distinguish between debts and other property,<sup>70</sup> in a decision by Lord Ellenborough, which has been justly criticised. The only recent instance of such confiscation was the act of the Confederate Congress of August, 1861, declaring that "property of whatever nature, except public stocks and securities held by an alien enemy since the 21st of May, 1861, shall be sequestered and appropriated," under which receivers were appointed and even land sold. While the act was probably within war powers, it was condemned at home and abroad, and the sales made under it have been held void.<sup>71</sup> Modern practice does not go beyond sequestering during the war the income of real property owned by private enemies within our limits, in deference to the principle that after encouraging persons to buy land it is not honorable to take advantage of war to deprive them of it.<sup>72</sup> Ships in port were formerly confiscated, but the universal rule now is to allow them time to finish loading and reach their home ports, if they do not contain contraband.<sup>73</sup> A declaration of war by one state against another does not *per se* affect residents and citizens of the former, except so far as it involves their right to remove their property from the enemy state within a reasonable time,—a right upheld by the courts of New York, and denied by the lower Federal Courts.<sup>73a</sup>

§ 465. Effect of war on trade.—War suspends civil inter-

<sup>70</sup> Wolf vs. Oxholm, 6 M. & S. 5, § 76; Bynkershoek, *Quaest. Jur. Pub.*, I, c. 7.  
<sup>92</sup>; Wheaton, *Elements of International Law*, IV, 1, § 12.

<sup>71</sup> Dewing vs. Perdicaries, 96 U. S. 193; 1 Hughes, 69.  
<sup>73</sup> Heffter, § 121, note 1; The Pedro, 175 U. S. 354; The Buena Ventura, *ib.* p. 384.

<sup>72</sup> Vattel, *Droit des Gens*, III, c. <sup>73a</sup> The Rapid, 8 Cranch, 155.

course of all kinds between the belligerent nations and between their respective citizens. Thus a Berlin banker (Güterbock) was punished for dealing in securities issued by the Gambetta government; and insurance on a cargo from an enemy country cannot be collected.<sup>74</sup> It has even been held that a vessel can be condemned after she has left her cargo at an intermediate enemy port and is on her way home.<sup>75</sup> If the theory ever prevails that the governments only are at war, trade and other intercourse across the lines will be lawful. But even then that practice will remain much the same, because such intercourse as a whole is contrary to military necessities. Now it is forbidden by law,<sup>76</sup>—under the new theory it would be forbidden by proclamation. Intercourse with neutrals is not affected by war, neither is domestic trade, except so far as either interferes with military operations.

§ 466. Effect of war on allies.—A declaration of war or its equivalent does not conclude an ally, who can always appeal to the tacit clause implied in every treaty of alliance, under which he has the right to determine for himself whether or no the *casus foederis* has actually taken place. If the war is clearly and obviously unjust the co-ally is not bound, no matter whether the alliance be offensive, defensive, or both.<sup>77</sup> In determining that question, however, the co-ally should give to his friend the benefit of all doubts; in the absence of proof to the contrary he should presume that his ally has just cause of war. When an alliance purely defensive is entered into the co-ally is expected, as a general rule, only to co-operate in defense of his ally in a war really and truly defensive. How difficult it often is to determine what constitutes a just or defensive war, since certain wars offensive in form are actually defensive both in spirit and substance, was fully illustrated by the serious conflict of views between Great Britain and Holland in 1756, to which reference has been made already.<sup>78</sup>

#### Conflict between France and the United States as to alliance of

<sup>74</sup> Potts vs. Bell, 8 Term R. 548; Frances, 8 Cranch, 335; Jecker vs. Heffter, § 123, Geffcken, n. 2.      <sup>75</sup> Montgomery, 18 How. 112.

<sup>75</sup> The Joseph, 8 Cranch, 451;      <sup>77</sup> Vattel, *Droit des Gens*, III, ch. 6, §§ 83, 86; Wheaton, *Elements*

The Caledonian, 4 Wheat. 100.      <sup>76</sup> Phillips vs. Hatch, 1 Dillon, Int. Law, III, ch. 2, 115; Halleck, Int. Law, pp. 416-417.

<sup>78</sup> See above, p. 369.



1778.—Further illustration may be found in the conflict that arose between the United States and the revolutionary government of France in 1793 as to the duty of the former under the treaty of alliance of February 6, 1778,<sup>79</sup> which, after reciting that in the then pending war with Great Britain, France and the United States were allies, provided that the “essential and direct end of the present defensive alliance” was to maintain the sovereignty and independence of the United States, in return for which the latter guaranteed to the crown of France all its then possessions in the West India Islands. It was further agreed “that in case of rupture between France and England the reciprocal guarantee declared in the said article shall have full force and effect the moment such war shall break out.” After calling on the members of his cabinet for their opinions in writing as to the binding force of the treaty in question, under conditions then existing, Washington, in the midst of divided counsels, issued his famous neutrality proclamation,<sup>80</sup> which a recent writer declares “has had a greater influence in molding international law than any single document of the last hundred years.”<sup>81</sup> The ostensible ground upon which the binding force of the alliance was denied was, as stated by Hamilton<sup>82</sup> in the essays of *Pacificus*, that the “guarantee” clause between the United States and France was personal to Louis XVI, and did not apply to the revolutionary government that succeeded the deposition of that monarch. That such a contention was entirely untenable was clearly demonstrated by Madison,<sup>83</sup> who, under the name of *Helvidius*, said that “a nation, by exercising the right of changing the organ of its will, can neither disengage itself from the obligations, nor forfeit the benefit of its treaties. This is a truth of vast importance, and happily rests with sufficient firmness on its own authority. To silence or prevent cavil I insert, however, the following extract: ‘Since then, such a treaty (a treaty not personal to the sovereign) directly relates to the body of the state, it subsists though the form of the republic happens to be changed, and though it should be even transformed into a monarchy—for the state and the nation are

<sup>79</sup> Treaties and Conventions of the U. S., p. 307.

<sup>82</sup> Works, vol. IV. (ed. 1885), p. 362 seq.

<sup>80</sup> Messages of the Pres., vol. I, pp. 156-8.

<sup>83</sup> Writings, vol. I, 614 ff. See also Tucker's *Life of Jefferson*, vol.

<sup>81</sup> Foster, *A Century of Am. Diplomacy*, p. 154.

I, pp. 414, 421.

always the same, whatever changes are made in the form of government — and the treaty concluded with the nation remains in force as long as the nation exists. Vattel, B. II, § 85.’” Even if it be true, however, that the ostensible ground upon which Washington ignored the “guarantee” clause in question was inconsistent with acknowledged principles of international law, there can hardly be a doubt that the United States was entirely released by the real ground, which was that the propaganda of the French Revolution, challenging the hostility of all Europe by the declaration of an offensive crusade against its ancient institution, did not make a *casus foederis* under an alliance purely defensive.

**Other illustrations; another tacit condition of alliances.**—When in 1826 the Princess Regent of Portugal called for the assistance of Great Britain against Spain by virtue of the tripartite treaty of 1703 between England, Portugal and Holland, Canning, who admitted the existence of the treaty, argued in the House of Commons that it was necessary that the *casus foederis* should be shown. Another tacit condition of every alliance is that the ally can be called upon to furnish only such assistance as is possible at the time.<sup>84</sup> Had the treaty provisions been even stronger in their terms, Great Britain could hardly have expected France while in her death struggle with Germany in 1871 to aid in punishing Russia for violating the regulations of 1856 as to warships in the Black Sea. Neither France, Austria nor Great Britain stirred to aid Turkey when Russia attacked her in 1871,—non-action which seems to have been a violation of their treaty engagements.<sup>85</sup> The same principles apply to qualified alliances, (*partie auxiliaire, neben-partei*), such as those for subsidy, auxiliaries, and the like.

**Warlike alliances made after the outbreak of war.**—No serious difficulty should ever attend the ascertainment of the *casus foederis* of a warlike alliance made at the commencement of, or during a war, because all parties are then expected to understand the exact nature of the obligations they assume. By the making of such compacts third parties are called upon to determine whether or no they are of such a nature as to make the signatories also parties to the war. If so, their making is tantamount to a declaration of war and justify immediate hostilities. Great Britain so regarded the alliance made

<sup>84</sup> Vattel, *Droit des Gens*, III, c. 6, § 92.

<sup>85</sup> Heffter, § 116, Geffcken, note 8.

by France with her revolted colonies in North America during the American revolution.<sup>86</sup>

§467. **Liability of domiciled aliens to military service.**—As stated heretofore the law of nations considers an alien while domiciled in a country entitled to the protection of its laws, in return for which he owes a temporary and local allegiance that continues during the period of his residence.<sup>87</sup> In time of peace, such a domiciled alien may be called upon to perform such police or military service as may be necessary for the maintenance of the social order of the state from which he is deriving advantage; in time of war, he may be called upon under certain conditions of emergency to render military service in protecting such a state against external dangers. The extent of this liability to police and military duty upon the outbreak of war has never been precisely defined. When the question arose at New Orleans, during the war of 1812, as to French subjects who, after serving efficiently in the hour of danger, attempted to leave the ranks and return to their business, Consul Tousard was quite active in supplying certificates to avoid service. The difficulty thus presented Andrew Jackson finally solved by compelling those who claimed to be foreigners to leave the city until he considered all danger passed. While there was a great stir at the time, no legal objection could be made to that method of expelling non-combatants from military lines.<sup>88</sup> During the American civil war the same question was presented more directly in the conscriptions imposed by the Southern Confederacy, and by the government of the United States under the act of March 3, 1863, the President's proclamation of May the 8th of that year, and section 18 of the act of February 24th, 1864, providing "that no person of foreign birth shall, on account of alienage, be exempted from enrollment or draft under the provisions of this act, or the act to which it is an amendment, who has at any time assumed the rights of a citizen by voting at any election under the authority of the laws of any state or territory, or of the United States, or who has held any office under such laws or any of them; but the fact that any such person of foreign birth has voted or held, or shall vote or hold, office as aforesaid, shall be taken as conclusive evidence that he is not entitled to exemption from military service on account of

<sup>86</sup> Bynkershoek, *Quaest. Jur. Pub.*

<sup>87</sup> See above, p. 251.

1, c. ix; Phillimore, iii, § 73;

<sup>88</sup> Gayarré, *La.* vol. iv., p. 579.

Requelme, *Derecho Pub. Int.* i, tit.

1, c. xi.

alienage." During the general discussion of the subject with Great Britain, which began as early as 1861, that power, after objecting to English subjects being compelled "to serve in the armies in a civil war, where besides the ordinary incidents of battle they might be exposed to be treated as rebels and traitors in a quarrel in which, as aliens, they would have no concern," admitted that its government "might well be content to leave British subjects voluntarily domiciled in a foreign country, liable to all the obligations ordinarily incident to such foreign domicile, including, when imposed by the municipal law of such country, service in the militia or national guard, or local police, for the maintenance of internal peace and order, or even, to a limited extent, for the defense of the territory from invasion." While that admission was in perfect accord with Lord Lyons' declaration "that there is no rule or principle of international law which prohibits the government of any country from requiring aliens, resident within its territories, to serve in the militia or police of the country or to contribute to the support of such establishments,"<sup>89</sup> Hall, after eliminating the distinction between residents and mere sojourners, was undoubtedly right in suggesting that "the concession made to local authority seems unnecessarily large."<sup>90</sup> Bluntschli states the rule more correctly when he says that resident aliens cannot be compelled to enroll themselves in a force to be used for ordinary national or political objects; that they cannot be compelled to aid in maintaining the social order except as a part of the police as distinguished from the political power; and that they can only be compelled to defend the state or a part of it against invasion when that is threatened by savages or uncivilized nations.<sup>91</sup>

§ 468. When neutrals become *de facto* citizens of belligerent state.—While it would be a violation of neutrality to seek to enlist soldiers in a neutral country, it is not improper to accept the military service of all neutrals who may come to the belligerent and offer themselves. In such case these cease to be neutrals and for the purposes of the war become *de facto* citizens of the belligerent state.<sup>92</sup> The same theory was acted on by the Germans during their occupation of Paris in 1871,

<sup>89</sup> Naturalization Commission, Append. to the Report, 42.

<sup>90</sup> Int. Law, 217.

<sup>91</sup> *Völkerr.*, § 391.

<sup>92</sup> Twiss, Law of Nations, War, § 42; Grotius, *De Jure Belli ac Pacis*, III, c. 4, §§ vi, vii.

when they billeted soldiers in apartments occupied by Americans and protected by certificates and flags of the United States. Bismarck declined to admit such rights of enclave, so to speak, and the United States did not press the point.<sup>93</sup>

<sup>93</sup> Foreign Relations U. S. 1871, p. 307.

## CHAPTER III.

### RIGHTS AND DUTIES OF BELLIGERENTS DURING HOSTILITIES ON LAND.

#### § 469. Instruments of war and their legitimate employment.

—The conduct of active hostilities, of the operations of armies in the field, is regulated by what is generally known as military law, which may be regarded from three points of view. The first involves the instruments of warfare, such as forces and weapons; the second, the methods of warfare and the degree of force to be employed; the third, the extent to which the use of fraud or artifice against an enemy is permissible. Although war is the extreme self-help of nations, such a use of force is permissible, and no more, as is necessary for the accomplishment of its legitimate ends.<sup>1</sup> In the practice of the ancient world almost any means could be used for coercing the enemy, although by the time of Sallust the conduct of Marius in putting to the sword some inhabitants of the Numidian town of Capsa and enslaving the rest was recognized as contrary to the law of war, *contra jus belli*.<sup>2</sup> Killing, enslaving, rapine, poison, fraud were the usual methods of the earlier ages, and even Bynkershoek and Wolf in the eighteenth century advocated a return to such practices,<sup>3</sup> the former declaring that everything is lawful against an enemy except perfidy. Fortunately, Grotius before and the humane Vattel after them inculcated different rules. While relapses from their standards sometimes occurred, they were at least recognized as relapses. The growth of modern methods has resulted in a great gain for humanity, which Heffter says is the “regulative” of the law of war. The general principle may be stated to be that everything is prohibited which is not of a nature to contribute to the military operations, and

<sup>1</sup> Wheaton, *Elements Int. Law*, p. 250; Heffter, § 119, § 113; Grotius, *De Jure Belli ac. Pacis*, III, ch. 4, secs. 5-7; Vattel, *Droit des Gens*, III, ch. 8. This division is preferable to Heffter's *Kriegsmannier* and *Kriegsraison*.

<sup>2</sup> Sallust, *Jugurtha*, c. 91. See Livy, II, 12, XXXI, 30, also.

<sup>3</sup> Wolf, *Jus Gent.*, § 878; Bynk., *Quaest. Jur. Pub.*, I, chs. 1, 3. Even Burlamaqui says that by a state of war that of society is abolished. 2 Nat. & Pol. Law, IV, ch. v; but see also ch. x.

everything permitted shall be done only in the manner and circumstances reasonably calculated to forward them.<sup>4</sup>

§ 470. **Evolution of military codes.**—Reference has been made already to the influence of the pioneer manual prepared in 1863 by Francis Lieber for the government of the United States armies in the field, and revised by a board of officers presided over by Major-General E. A. Hitchcock, a work styled by Calvo the codification of the laws of war.<sup>5</sup> Many of the best principles thus put together are to be found in the Swedish army regulations of Gustavus Adolphus, which presented so marked a contrast to the general practice of armies in the Thirty Years' War. As Lieber's dominant idea was the repression of what he deemed a rebellion, his Manual is in some particulars too severe, especially so in regard to occupied territory, its residents and their property.<sup>6</sup> The good work thus begun, necessarily in an imperfect form, was gradually developed by the Red Cross Conventions of 1864 and 1868; by the Declaration of St. Petersburg, 1868; by the Brussels project of 1874; and by the code adopted at Oxford by the Institute of International Law in 1880. The most important of these progressive efforts was the Brussels project, based in the main on the labors of Lieber and Bluntschli, which remained as a mere project, a guide to jurists and a beacon to such nations as chose to follow, down to its adoption, with only a few changes, by The Hague Conference of 1899. The convention into which it was then incorporated provides that each of the signatory powers shall issue to its armed forces corresponding instructions or manuals to govern in wars between themselves in which non-assenting states do not intervene. "In cases not provided for in the articles, populations and belligerents remain under the safeguards and government of the principles of international law resulting from the customs established between civilized nations, the laws of humanity, and the demands of public conscience."<sup>7</sup>

§ 471. **Combatants, lawful and unlawful. Theatre of war.**—Legally all residents of countries at war are enemies; and no matter whether we adopt the new rule that only the governments are at war, or the theory that only a part of the citizens are delegated to conduct it for all, the result is the same,—some of the respective populations carry on hostilities and

<sup>4</sup> Westlake, *Int. Law*, 236.

<sup>7</sup> Hague Second Convention, Art.

<sup>5</sup> Calvo, *Droit Int.*, II, 282.

I and II.

<sup>6</sup> Davis, *Int. Law*, 397.

others do not. The former are termed active enemies, the latter passive. Of active enemies some are lawful combatants and others not. The lawful combatants are those impressed with military character by the belligerent state.<sup>8</sup> Such as are connected with the military or official service whose positions do not call for hostile acts, like the medical, judicial and commissary departments, are exposed to the dangers of hostilities, but cannot be separately attacked so long as they do not take part in actual hostilities. They are sometimes called special combatants; or, as in The Hague Second Convention, are included among non-combatants. Unlawful combatants are those who carry on hostilities without state authority, those who give aid and comfort to the enemy, and also spies and pirates. Active enemies or combatants may be killed while resisting with arms, but must be taken if unarmed, or when they offer to surrender. While unlawful combatants may be summarily dealt with, after capture lawful combatants are prisoners of war. The theatre of war can be only our own country, that of the enemy, or the territory of no one,—of which almost the only example now known is the high seas. To wage war on neutral territory, by land or sea, is to invade it and justify war by the invaded country.

§ 472. **Regular forces.**—While a declaration of war in the usual form calls upon all citizens to proceed to hostilities against the enemy, in practice this duty is limited to those persons who are impressed with military character by the national authority, to such, in short, as constitute the regular army and navy. Cato advocated the necessity of regular enrollment to make a soldier,<sup>9</sup> but generally in ancient times the whole male population made up the military forces, a usage that survived for some time after the Teutonic conquests. During the Middle Ages war became a trade, carried on by highly trained mercenaries, who sold their services wherever required. Upon the formation of large states, however, that plan became unreliable and unsatisfactory. The growth of the Spanish power in the fifteenth century was accompanied by that of a disciplined national army under Ferdinand, Charles and Philip.<sup>10</sup> Thus was necessitated simi-

<sup>8</sup> Calvo's division into *ennemis forcés, volontaires, et passifs* is the same, remembering that his first and second classes are included under active enemies above: *Droit*

*Int.*, II, 107; Am. Regulations, 57; Hague Second Convention, Article III.

<sup>9</sup> *Cic. De Off.*, c. II.

<sup>10</sup> As to the Spanish and other



lar organizations in France, under Francis I and Louis XIV, and in Prussia under Frederick II. Standing armies thus came in and grew with the growth of kingship, a process certainly not interrupted by the French Revolution, resulting in a military system which gave to them a still wider expansion. The nationalization of Europe has also increased standing armies by making service general and compulsory, apart from calling attention to the necessity for the employment of irregular forces. At present European armies amount even in time of peace to several hundred thousand men for each of the great powers, and in war perhaps a million can be called out by each. Regular forces, uniformed and officered, are governed by military law; and, when properly disciplined, move like huge machines, doing comparatively little damage to their own citizens or to non-combatant enemies and their property. They are impressed with the military character of the nation and are only too well known and recognized in international law. They and they only are the war power, the nation at war, the national authority, under the rule requiring offensive hostilities to be committed only by lawful authority. All such acts are unlawful except when so committed under authority of a belligerent or in self-defense.<sup>11</sup> The forcible acts of a soldier become those of the state by which he is commissioned; he is not responsible to the local courts, or to any other except his military superiors.<sup>12</sup> Chaos would come again on land and sea if the old theory dominated the modern practice; if all the citizens of one country engaged in actual hostilities with all those of the other. All persons not in military and naval forces are now considered only as passive enemies in contradistinction to fighting men.<sup>13</sup>

§ 473. Irregular forces: employment of savage against savage.

—It is the common practice for civilized states to employ savages as allies or subordinates in wars with other savages. In America the Choctaws under Pushmataha acted with Andrew Jackson in the great Creek War; and the same kind of allies have often been employed since in operations against the Modocs, Apaches and other western Indians. During the war

armies, see Robertson's Charles V, section II.

<sup>11</sup> Field, Int. Code, § 734; Talbot vs. Jansen, 3 Dallas 133, 160; Halleck, Int. Law, § 391. See also

Jefferson and Webster in Wharton, Int. Law Dig. § 350.

<sup>12</sup> Dow vs. Johnson, 100 U. S. 158.

<sup>13</sup> Heffler, § 124; Wheaton, Elements, 255.

in Tonquin the French used the Yellow Flags against the native Black Flags, and in Africa and India the British habitually employ the native peoples. It seems that in no other way can white troops, trained in a different school, so learn the methods of their savage foes as to grapple with them effectually. Such a practice necessarily sanctions many barbarities, but only against races outside the pale of international law, who do not consider such acts as barbarities when committed by themselves. If war is to be carried on against savages, it must be, to some extent at least, on a plane and in a manner which they can appreciate and understand. "A war against hordes and bands who recognize no law of humanity," says Heffter,<sup>14</sup> "is necessarily lawless." The disturbances in China in 1900 constitute a case in point. International law is based on reciprocity, even of evil, if that be practiced by the enemy. While the governmental announcement in parliament that the Zulus if attacked by Boers would be armed and encouraged to defend themselves, came as a painful surprise, it was only a threat of a lawful and necessary expedient, which fortunately the non-action of the Boers in that direction made it unnecessary to execute.

§ 474. Except as against their kind, employment of savages now condemned.—Except as against their kind, the employment of savages is now condemned.<sup>15</sup> Through a long course of development certain races have ripened into what are called civilized communities, with many customs and traits in common; and so bound together by ties of intercourse that war is regarded as an abnormal condition.<sup>16</sup> While it is true that all may have started from the same savage state, those who have passed through it differ widely from those who remain in it. The solemn formula of the *Ver Sacrum* of the Romans was a survival of the annual wandering of the early Aryans; but could those who took part in it (*sacrani*) have met their own ancestors with whom it originated they would have disowned these as barbarians. The Catholic Pontiff (*pontifex*—bridge-builder) is the lineal successor of the bridge-builders of those same wandering tribes, but the Pope represents an international power which would frown on such warfare as those car-

<sup>14</sup> § 119.

<sup>15</sup> Bluntschli, *Mod. Kriegsrecht*, sec. 53 (559).

<sup>16</sup> See Ihering's Aryans, *passim*;

and the works of L. H. Morgan, H. S. Maine, J. F. McLennan, Sir John Lubbock and others.

penters aided. In war cruelty of all kinds, now universally condemned by civilized peoples, was and is characteristic of uncivilized races, ancient and modern. Can war be waged more cruelly than by turning savages against civilized communities? The employment of Turkos in the Franco-German war was therefore justly condemned by Bluntschli; and the sending of Circassians into Hungary by Russia in 1848, and of Bashi Bazooks into Bulgaria in 1877 was equally reprehensible. Nevertheless, towards the end of the Crimean War Russia was preparing to arm some of her savage races; and in the threatening time of 1878 Lord Beaconsfield brought Indian troops through the Suez Canal and quietly stationed them at Malta. On the one hand that act was regarded as a master stroke of policy, showing what resources Great Britain could muster; on the other, it was decried as a fresh invasion by barbarians. As these men were uniformed and disciplined, the outcry was probably unjustifiable. Their organization certainly marked an advance on what had been witnessed in the American Revolution, and in the earlier French-English wars for the possession of this continent, when much of the fighting was done by the redskins. Even in the Anglo-American war of 1812 Tecumseh was in British pay; savages were attached to British armies; from the Lakes to the Gulf warfare was waged between Americans and Indians. The fact that no such thing would be tolerated now represents a distinct gain for civilization. While the participation of Indians in the American civil war is interesting, it is not so important, because their hostilities were confined to their Indian Territory and were directed against their own races. Arming slaves to fight against their old masters in that struggle was perhaps an inevitable result of the exalted enthusiasm for what was deemed by the one side a war for human freedom, not unlike the call of the French Republic in 1793 to the nations of Europe to throw off the yoke of kings and princes. And yet was not such arming an international wrong? Incentives to a servile insurrection would probably appear to a calm observer now in a different light. If slavery is brutalizing, slaves for that very reason are unfit for soldiers. While it is true that Lee favored their use on the Southern side, it was only after all other defensive means were well nigh exhausted.<sup>18</sup> Although the freeing of slaves as a matter of war

<sup>18</sup> White's Lee, 416.

policy is now considered permissible,<sup>19</sup> it was declared by Mr. Adams when Secretary of State in 1820 not to be among the acts of legitimate war.<sup>20</sup>

§ 475. **Guerrillas and banditti.**—Whether guerrillas or partisans can be legitimately employed in war is less clear. Marion, in the American Revolution, and Mosby, in the civil war, were, according to their lights, as truly patriotic as Andreas Hofer in the Tyrol. The propriety and value of scout and partisan service when properly guarded can scarcely be doubted. “It is just as legitimate to fight an enemy in the rear as in the front. The only difference is in the danger” to those who thus strive to capture supply trains, and despatches, and isolate an army from its base. The American regulations speak of such bands as armed and uniformed, but acting in detached corps or bodies.<sup>21</sup> While the history of every country reveals the existence of like forces, the great military powers have always been hostile to them. When South German peasants mutilated his stragglers, the soldiers of Gustavus Adolphus burned their villages. Napoleon was equally severe in Germany and in Spain, for which he has since been commended by Bismarck. Wellington issued a proclamation in southwest France that guerrillas must join the regulars under Soult or be shot and have their villages burned. During the Franco-Prussian war the Germans treated as banditti the *Franc-tireurs* who harassed their outposts, and picked off their sentinels; and they would not recognize the “*garde nationale mobile*,” although that force was by law of 1870 made part of the army. British severity in South Africa is similarly defended.<sup>22</sup> The ground of complaint is, that, since distinction is made in the treatment of combatants and non-combatants, there must be a distinction in the dress and behavior of these two classes. The man with the hoe must not by day enjoy the protection of the occupying army and by night burn its stores or assassinate the sentinels.<sup>23</sup> The matter was thoroughly discussed at the Conference of Brussels in 1874, shortly after the Franco-Prussian war, and also at The Hague.

<sup>19</sup> Bluntschli, *Mod. Kriegsrecht*, Am. Regulations, 81; 3 Bourrienne, ch. 18.

<sup>20</sup> Wharton, *Int. Law. Dig.*, § 338.

<sup>22</sup> Calvo, *Droit Int.*, II, 117, 119.

<sup>23</sup> Vattel, *Droit des Gens*, § 271.

<sup>21</sup> Mosby's *Reminiscences*, 44; III, c. 15, § 226; Martens, *Précis*, § 271.

At Brussels the German delegate endeavored to have warfare limited to regular forces, while the smaller states contended that this would leave them at the mercy of neighbors, who, unlike them, could and did maintain large standing armies. The conclusion finally reached at Brussels and affirmed at The Hague was that militia and volunteers should be treated the same as the army, when "1. Having at their head a person responsible for his subordinates; 2. Having a distinctive sign, fixed and recognizable at a distance; 3. Carrying arms openly; and, 4. Complying in their operations with the laws and customs of war. In those countries where the militia or corps of volunteers constitute the army, or make part of it, they are comprised under the denomination of army." That provision is now part of the Second Convention of The Hague,<sup>24</sup> and covers militia like the Landsturm of Norway, and the Ordenanza of Portugal, un-uniformed forces which are or may be officered. In 1810 Wellington used the Ordenanza to harass Masséna, who called them assassins and highway robbers, and ordered all that were captured to be shot. When the former remonstrated, pointing out that they were real militia, and that Masséna himself had "augmented the glory of French arms" while in command of un-uniformed levies, the order was not carried out.<sup>25</sup> Bluntschli, writing before the Conference at Brussels, boldly contends that the right and duty of patriotism cannot be made dependent on the cut and color of one's clothes. Uniform is a matter of discipline, not of international law.<sup>26</sup> Volunteers from abroad may aid the contending parties, as in the case of Garibaldi in Italy, and later in France,<sup>27</sup> even without express authority from the state. Such authority, however, must be presumed, as it is that which distinguishes soldiers from freebooters. The other requirements consist in the main of marks to indicate the same. A notable instance of irregular warfare occurred in 1602 when the Savoyards attempted to capture Geneva by escalade, on the failure of which the Genevans hanged all their prisoners as robbers who had attacked them without cause.<sup>28</sup> Napoleon, in 1796, shot the leaders of the

<sup>24</sup> Hague Second Convention, Article I, to be found in Holls' Peace Conference at The Hague. The Brussels Project (in English) will be found in the appendix to Field's Int. Code, second edition.

V, 386; Wellington, Despatches. <sup>26</sup> Bluntschli, *Mod. Kriegsrecht*, sec. 65 (570a).

<sup>27</sup> Id., sec. 64 (570).

<sup>28</sup> Vattel, *Droit des Gens*, III, ch. 4, § 68.

<sup>25</sup> Lanfrey, 1 *Hist. de Napoléon*,

Pavian revolt, magistrates and peasants alike; and in the next year he not only shot the Venetian revolutionists who killed the French wounded in Verona and massacred the garrison at Chiusa, but levied contributions besides. One of the most atrocious proclamations in history is that of the allied army which invaded the Lower Valais in 1799, by reason of its disregard of the recognized distinction between partisans and banditti. The former are irregular but lawful troops, while the latter are raiders without commission, robbers, assassins and all others who are beyond the pale of law.<sup>29</sup>

§ 476. *Levies en masse*.—The status of levies *en masse* is defined in identical terms by the Brussels Project and The Hague Convention, as follows: “The population of an unoccupied territory, who, on the approach of the enemy, spontaneously take up arms to combat the invading troops, without having had time to organize themselves in conformity with Article 9 (or Article 1 of the Convention), shall be considered as belligerent if they respect the laws and customs of war.” During the Franco-Prussian War, after the army was dispersed, captured, or besieged in Paris, and government non-existent, all France was in a ferment, and in many places “the population spontaneously took up arms to combat the invading troops.” The same thing has many times occurred elsewhere; as the Belgian delegate said at Brussels, the records of such risings make up the most glorious pages in the history of every country. It is difficult, if not impossible, to reconcile the interests of invaders, who need security, with those of the invaded, whom patriotism urges to arms.<sup>30</sup> At the same time Bluntschli is correct in saying that such risings in the rear of an occupying army present other questions, and may be treated with great severity, unless they assume such proportions as to make the occupation nominal. As the German delegate at The Hague, General Schwarzhoff remarked, soldiers deserve consideration on the ground of humanity as well as inhabitants, and when exhausted by march and battle have a right to protection against treacherous uprisings after occupation.<sup>31</sup> The Brussels Project, as confirmed at The Hague, now dispenses with both uniform and authorization in the case of such levies.

<sup>29</sup> Am. Regulations, 82.

<sup>31</sup> *Mod. Kriegsrecht*, sec. 96

<sup>30</sup> Maine, *Int. Law*, 172; Hague (598); Holls' Peace Conference, Second Convention, Article II. 144.

§ 477. **Weapons to disable an enemy without unnecessary suffering.**—Turning now from forces to their weapons, including arms, projectiles and material, the general rule is that only those shall be used which will disable the enemy with as little suffering as practicable.<sup>32</sup> “All unnecessary cruelty,” says Bluntschli, “is barbarity;” and on that ground the Brussels Project prohibited the use of all arms, projectiles and substances which may cause unnecessary suffering. Perhaps the principle involved may be said to forbid every method of warfare which aims at injuries which cannot be obviated by surgery. From that point of view instruments of war and surgery become correlative. For definite applications of the principle reference must be made to certain details agreed on in international conferences. Thus at St. Petersburg, in 1868, it was agreed that no projectile should be used on land or sea of less than 400 grammes (or 14 ounces) in weight, charged either with fulminating or inflammable material. At The Hague it was declared that “the contracting parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core, or is pierced with incisions.”<sup>33</sup> It was understood that this was aimed at the Dumdum bullet, originally manufactured for the British army in India, claimed on the continent to be cruel, and in England defended as humane. The British and American delegates did not sign this declaration because, amongst other reasons, it forbids a particular specification in bullets instead of establishing a principle. All nations represented, however, in view of the newness of the practice and danger of injury to other than combatants, agreed “to prohibit, for a term of five years, the launching of projectiles and explosives from balloons, or by other new methods of a similar nature.”<sup>34</sup> Another special declaration or convention was that “the contracting powers agree to abstain from the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases,” although that attempt to limit inventiveness was dissented from by the British and American delegates.<sup>35</sup> At The Hague Capt. Crozier proposed the adoption of the principle “that the use of bullets inflicting wounds of useless cruelty, such as

<sup>32</sup> Lord Stowell, in the *Flad Oyen*, 1 Ch. Robinson, 140.

<sup>33</sup> Holls' Peace Conference, 459. For discussion, see page 98.

<sup>34</sup> Holls' Peace Conference, 455. For discussion, see page 95.

<sup>35</sup> Holls' Peace Conference, 461. For discussion, see page 119.

explosive bullets, and in general every kind of bullets which exceeds the limit necessary for placing a man *hors de combat*, should be forbidden.”<sup>36</sup> While that proposal did not come to a vote, it probably embodies good law not requiring special endorsement. Excepting the prohibitions above named, which apply only between the signatory powers, every nation can avail itself of inventions to disable or destroy, by wholesale if preferred. Torpedoes, mines and great guns may be used to destroy whole ships and hundreds of men at one time, provided no unusual suffering is inflicted upon the victims.

§ 478. Unlawful weapons. Efforts to prohibit their use.—Poison has been forbidden from the laws of Manu to the conventions of The Hague, whether applied to weapons in battle or to the water used by the enemy.<sup>37</sup> Nails, scrap iron and other forms of langridge cannot be used in guns,<sup>38</sup> and some authorities contend that chain and bar shot,<sup>39</sup> and red hot balls (first used in 1574 at the siege of Dantzic) are also prohibited.<sup>40</sup> The last prohibition is, however, not apt to be material now, as the use of rifled cannon has dispensed with such missiles. Bombshells are allowed, but fire grenades not. Broken glass, lime, double or half bullets and the like are unlawful, and bloodhounds and wild animals are forbidden. Such prohibitions are subject to change, and vary with each epoch. Although Innocent III’s attempt to prohibit the use of all missiles among Christians failed, the crossbow was anathematized to some effect in 1139 by the Lateran Council as *artem Deo odibilem*. To that fact England’s fortunate reversion to the long bow is attributed. Firearms were held by Chevalier Bayard to be an unfair innovation, and in his last days he thanked God that he had slain without mercy all musketeers falling into his hands. Cannon were first used only to batter down walls, and not against soldiers, for it was considered barbarous to subject a brave man to death at the hands of a coward who remained at a distance. The English at Crecy first used firearms against the foe, and their suc-

<sup>36</sup> Holls’ Peace Conference, 103.

<sup>37</sup> Bluntschli, *Kriegsrecht*, sec. 50 (557) et seq.; Martens, *Précis*, VIII, ch. III, § 3, n.; Vattel, *Droit des Gens*, § 156; Halleck, *Int. Law*, 339; Hague Second Convention, Article 23. Wolf held otherwise, *Jus Gent.*, § 878.

<sup>38</sup> Hall, *Int. Law*, § 185; Martens, *Précis*, VIII, ch. 3, § 3, n.

<sup>39</sup> Klüber, *Int. Law*, § 244; Bluntschli, *Mod. Kr.*, § 54 (560); Martens, *supra*.

<sup>40</sup> Heffter, *Völkerr.*, § 125; Bluntschli, § 54 (560); Martens, *supra*.



cesses compelled other nations to adopt their methods. And yet as late as 1759 the French vice-admiral Conflans forbade the use of hollow shot because he did not deem the practice honorable. The first users of the rifle wore green the better to escape capture and death, and for fear of similar treatment the bayonet was not much used until Frederick the Great adopted it. The torpedo, invented as the American Turtle during the revolt of the colonies from the mother country and perfected during the American civil war, although execrated at first, has, like firearms and the bayonet, won a permanent place in war. The same is true of the ram, first used with effect by the Virginia during the American civil war, although existing in the French navy in the Solferino and Magenta since 1859.<sup>41</sup> At The Hague Russia vainly endeavored to secure its prohibition.

§ 479. **Recent conferences on the subject of weapons.**—Civilized nations have during recent years held several conferences on the subject of weapons, and as between themselves the matter has now approximated an agreement. As heretofore explained, those of St. Petersburg in 1868 and of The Hague in 1899, both due to the initiative of Czars of Russia, have been the most important. The former on December 11, 1868, declared that in war it is sufficient to "disable the greatest number of soldiers possible; and that this end would be exceeded by employing arms needlessly aggravating the sufferings of the disabled or making death inevitable; and that, therefore, the employment of such arms is contrary to the laws of humanity."<sup>42</sup> The importance of that declaration depends not so much upon a description of weapons as upon the fact that it announces a general principle of international law. Prussia endeavored to list the forbidden weapons, but was thwarted by England, who feared that a check would thereby be given to inventiveness.<sup>43</sup> Although the passions of the Franco-Prussian War had not sufficiently subsided to permit the immediate and formal adoption of its recommendations, the moral effects of the Brussels Conference manifested themselves in varying degrees in the more humane manuals for army use since then adopted by different countries, following the model promulgated by the United States during the civil

<sup>41</sup> See Maine, *Int. Law*, lectures VII and VIII; Mahan, *Influence of Sea Power*, 117.

<sup>42</sup> Martens, 18 *Nouv. Rec. Gen.*, 474.

<sup>43</sup> Bluntschli, *Mod. Kriegsrecht*, sec. 52 (558a).

war.<sup>44</sup> The Brussels rules were approved by the Institute of International Law and substantially embodied in its military code. Russia endeavored to observe them during her war with Turkey in 1877 and expounded them in a military catechism distributed among her troops. With but slight revision they were adopted at The Hague.

§ 480. No exemption for crowned heads and officers in actual battle. Pickets and sentinels.—The practice of picking off officers of the enemy, common during the Franco-Prussian War, has been specially emphasized by the Boer War. In 1870-1 twice as many officers were killed and three times as many wounded in proportion as soldiers in the ranks. In the future the relative loss of the former will probably increase now that modern guns with smokeless powder enable sharpshooters to kill officers at 800 paces with ease and safety.<sup>45</sup> While crowned heads have sometimes claimed exemption from the dangers of battle which they often manage to bring on,<sup>46</sup> Charles XII said the cannoneers of Thorn were right in firing at him, because by his death they might end the war. Although officers, like crowned heads, have no exemption above other men, they should as far as possible keep themselves out of danger, and the old Confederate cry in the Wilderness of "Lee to the rear" recognized the duty not less than the danger of the commander. It is also contended in many quarters that pickets and sentinels should not be fired on except to drive them in; but, considering how important their removal is in order to effect a surprise, this requirement is too exacting<sup>47</sup> and cannot be considered as an established rule of international law.

§ 481. Devastation as a means of offense.—Devastation of an enemy's country must be viewed first as a means of reducing the foe to submission by inflicting distress upon him; second, as a necessary incident to military operations. While Grotius, regarding it mainly in its first aspect, expressly tolerates it,<sup>48</sup> it was not generally regarded, even in his time, as permissible. The harrying of the Palatinate by Louis XIV in 1689, and the savage wasting of Bavaria by Marlborough in 1704 called forth the execrations of that age as well as of

<sup>44</sup> Maine, *Int. Law*, 129.

<sup>47</sup> *Am. Regulations*, 69; Davis

<sup>45</sup> Bloch, *Future of War*, 41, 332, 336.

*Int. Law*, 223.

<sup>46</sup> Vattel, *Droit des Gens*, III, ch. 8, § 159.

<sup>48</sup> *De Jure Belli ac Pacis*, III, 11, sec. 1.

posterity. The severity of the French minister Louvois, of which a monument still remains in the ruins of Heidelberg castle, was indirectly a blessing, because, while it desolated the country, it rendered a like occurrence impossible for the future. The only form of offensive devastation really permissible is that occurring as a necessary part of military operations, involving the laying waste of the country in order to form a "barrier," as Vattel has expressed it.<sup>49</sup> While the cutting of the Dutch dikes by Vendome, from Ostend to Ghent, may possibly have been permissible, such conduct surely injures non-combatants while its effect on combatants is uncertain. The tendency of civilized opinion is therefore to restrict such operations as much as possible. Although the history of Cuba shows that devastation was for a long time employed as a regular method of war by both Spaniards and insurgents, it was left for Gen. Weyler while governor-general to give to it a new and terrible significance. In order to make the country untenable for insurgents, an official *bando* of October 21, 1896, forbade cultivation and drove the peasantry into towns or within the military lines. That policy was called "reconcentration," and resulted in the miserable death of fifty per cent. of the 300,000 reconcentrados. This as much as any other one thing led to the intervention of the United States, for, as President McKinley declared, "it was not civilized warfare; it was extermination. The only peace it could beget was that of the wilderness and the grave."<sup>50</sup> Fortunately the disastrous result of the experiment, to its authors as well as to its victims, is likely to make a repetition impossible.

§ 482. Devastation as a means of defense.—While what may be done in one's own country to harass the enemy is important as a matter of strategy, it is not so much a question of international as of municipal law, or rather of the military law of the state interested. When the Dutch cut their dikes to flood out the French, it was regarded as an act of heroism, the fulminations of Louis XIV to the contrary notwithstanding. Peter ravaged eighty leagues of his own empire to check Charles XII, and reaped the results at Pultowa.<sup>51</sup> The burning of Moscow was certainly as patriotic as it was effective

<sup>49</sup> *Droit des Gens*, III, 9, § 167-8; Wheaton, *Int. Law*, p. 253. As to the Palatinate, see Hassall's *Louis XIV*, pp. 263-6.

<sup>50</sup> 10 Messages of the Presidents, 141.

<sup>51</sup> Vattel, III, 9, § 167.

against Napoleon. As such means are generally employed before the enemy's power is firmly fixed, they must be distinguished from revolts designed to destroy it after occupation, which are governed by different principles elsewhere discussed.

§ 483. Sieges and bombardments. Starvation.—When an army besieges a place several interesting questions arise. While polluting and poisoning streams that supply the garrison is of course forbidden now as it was in Greece, it is lawful to cut off the water itself and all provisions. It is lawful to starve the enemy into submission,<sup>52</sup> a result almost accomplished at Ladysmith by the Boers. It is also lawful, as an extreme measure, to bombard the fortifications when it is impossible to reduce the place otherwise; if private property is thereby injured, no blame attaches to any one. It is even allowable to bombard a city protected by forts in order that private distress may compel the military to capitulate. Such was the Prussian practice in France during the twenty-two sieges in which they made no assaults.<sup>53</sup> The same means were employed in the American civil war, and by the Versailles troops against the Paris Commune. Such a practice, sharply opposed as it is to the humanitarian drift of modern thought, does not justify, however, the bombardment of the residence quarter of a city as such in order to force residents to urge a surrender. "Such moral pressure," says Bluntschli, "would be thoroughly immoral."<sup>54</sup> The only attempt at a remedy made at The Hague was in the form of a prohibition against an attack or bombardment of undefended towns, villages, habitations, or buildings. A fortress may be attacked without warning, but the bombardment of a town should be resorted to only after reasonable notice, say twenty-four hours, so that non-combatants may retire to a place of safety, unless surprise, assault or other pressing military reasons prevent.<sup>55</sup> Although that right was insisted on in vain by the representatives of neutral powers at Paris in 1871, a truce of several days was allowed at Santiago on demand of the consuls, in order that foreigners might retire beyond the American lines. When reasonable notice was given by Dewey and

<sup>52</sup> Bluntschli, *Mod. Kriegsrecht*, § 50 (557).

<sup>53</sup> Calvo II, 123, 125.

<sup>54</sup> *Mod. Kriegsrecht*, sec. 47 (554a).

<sup>55</sup> Bluntschli, *Mod. Kriegsrecht*, sec. 44 (552) et seq.; American Regulations, 19; Calvo, *Droit Int.* II, 126; Hague Second Convention, Article 26.

Merritt at Manila, the commandant, surrounded by the insurgents, had no place of safety for non-combatants. Buildings dedicated to religion, art, science, or benevolence, hospitals, and public buildings not in military use are to be spared if recognized as such, and to that end the besieged are expected to designate them by some specially visible signs previously indicated to the assailants.<sup>56</sup> While a white flag or any other clear indication is sufficient, the American regulations mention a yellow flag as used for hospitals; and during the Spanish-American War the flag of the Red Cross Society was largely used for that purpose. In Corsica, in Nelson's time, even black flags were so employed.<sup>57</sup> If such a flag is misused, the besieged cannot complain if it should be subsequently disregarded; it will not even protect churches if they are devoted to military purposes. Bismarck said "museums ought not to be placed in fortresses," and for that reason he would not have hesitated to bombard any part of Paris. In fact, hospitals, schools and a museum of natural history were not spared at Paris, nor a library and cathedral spire at Strasburg. As to the last, the excuse was that it was used by the French for the purpose of observation.<sup>58</sup> During the siege non-combatants may be expelled, subject to a recognized though harsh rule of war authorizing the besieger to refuse exit and thus force the garrison of the city to readmit them if he thinks such a course will hasten the surrender of the place through a more rapid consumption of its supplies.<sup>59</sup> At the siege of Jerusalem Titus at first thought of thus turning fugitives back, but finally yielded to compassion and let them pass; and such was the conduct of Henry IV at his siege of Paris. In our own day the Germans twice permitted non-combatants to retire from Strasburg, but refused to allow "useless mouths" to leave Paris, because they had determined to reduce the capital by famine.<sup>60</sup>

§ 484. **Storming and sacking of towns.**—No matter how desperate the fighting may be, after a fortified place is taken by storm the enemy is to be treated as in other battles, and civilian persons and property are to be respected as in other cases. When the practice has been otherwise, the excuse has been made that it is difficult to prevent the indulgence in lust and

<sup>56</sup> Hague Second Convention, Article 27.

<sup>58</sup> Calvo, II, 128-9.

<sup>59</sup> Am. Regulations, 18.

<sup>57</sup> Am. Regulations, 115; Mahan's Nelson, 124.

<sup>60</sup> Heffter, § 126 and note 9 (Geffcken); Am. Regulations, 18.

rapine of troops maddened by hand-to-hand encounters. Grotius says that in order to remove the danger of surprises the rule was established by mutual consent, about the time of Prince Maurice's attempt upon Venloo in 1597, that prisoners should be put to death.<sup>61</sup> After Tilly's siege and storming of Magdeburg it was discovered that the population of twenty-five thousand had been reduced to twenty-seven hundred, and that largely by throat-cutting. While that was undoubtedly an extreme case, the massacres of garrisons and populations were common during the Thirty Years' War, and have occurred often since. A recent parallel may be found in the burning of Bazeilles near Sedan in 1870, where it is said women and children were deliberately murdered, only three hundred surviving out of a population of two thousand. The excuse given was that some of the people there had massacred wounded Germans.<sup>62</sup> All text writers unite in condemning the sacking of towns; and even soldiers declare it subversive of military discipline. At The Hague it was specially prohibited even when a place is assaulted.<sup>63</sup> Unless an officer, says Halleck, "can control his soldiers, he is unfit to command them;"<sup>64</sup> and after recounting the horrible scenes in Spain at the capture of Ciudad Rodrigo, Badajos, and San Sebastian, Napier declares that soldiers can be controlled if taught that such conduct is criminal, immoral and contrary to military honor, and punishable by death, if necessary. "With such regulations," he observes, "the storming of towns would not produce more military disorders than the gaining of battles in the field."<sup>65</sup> Although pillage is still sanctioned by some authorities in extraordinary cases, as by way of punishment for violation of the laws of war, the propriety of its employment is always questionable. Such reprisals should be inflicted only on the guilty few, not on a whole community.<sup>66</sup>

§ 485. **Unjustifiable resistance.**—It was anciently maintained that a garrison resisting an overwhelming force should be punished by massacre for the reason that an obstinate and hopeless defense unnecessarily causes the death of the besiegers. The rule may have grown out of the Roman practice that

<sup>61</sup> Vattel, *Droit des Gens*, III, ch. 10, § 178 n.

<sup>62</sup> Calvo, II, 121-2; Heffter, 278, G. n. 6.

<sup>63</sup> Hague Second Convention, Art. 28.

<sup>64</sup> Halleck, 442-3; Martens, *Précis*, VIII, ch. 3, § 17.

<sup>65</sup> Peninsular War, XXII, ch. 2; 3 Alison's Europe, ch. 63.

<sup>66</sup> Halleck, *Int. Law*, XIX, §§ 13-14; Martens, *Précis*, § 280, and

the besieged could expect quarter only before the battering rams were put into actual operation. Even Wellington writing in 1820 says "it has always been understood that the defenders of a fortress stormed have no right to quarter."<sup>67</sup> He did not, however, follow that rule himself, which is moribund, if not dead. As a recognition of the fact that bravery should always be respected Alexander ordered the Milesians spared because of their resistance; nothing can be more cruel, says Bynkershoek, than to punish an enemy for his courage.<sup>68</sup> Davoust's long defense of Hamburg in 1814, when he even refused to hear of French reverses elsewhere, is a striking illustration of that stern sense of duty which inspired those who held out at Mafeking, Kimberley and Ladysmith against the besiegers during the Boer War. When Galvez, who appeared before Mobile in 1780, summoned the garrison to surrender under threat of less favorable terms after resistance, Durnford replied, "was I to give up the Fort on demand, I would be regarded as a traitor to my king and country. A heart full of generosity and valor will ever consider brave men fighting for their country as objects of esteem and not revenge." Lawrence, who, in 1814, bravely defended Fort Bowyer against three vessels, did not surrender it until the next year upon the attack of the whole British fleet and army after the battle of New Orleans.<sup>69</sup> In the American civil war General Page fought the whole Federal fleet under Farragut until the same fort (then called Morgan) was practically in ruins, while on the opposite side of the channel Colonel Anderson gave up Fort Gaines on demand. In 1877 Osman Pasha with the spade converted open Plevna into a fortress which thrice withstood the fiercest Russian attack and greatly raised the prestige of Turkish arms, while Toral surrendered Santiago in 1898, by consent of his superiors, rather than have it taken by storm. Each of these brave and skilled officers acted according to his convictions of duty, under circumstances that differed widely from each other.

§ 486. The giving of quarter.—Quarter should be given an enemy when he offers to surrender or when by wounds or other circumstances he is rendered incapable of further resistance.<sup>70</sup> Being placed *hors de combat*, he ceases to be a combat-

Pinheiro-Ferreira's note to it; Calvo, *Droit Int.*, II, 182.

<sup>68</sup> *Quaest Jur. Pub.*, ch. III.

<sup>67</sup> Calvo, *Droit Int.*, II, 141; Caesar, *Bell. Gall.* II, 32; Cicero *De Off.* I, 21.

<sup>69</sup> Colonial Mobile, pp. 254, 379, 382.

<sup>70</sup> Second Hague Convention, Article 23 (c) (d).

ant, and from that time no one has the right to treat him as a foe. War, says Calvo, cannot silence conscience. The only exception now recognized is where a combatant has committed some flagrant breach of the laws of war, as by fighting in his enemy's uniform, or by refusing quarter himself.<sup>71</sup> In such case, says Lieber, he may be executed if the fact of his guilt is discovered within three days after his surrender. The American regulations mention another exception, which is so contrary to humanity that it cannot be recognized as international law, and this is, that troops may refuse quarter when they are in such straits as to render it impossible that they should encumber themselves with prisoners.<sup>72</sup> Instances of no quarter were frequent in the wars of the Vendée and Commune, and sometimes still occur in the heat of action. Formerly the exception was almost the rule. Even as late as the Revolt of the Netherlands war was carried on at sea with unrelenting cruelty. On the capture of a Spanish expedition in the Strait of Calais, the Dutch drowned every Spaniard captured; and in 1593 the Council of the Netherlands resolved to give the Dutch no quarter on land, an order revoked only because of complaints of the military, who saw that they would be the sufferers through retaliation.<sup>73</sup> Louis XIV declared that he would grant no quarter to the Dutch cities; and nearer our own times Radetsky in Lombardy, Haynau in Hungary, and Muravieff in Poland refused quarter to thousands of their opponents, because, forsooth, they were rebels.<sup>74</sup> The only theory upon which the German threat at St. Menend of death to all concealing arms can be justified is that in such cases resistance constructively continues. It may be said that quarter can seldom, if ever, be properly refused except by way of retaliation on soldiers who have themselves denied it.

§ 487. **Retaliation and reprisals.**—Retaliation, or military vengeance, may justify some acts of force which would otherwise be condemned. The Golden Rule has little international application, for "the whole international code," observes Wheaton, "is founded upon reciprocity."<sup>75</sup> If an enemy violates the established usages of war, it may become the duty as well as the right of his adversary to retaliate in order to

<sup>71</sup> Vattel, III, ch. 8; § 141.

<sup>74</sup> Calvo, *Droit Int.*, II, 143, 144;

<sup>72</sup> Am. Regulations, 60, 68.

Heffter, 278, Geffcken, n. 7.

<sup>73</sup> Grotius, *Annals of the Low Countries*, XIV, p. 550; *Id.* book III.

<sup>75</sup> Wheaton, *Elements Int. Law*, 253.



prevent further excesses on his part. In any event retaliation should consist of a repetition of the same or similar acts, and, so far as possible, it should be inflicted, not vicariously, but on the actual wrongdoer. Alexander sent word to Darius that if the latter continued to wage war without quarter he would himself be refused quarter; and Scipio told the Spanish princes that they themselves and not hostages would be held responsible for their acts. While the destruction of Corinth because of injury to Roman ambassadors has been justly condemned as excessive retaliation, the same can hardly be said of Lysander's execution of Athenian prisoners for Athenian cruelty. In 1813 there was the possibility of the enforcement of a very aggravated form of reprisal and counter reprisal growing out of the British threat, afterwards abandoned, to try for treason twenty-three naturalized Irishmen captured in American vessels.<sup>76</sup> During the American civil war Lee disapproved of Early's burning of Chambersburg, despite the fact that it was done by way of retaliation for Hunter's destruction of property in the valley of Virginia.<sup>77</sup> When, in the course of that war, the Union government liberated Southern slaves and enrolled them in the army, the Confederates, refusing to recognize them as soldiers, treated them as revolted slaves, and as such refused to grant them quarter. Whereupon President Lincoln, July 30, 1863, threatened the execution of prisoners as retaliation in kind.<sup>78</sup> However improper the arming of such slaves may have been, the flag and commission under which they acted, as in the case of warships, should have protected them by cutting off all question as to their original character. As they were not deserters in any proper sense, the Union authorities, after having adopted them as soldiers, could hardly have done less than protect them by retaliation. While reprisals on helpless prisoners is the most cruel and objectionable form of vengeance, sometimes it may present itself as the only available method.<sup>79</sup> The question often arises in conflicts between communities standing on different planes of civilization. Even then reprisals by a civilized country can only be tolerated in a clear and grave case of barbarity. The better opinion forbids inhumanity. If torturing captives to death is to be punished, execution

<sup>76</sup> Wharton, *Int. Law Dig.*, § America, 350, etc.; *Am. Regulations*, 58.

<sup>77</sup> White's *Lee*, 408 n.

<sup>79</sup> Heffter, § 129.

<sup>78</sup> Williams, *Negro Race in*

without cruelty is sufficient. Field justly declares for death alone rather than any barbarity in retaliation.<sup>80</sup> The sacking and burning of the Emperor's palace in 1860 in retaliation for Chinese cruelty to Europeans captured in ambush was unjustifiable.<sup>81</sup>

§ 488. **How far deceit may be used against an enemy.**—When we pass from the question of open Force to that of Deceit, involving the employment of secret means, still more debatable ground is reached. Roman law considered as innocent all fraud used against an enemy; and Augustine, although the author of the phrase *fides etiam hosti servanda*, said as much. Chrysostom commended most those generals who conquer by subtlety,<sup>82</sup> on the theory that anything is preferable to bloodshed, a view largely adopted in modern thought and practice.<sup>83</sup> According to that practice, deceit, even during hostilities, must be confined within certain limits. While it may be used as a part of the secret play for position in the preparation for battle, when fire is actually delivered it must be under the true flag distinctive of the countries of the belligerents. According to Hautefeuille, and the ordinances of 1696 and 1704, the first summons to stop at sea should likewise be fired under the national colors, a claim, however, not universally admitted. A false uniform or flag, permissible on land or sea as a means of bringing on or escaping a conflict, must be abandoned just before the delivery of fire; and captured uniforms must have in battle some distinguishing mark.<sup>84</sup> False information may be allowed to fall into the hands of an enemy and feints, surprises, ruses, and stratagems of all kinds are permissible in actual hostilities,<sup>85</sup> but not in negotiations. Vattel, followed by Halleck and others, holds that deceit is not allowable “whenever we have expressly or tacitly engaged to speak the truth to an enemy;”<sup>86</sup> and Bynkershoek admits that we must keep our promises to an enemy. Accepting such statements as truisms, when does the perfect

<sup>80</sup> Bluntschli, *Mod. Kr.*, Sec. 61 (567), 75 (580), etc.; Maine Int. Law, 174; Field, Int. Code, § 759.

<sup>81</sup> Calvo II, 111. For the papers in Asgill's case during the American Revolution, see 2 Martens, *Causes Célèbres du Droit des Gens*, 169.

<sup>82</sup> Quoted in Grotius, *De Jure Belli ac Pacis.*, III, ch. 1, § 3.

<sup>83</sup> Vattel, *Droit des Gens*, III, ch. 10, §§ 178, 180.

<sup>84</sup> The Peacock, 4 Rob. Rep., 187; Bluntschli, *Mod. Kr.*, § 59 (565); Am. Regulations, 64. See Field's Int. Code, § 764.

<sup>85</sup> Hague Second Convention, Article 24.

<sup>86</sup> Vattel, *Droit des Gens*, III, ch. 10, § 177.

good faith implied by peaceful negotiation begin and end? A little consideration will clear up the point. Deceit and fraud are lawful only in war, and war suspends intercourse. To the extent that intercourse is resumed, by truce or otherwise, there is a return *pro tanto* to peaceful methods,—from that time the good faith of peace may be rightfully expected. As Bynkershoek expresses it, the opponents then cease, *pro hac vice*, to be enemies.<sup>87</sup> All official intercourse must therefore be truthful; on no other basis can there be any mitigation of the horrors of war or even a cessation of hostilities. There must be some common ground on which to meet; some time when artifice in every form is inadmissible.

§ 489. **Assassination, or injury by treachery never permissible.**—Assassination or injury by treachery is never permissible;<sup>88</sup> such methods have no place in an honorable contest of arms. If a general can be captured by a charge, no rule is violated; if a soldier in uniform breaks through the enemy's lines in battle, or even into a camp, and kills the commander, his life may be sacrificed, but not as a penalty for the breach of military law. Porsenna commended the courage of Mucius Scaevola who tried thus to kill him.<sup>89</sup> The putting of a price upon an enemy's head and the gaining of admission within his lines by false pretenses or by disguises, are, however, forbidden.<sup>90</sup> The true spirit was manifested when the Romans warned Pyrrhus that his physician had offered to poison him, and when even Tiberius rejected a similar proposal as to Arminius. Mr. Fox earned the lasting respect of Napoleon by notifying him, upon the part of the British cabinet, of an attempt projected by fanatics against his life. On the other hand, the atrocious assassination of William of Orange has done much to perpetuate the horror ever since entertained for such conduct. It is now generally admitted that all such unnecessary acts are mistakes as well as crimes. While the abnormal state called war opens the door to deception, it closes the door to perfidy. As the American regulations put it, men do not cease to be moral beings because battling with arms.<sup>91</sup> "Every nation," says Webster, "on being received at her own request into the circle of civilized governments must understand that she

<sup>87</sup> *Quaest. Jur. Pub.*, ch. I.

<sup>88</sup> Heffter, § 125, note 9 (Geffcken); Hague Second Convention, Article 23 (b).

<sup>89</sup> Livy, II, ch. 12.

<sup>90</sup> Halleck, *Int. Law*, 400; Bluntschli, *Mod. Kr.*, § 54 (561).

<sup>91</sup> Halleck, *Int. Law*, 402; Bynkershoek, *Quaest. Jur. Pub.*, I, ch. I; Heffter, § 141; Am. Regulations, 15, 16.

binds herself to the strict and faithful observance of all those principles, laws and usages which have obtained currency among civilized states and which have for their object the mitigation of the miseries of war.”<sup>92</sup>

§ 490. **Bribery.**—It is unlawful to bribe or otherwise seduce generals, soldiers or people of the opposing belligerent. Thus, death is the penalty for attempting to bribe an officer or to make a soldier desert. At the same time, it is lawful to accept the services of traitors when tendered.<sup>93</sup> Usage authorizes aiding and perhaps instigating a rebellion or other political movement in the enemy state.<sup>94</sup> History is full of examples, the latest being that of Aguinaldo in the Philippines, for which, however, the United States have paid dearly.

§ 491. **Guides.**—A belligerent may compel any inhabitant to act as a guide to the military, and for that reason any one acting under such compulsion is exempt from the rule providing that a person who voluntarily guides the enemy of his country is punishable by death. A guide who intentionally misleads, even when acting under compulsion, may be punished by death;<sup>95</sup> and as the same harsh rule is applied when a district is occupied by an enemy, an active guide misleading the occupying army is punishable in the same way. The death penalty is likewise inflicted upon a war traitor for offering to guide the army of his old country. In each instance such service is regarded as perfidy, not patriotism.

§ 492. **Spies. Employment of balloons.**—A spy is one who with disguise or other deception goes peaceably among the enemy forces to discover and report their condition. The Hague Conference declared that “an individual can only be considered a spy if, acting clandestinely, or on false pretenses, he obtains, or seeks to obtain, information within the zone of operations of a belligerent, with the intention of communicating it to the hostile party.”<sup>96</sup> Although captured spies are, as a general rule, liable to be hanged, regardless of the fact that they are authorized by their commanders, The Hague conventions require a trial before punishment, even when they are taken in the act. While all generals employ spies, Vattel

<sup>92</sup> Letter to Thompson, Apr. 15, Klüber, *Droit des Gens*, § 244. 1842 (6 Works, 437).

<sup>94</sup> Heffter, § 125, G. n. 7.

<sup>93</sup> Woolsey, *Int. Law*, § 127; Vattel, *Droit des Gens*, III, c. 10, § 180-1; Halleck, *Int. Law*, § 27;

<sup>95</sup> *Am. Regulations*, 93-7; Bluntschli, §§ 634-6.

<sup>96</sup> Hague Second Convention, Art. 29-30.

says that none boast of them.<sup>1</sup> Frederick II reduced their use to a science; Wellington employed them constantly in Spain;<sup>2</sup> and Wolseley frankly advocates them. Information about the enemy from some source is necessary, and reconnoitering in uniform, which is permitted, reveals only external conditions. Spies, who are the detectives of war, may be men of high patriotism, as they certainly are of unusual bravery. André was of a higher type than Arnold; and Capt. Nathan Hale, shot by the British as an American spy, was an honorable man.<sup>3</sup> And yet the enterprise has a dishonest side, because the spy must disguise himself and play friend to acquire information to be used by him as an enemy. The principle of self-preservation demands that every army shall punish spies with death; the business must be made too hazardous to have many practitioners. For that reason spies must be volunteers; no commander can detach a soldier for such service.<sup>4</sup> And yet the criminality is limited to the special expedition; after the spy has rejoined his army, he ceases to be such, and if subsequently captured is to be treated as other prisoners of war.<sup>5</sup> Communication of information, fairly acquired, to the army of one's own country when it reestablishes its occupation of a captured place, is not punishable. Reconnoissance in uniform, such as Lieutenant Rowan's daring expedition to Cuba for the purpose of communicating with the insurgent Garcia, is legitimate; and so is the carrying of dispatches openly, even by civilians. As disguise and secrecy are the essential characteristics of a spy, there seems to be no just ground for regarding soldiers reconnoitering from balloons as such, despite the contrary contention made by the Germans at the siege of Paris, during which sixty-four balloons were sent up. Gambetta was able to organize resistance in the provinces after escaping in that manner.<sup>6</sup> Balloons, used by the French as early as the battle of Fleurus in 1794, and by the Russians in 1812, were employed by the Federal troops in Virginia, by the British in

<sup>1</sup> Field's Int. Code, § 767; *Droit des Gens*, III, ch. 10, §§ 179, 180, 182; Am. Regulations, 88-90; Bluntschli, *Mod. Kr.*, § 126 (628), etc.

<sup>2</sup> 4 Napier, *Penin. War*, XIV, 220-1.

<sup>3</sup> See 3 Phillimore, 153, for the British side.

<sup>4</sup> Halleck, *Int. Law*, p. 407.

<sup>5</sup> Hall, *Int. Law*, 561; Am. Reg., 633; Bluntschli, *Mod. Kr.*, § 131 (632a); Brussels Code, Articles 19-21; Second Hague Convention, Article 31.

<sup>6</sup> Hall, *Int. Law*, 560; Bluntschli, *Mod. Kr.*, § 129 (631); Calvo, *Droit Int.*, II, 133; Heffter, § 128, n. 2; Second Hague Convention, Article 29.

the Boer war, and, along with telephones, are a regular part of the German manoeuvres.<sup>7</sup> It is not, therefore, strange that messengers by balloon should have been recognized at The Hague Conference as a legitimate means of reconnoissance.<sup>8</sup> Persons so traveling are to be regarded when captured as prisoners of war, as legitimate aids to military operations.

§ 493. **Deserters.**—Deserters from the enemy may be accepted and enlisted,<sup>9</sup> but when recaptured they may be shot. International law has nothing to oppose to so salutary a military rule, because such persons have forfeited all right to be regarded as soldiers.<sup>10</sup> When taken by their former sovereign they are not treated as prisoners of war, although regularly uniformed and enrolled as members of the opposing army. It is unlawful to incite the enemy's soldiers to desert or to betray their cause, just as it is to encourage crime of any kind in the enemy's country.<sup>11</sup> The general interest of civilization demands that the military oath should be respected, and for that reason France in 1859 and Prussia in 1866 committed wrongs when they raised Hungarian regiments against Austria. While volunteers from the enemy's country may be accepted and enrolled, at least until conquest is complete, inhabitants of the enemy's country cannot be compelled to serve against their old sovereign in the army or otherwise.<sup>12</sup> Although not deserters unless they have abandoned their country's army, such volunteers by breaking their oaths of allegiance become traitors; and, unless protected by retaliation, they may justly expect civil trial for treason.

<sup>7</sup> Miles, *Military Europe*, 103.

<sup>8</sup> White's *Lee*, 255; Second Convention Hague, Article 29.

<sup>9</sup> *U. S. v. Reading*, 18 How., 10.

<sup>10</sup> *Am. Reg.*, 1, 48; Bluntschli, *Mod. Kr.*, § 125 (627); Vattel,

*Droit des Gens*, III, ch. 8, § 144;

Woolsey, *Int. Law*, 220.

<sup>11</sup> Bluntschli, *Mod. Kriegsrecht*, § 58 (564).

<sup>12</sup> *Ib.*, § 71 (576).

## CHAPTER IV.

### ' RIGHTS AND DUTIES OF BELLIGERENTS DURING HOSTILITIES AT SEA.

§ 494. Rules of land war observed at sea so far as they apply.—So far as they apply the rules regulating the conduct of hostilities on land are observed during hostilities at sea. When the vast importance of the subject is considered it is strange indeed that during a period in which such great and successful efforts have been made to codify the rules of land war so little should have been done to codify the rules of sea war. It is safe to predict that in the near future naval warfare must proceed upon a gigantic scale when the fact is recalled that the war fleet of Great Britain alone numbers over five hundred ships of all classes, costing upwards of \$400,000,000, and manned by over 100,000 men;<sup>1</sup> and that the sea power of the other leading maritime states is undergoing a correspondingly rapid development. And yet when search is made for an international naval war code to direct the conduct of such vast forces it cannot be found, save so far as its beginnings may be indicated in The Hague third “convention for the adaptation to maritime warfare of the principles of the Geneva convention of August 22, 1864,” and in a few national regulations. Since the Spanish-American war the Secretary of the Navy of the United States has prescribed, with the President’s approval, for the use of that branch of the service, a Naval War Code,<sup>2</sup> purporting to embody the laws and usages of war at sea, which should be considered in connection with other attempts to accomplish the same result.<sup>3</sup> In the light of the imperfect rules and usages now regulating the subject, brief consideration will be given, first, to belligerents at sea, and the limits within which they may act; second, to naval hostilities on the sea and shore; third, to the care of the wounded and prisoners at sea.

§ 495. General object of naval warfare. Armed forces of the state at sea.—The special objects of maritime war, according to

<sup>1</sup> Miles, *Military Europe*, 69.

<sup>2</sup> Prepared by Capt. Chas. H. Stockton, U. S. N., president of the Naval War College.

<sup>3</sup> As to foreign naval codes, see

*Das Internationale Öffentliche Seerecht der Gegenwart*, by F. Perels, Berlin, 1882; *Guide International du Commandant de Bâtiment de Guerre*, by E. Rosse,

the American Naval War Code, are the capture or destruction of the military and naval forces of the enemy; of his fortifications, arsenals, drydocks and dockyards; of his various military and naval establishments, and of his maritime commerce; to prevent his procuring war material from neutral sources; to aid and assist military operations on land; and to protect and defend the national territory, property, and sea-borne commerce. Military necessity permits measures that are indispensable for securing the ends of the war and that are in accordance with modern laws and usages of war. It does not permit wanton devastation, the use of poison, or the doing of any hostile act that would make the return of peace unnecessarily difficult. Non-combatants are to be spared in person and property during hostilities, as much as the necessities of war and the conduct of such non-combatants will permit.<sup>4</sup> To effect such objects is the purpose of naval organization. In the United States the following are recognized as armed forces of the state at sea:

(1) The officers and men of the navy, naval reserve, naval militia, and their auxiliaries.

(2) The officers and men of all other armed vessels cruising under lawful authority.<sup>5</sup>

§ 496. **Ships with commissions of war. Origin of permanent fleets.**—The right to give battle at sea is in general confined to ships with commissions of war. The fighting force at sea is the navy, now as well organized as the army, composed of war vessels, which represent the nation in arms on the sea. Permanent and organized fleets of that character have been gradually developed out of voluntary forces composed of ships belonging to private individuals. “The beginnings of the English navy can be faintly traced in the fleets which were raised in the latter part of the pre-Norman period for the protection of the kingdom against the incursions of the Danes. Under the scheme then employed each shire was required to furnish ships in proportion to the number of its hundreds,—an arrangement which applied to the inland shires as well as to those on the seaboard. Each shire sent its quota of ships to the fleet, as it sent its quota of fighting men to the host. This primitive system, which did not long survive the Norman conquest, was succeeded after that event by a new arrange-

Paris, 1891; *Almanach für die k.*

4 Am. Naval Code, Art. 1.

*u. k. Kriegs-Marine*, 1900, II Theil,

5 *Ib.*, Art. 9.

*Pola*, Austria.



ment based upon different principles. In order to supply the lack of a regular navy, and to protect the southern seaboard against attack, the Conqueror incorporated the Cinque Ports and endowed them with certain privileges, upon condition that they would furnish a given number of ships and men for so many days in case of an emergency. The naval force thus contributed by the privileged towns for local defense was augmented, when the crusades created a necessity for a large number of ships for foreign expeditions, by fleets of mercenaries, which were maintained, like the mercenary element in the army, out of the royal exchequer. In the naval force of mercenaries thus raised and maintained out of the royal revenue the permanent fleet finds its origin. The organization and government of the fleet, thus dependent upon the king's bounty, devolved during the mediæval period upon the admiral, the king's lieutenant and highest naval representative."<sup>6</sup> In Holland also the navy was originally composed of private ships which received a kind of subsidy.<sup>7</sup>

**Vessels without commissions.**—In accordance with the theory that all citizens of one belligerent state are at war with all citizens of the other, practice still permits private vessels without commissions of any kind to defend themselves, and even to attack vessels of the enemy,—captures by such ships being now reserved as *droits* of the admiralty.<sup>8</sup> In the absence of a commission, a right of search and capture does not exist as against neutrals.<sup>9</sup>

§ 497. **Rules governing privateers.**—Privateers may make captures wherever the Declaration of Paris does not prevail. No matter what prejudice still exists against privateering, it is not to be confounded in any sense with piracy. Its conduct is the subject of regular rules, which many treaties have defined from the fourteenth century, when letters of marque became common, down to the nineteenth. On one occasion the British confiscated a French privateer for exceeding her commission.<sup>10</sup> Cruisers of a *de facto* government or belligerent are

<sup>6</sup> Origin and Growth of the Eng. Const., vol. I, pp. 348-549.

<sup>7</sup> Bynkershoek, *Quæst. Jur. Pub.*, ch. XVIII.

<sup>8</sup> The Grand Terrein, 1 Hay & Mar. 155.

<sup>9</sup> Haven v. Holland, 2 Mason, 230; The Rebeckah, 1 Ch. Rob. 227; The Melomane, 5 Ch. Rob. 42; The

Caledonian, 4 Wheat. 100; The Amiable Isabella, 6 Wheat. 1; Carrington v. Mercht. Ins. Co., 8 Pet. 495; Bynkershoek, *contra*, *Quæst. Jur. Pub.*, ch. XX; the Charlotte, 5 Ch. Rob. 280.

<sup>10</sup> Leoline Jenkins, 714, 754; 2 Wooddeson, 425; Du Ponceau's Bynkershoek, 134, n.

not pirates, for it is immaterial whether the government be rightful or not.<sup>11</sup> In 1777 the British parliament declared that acts of treason and piracy had been committed on the high seas from the colonies, and enacted that all persons arrested therefor should be imprisoned but not tried. This provision was continued from year to year and was aimed at American privateersmen. Those so captured were ultimately exchanged or released. The same result followed the attempt made during the American civil war to carry out President Lincoln's order of April 19, 1861, declaring that Confederates molesting commerce of the United States would be treated as pirates. The crew of the captured Savannah, under Judge Nelson's charge at New York, were not convicted; while those convicted at Philadelphia in Smith's case were not sentenced, but treated as prisoners of war when a threat of retaliation was made.<sup>12</sup> A privateer may be visited to ascertain its character, but as in the case of a public war vessel it is exempt from search. Hautefeuille even contends that it is exempt from visitation, but he also holds the doubtful view that a merchant vessel may resist the visitation of a privateer unless a commission is first shown.<sup>13</sup> Privateers are not always allowed the same privileges in neutral ports as public war vessels. Some states do not admit them at all except in cases of necessity, while others even permit them to sell their prizes. The same rules apply, however, to privateers as to public war vessels when once admitted to a port. Since the Declaration of Paris, the subject has necessarily lost much of its importance, for the reason that captures have since been made almost exclusively by public vessels of war.

§ 498. **Neutral territorial waters not to be violated by naval combats.**—The operations of war vessels are necessarily confined to the waters of their own country, those of the enemy, or the high seas, which are free to belligerents and neutrals alike. The extent of sea embraced within the territorial limits of a state has been already defined. While Philip II

<sup>11</sup> *Mauran v. Ins. Co.*, 6 Wall. 1; Wharton, *Int. Law Dig.*, § 381. *Dole v. N. E. Ins. Co.*, 6 Allen, 373; The case of the Savannah was *Same v. Merchts. Co.*, 51 Me. 464; printed separately, and in full, by *Fifield v. Ins. Co.*, 47 Pa. St., 166; Baker & Godwin, 1862. *U. S. v. Baker*, 5 Blatchford 6; <sup>12</sup> *The St. Juan*, 2 *Causes Célèbres du Droit des Gens*, 183; 3 *Ford v. Surget*, 97 U. S. 619. *Droits et Devoirs des Nat. Neut.*,

<sup>12</sup> Whiting's *War Powers*, 215, *note*; *U. S. v. Baker*, 5 Blatch. 6; XI, 1, § 1.

claimed so much as was within sight from land, Bynkershoek's view has prevailed that the dominion of the state ends where the power of its arms terminates. *Terrae dominium finitur ubi finitur armorum vis.* "According to the code of laws and usages of war at sea adopted by the United States the area of maritime warfare comprises the high seas or other waters that are under no jurisdiction, and the territorial waters of belligerents. Neither hostilities nor any belligerent right, such as that of visitation and search, shall be exercised in the territorial waters of neutral states. The territorial waters of a state extend seaward to the distance of a marine league from the low water mark of its coast line. They also include, to a reasonable extent, which is in many cases determined by usage, adjacent parts of the sea, such as bays, gulfs, and estuaries inclosed within headlands; and where the territory by which they are inclosed belongs to two or more states the marine limits of such states are usually defined by conventional lines."<sup>14</sup> At the mouth of the Mississippi, for instance, the marine league runs from the mud islands dotting the gulf.<sup>15</sup> Within these limits the area covered by the territorial waters of a neutral state is as sacred as its soil. Thus in 1793 when the British ship *Grange* was captured by the French *L'Ambuscade* on the waters of Delaware Bay, the United States compelled its restitution. Although Bynkershoek says that pursuit begun outside may be continued and finished within the limit, *dum fervet opus*, such is not the practice. The territorial waters of a neutral, says Azuni, constitute a sacred asylum.<sup>16</sup>

§ 499. **Bombardments from the sea not limited to fortified places.**—Sometimes land forces have an opportunity to attack war vessels when the latter attempt to pass through a narrow channel, as at Vicksburg and Mobile during the American civil war. Such conflicts occur more often, however, through the employment of sea forces for the bombardment of coast defenses, or undefended places, an important and unsettled subject, remitted at The Hague for discussion by future conferences. There is no law or practice which

<sup>14</sup> Bynkershoek, *De Dom. Maris*, ch. II; *Quaest. Jur. Pub.*, ch. VIII; Am. Naval Code, Art. 2.

<sup>15</sup> The *Anna*, 5 Ch. Robinson, 373, 385.

<sup>16</sup> *Quaest. Jur. Pub.*, ch. VIII;

2 Azuni, II, ch. IV, Art. 1. Among French cases may be mentioned *Il Volante*, in 13 Merlin, *Repertoire de Jurispr.*, 94; *La Christiane Colbiornsen*, and the *Daniel Frederick*, *ib.* 112.

limits bombardments from the sea to fortified places as on land. In 1866 Valparaiso was bombarded by the Spanish admiral Mendes Nunez; and recently a French naval officer, Admiral Aube (shortly afterwards appointed minister of marine) advocated the use of bombardment, together with the levy of heavy contributions, in case of war with Great Britain. Nelson's bombardment of Copenhagen is scarcely a case in point, as that was only or mainly incidental to the battle with the Danish fleet stationed in front of the city. In the American naval code bombardment, by naval force, of unfortified and undefended towns, villages, or buildings is forbidden, except when it is incidental to the destruction of military or naval establishments, public depots of munitions of war, or vessels of war in port, or unless reasonable requisitions for provisions and supplies essential, at the time, to such naval vessel or vessels are forcibly withheld, in which case due notice of bombardment shall be given. The bombardment of unfortified and undefended towns and places for the non-payment of ransom is forbidden.<sup>17</sup>

§ 500. When artifice is permissible at sea. Naval battles between fleets or single vessels.—At sea as on land the use of false colors in war is forbidden. When a vessel is summoned to lie to, or before a gun is fired in action, the national colors should be displayed. And yet it is lawful to use false colors as a ruse, as Nelson did while he lay off Barcelona for a long time showing the French flag, with the object of drawing out the ships of Spain, then allied with France.<sup>18</sup> When such preliminaries are over and naval combat actually begins between fleets or single vessels, war assumes its most terrible form, involving as it does not only the destruction of the crew by missiles from all the engines of war, but also the danger of destruction of the ship itself by shot and shell, rams, mines, torpedoes and magazine explosions. As to the conduct of such engagements nothing more specific can be said than that the general rules of land war must be observed so far as they apply, subject to certain modifications resulting from special provisions as to hospital ships and the like to be separately considered hereafter. The use of chain and bar shot and red-hot balls meets with less objection at sea than on land because the former were designed to cut away the rigging and the

<sup>17</sup> Am. Naval Code, Art. 4.

<sup>18</sup> *Rev. des Deux Mondes*, 314-346, for 1882.

latter to fire wooden ships, and to that extent they are as legitimate as fireships. Even boiling water may be used as a permissible means of defense against boarding parties, but pitch cannot be thrown. While there are fewer conventional restrictions on weapons and projectiles than on land, fighting at sea is subject to the general principle forbidding the infliction of injury beyond what is actually necessary to compel submission,<sup>19</sup> a principle whose application leaves a wide range of discretion to each commander. Thus before Trafalgar Nelson declared annihilation his object, and his fleet was ordered, in the event of danger of the escape of the enemy, not to desist from destruction in order to save ships or men.<sup>20</sup> On the other hand, during Farragut's passage of Fort Morgan, the Confederate Gen. Page chivalrously refused to fire on a ship's boat pushing off to rescue the struggling survivors from the *Tecumseh*, sunk by a torpedo, even though the oarsmen defiantly raised the Union colors instead of the usual flag of truce.

§ 501. **Surrender at sea.**—At sea the question of surrender of the crew is complicated with that of the ship. As she is manned by the crew, when she surrenders, they must. Therefore while they cannot run the ship away after an offer of surrender is made, if it is not accepted in a reasonable time, or circumstances put acceptance out of the power of the conquering ship, the offer is avoided. The crew are not bound to sink with the ship; they are not required to drown because the flag is struck. They can save themselves in any way possible, and they do not then become prisoners unless they pass under the control of the enemy. Thus when Admiral Gantheaume was picked up by a French boat after the *L'Orient* exploded, and when Captain Semmes escaped to a British pleasure yacht after the *Alabama* sank, both were free men. Mr. Seward's shocking contention in the latter case that it was the right of the *Kearsarge* to claim the advantage that would have resulted from the lawful destruction of the crew of the *Alabama*, Lord Russell promptly and justly rejected.<sup>21</sup> At the battle of the Nile, when fire was seen on the *L'Orient*, the British directed their aim to that spot and thus prevented its extinguishment. But, when the destruction of the ship became inevitable, Nelson sent boats and men to aid in saving the

<sup>19</sup> Am. Naval Code, Art. 1.

<sup>20</sup> Mahan's *Nelson*, 302.

<sup>21</sup> Semmes' *Service Afloat*, 766; Wharton, *Int. Law Dig.*, § 394.

crew.<sup>22</sup> During the battle off Santiago, when the *Vizcaya*, on fire all over, ran up a white flag, the *Iowa* not only refrained from a finishing broadside but lowered her boats and saved hundreds of the crew. When Phillips of the *Texas* in the same battle kept his men even from cheering, because "the poor devils are dying," he expressed the true spirit of modern international law, which regards a disabled opponent as no longer a foe, but a fellow man in distress, who is to be helped, not injured.

§ 502. **Who are to be regarded as prisoners at sea. Their treatment.**—The American Naval Code declares, in accordance with the general practice, that in case of capture, the personnel of the armed forces or armed vessels of the enemy, whether combatants or non-combatants, are entitled to receive the humane treatment due to prisoners of war. The personnel of all public unarmed vessels of the enemy, either owned or in his service as auxiliaries, and of merchant vessels who, in self-defense and in protection of the vessel placed in their charge, resist an attack, are entitled, if captured, to the status of prisoners of war. The personnel of a merchant vessel of an enemy captured as a prize can be held, at the discretion of the captor, as witnesses, or as prisoners of war, when by training or enrollment they are immediately available for the naval service of the enemy, or they may be released from detention or confinement. They are entitled to their personal effects and to such individual property, not contraband of war, as is not held as part of the vessel, its equipment, or as money, plate, or cargo contained therein. All passengers not in the service of the enemy and all women and children on board such vessel should be released and landed at a convenient port, at the first opportunity. Any person in the naval service who pillages or maltreats, in any manner, any person found on board a merchant vessel captured as a prize, shall be severely punished.<sup>23</sup>

§ 503. **Application of Red Cross Conventions to wounded at sea.**—As explained heretofore, while warfare on land has been regulated from time to time by conferences of the great powers, no binding agreement was ever reached designed to regulate even in part warfare at sea prior to the Peace Conference at The Hague, whose third convention extended the rules of the Red Cross Conventions of 1864 and 1868, with some modifications, to such warfare. By their own terms such rules are

<sup>22</sup> Mahan's *Nelson*, p. 303.

<sup>23</sup> Am. Naval Code, Art. XI.

binding on the contracting powers only in case of war between two or more of them; and from the time when one of the belligerents is joined by a non-contracting power they cease to bind even the former.<sup>24</sup> Such rules, relating mainly to the wounded and to hospital ships, may be summarized as follows:—the shipwrecked, wounded, or sick of one of the belligerents, who fall into the hands of the other, are prisoners of war. The captor must decide, according to circumstances, if it is best to keep them, or to send them to a port of his own country, to a neutral port, or even to a hostile port. In the last case, prisoners thus repatriated cannot serve as long as the war lasts.<sup>25</sup> Sailors and soldiers who are taken on board when sick or wounded, to whatever nation they belong, shall be protected and looked after by the captors.<sup>26</sup>

§ 504. **Religious and medical staff.**—The religious, medical, or hospital staff of any captured ship is inviolable, and its members cannot be made prisoners of war. On leaving the ship they take with them the objects and surgical instruments which are their own private property. They may continue to discharge their duties while necessary, and can afterwards leave when the commander-in-chief considers it possible. Belligerents must guarantee to members of such staffs falling into their hands the enjoyment of their salaries intact.<sup>27</sup>

§ 505. **Hospital Ships.**—Military hospital ships,—that is to say ships dedicated by states specially and solely to the purpose of assisting the wounded, sick, or shipwrecked,—shall be respected, and cannot be captured while hostilities last, provided the names of such ships shall have been communicated to the belligerent powers at the commencement or during the course of hostilities, or in any event before they are employed. So far as regards their stay in a neutral port, such ships are not, however, on the same footing as men-of-war.<sup>28</sup> Hospital ships, equipped wholly or in part at the cost of private individuals or officially recognized relief societies, shall likewise be respected and exempt from capture, provided the belligerent power to whom they belong has given them an official commission and has notified their names to the hostile power at the commencement of or during hostilities, and in

<sup>24</sup> Hague Third Convention, Art. XI.

<sup>26</sup> *Ib.*, Art. VIII.

<sup>27</sup> *Ib.*, Art. VII.

<sup>25</sup> Hague Third Convention, Art. IX.

<sup>28</sup> *Ib.*, Art. I.

any case before they are employed. Such ships should bear a certificate from the competent authorities, declaring that they were under their control while fitting out and at their final departure.<sup>29</sup> Hospital ships, equipped wholly or in part at the cost of private individuals or officially recognized societies of neutral countries, shall be respected and exempt from capture, if the neutral power to whom they belong has given them an official commission and notified their names to the belligerent powers at the commencement of or during hostilities, and in any case before they are employed.<sup>30</sup> Military hospital ships shall be distinguished by being painted white outside, with a horizontal band of green about a metre and a half in breadth. The private or neutral ships above mentioned shall be distinguished by being painted white outside, with a horizontal band of red about a metre and a half in breadth. Boats belonging to such ships as well as small craft employed in hospital work, shall be distinguished by similar painting. All hospital ships are required to make themselves known by hoisting, together with their national flag, the white flag with a red cross provided by the Geneva Convention.<sup>31</sup> Such ships which cannot be used by the governments concerned for any warlike purpose shall afford relief and assistance to the wounded, sick, and shipwrecked of the belligerents independently of their nationality. During and after an engagement they act at their own risk and peril; and they must not in any way hamper the movements of the combatants. The belligerents have the right to control and visit them; they can refuse their assistance; order them off; make them take a certain course; put a commissioner on board; and they can even detain them if important circumstances require it. As far as possible the belligerents shall inscribe on the sailing papers of the hospital ships the orders which they give them.<sup>32</sup>

§ 506. **Effect of rescue by a neutral.**—While under the rules adopted at The Hague Conference neutral merchantmen, yachts, or vessels, having, or taking on board, sick, wounded, or shipwrecked of the belligerents, cannot be captured for so doing, they are liable to capture for any violation of neutrality they may have committed.<sup>33</sup> No attempt was made, however, to determine the fate of belligerents so rescued. The American delegates at The Hague endeavored to secure the adoption

<sup>29</sup> Hague Third Convention, Art. II.

<sup>31</sup> *Ib.*, Art. V.

<sup>32</sup> *Ib.*, Art. IV.

<sup>30</sup> *Ib.*, Art. III.

<sup>33</sup> Holls' Peace Conference, 469.



of certain articles making such rescued men prisoners on demand of either belligerent, but this never came to a vote.<sup>34</sup> Article 10, as adopted, provided for the internment of those landed in a neutral country, but from the convention as ratified that article was omitted.<sup>35</sup> The American naval code provides that merchant vessels, yachts, or neutral vessels, that happen to be in the vicinity of active maritime hostilities, may gather up the wounded, sick, or shipwrecked of the belligerents. Such vessels, after this service has been performed, shall report to the belligerent commander controlling the waters thereabouts, for future directions, and while accompanying a belligerent will be, in all cases, under his orders; and, if a neutral, shall be designated by the national flag of that belligerent carried at the foremasthead, with the red cross flag flying immediately under it. These vessels are subject to capture for any violation of neutrality that they may commit, and any attempt to carry off such wounded, sick, and shipwrecked, without permission, is a violation of neutrality.<sup>36</sup> It should be noted that this provision is stronger than the American proposal at The Hague in that it compels the neutral rescuer to surrender his guest to the stronger belligerent. Whether a neutral can be required to make a surrender under such circumstances is an unsettled question. A notable case was that of Captain Semmes of the *Alabama*, rescued by the British pleasure yacht *Deerhound*, whom Great Britain declined to surrender to the United States.<sup>37</sup>

§ 507. **Naval reprisals.**—According to the American naval code, in the event of an enemy failing to observe the laws and usages of war, resort may be had to reprisals, when the offender is beyond reach, if such action should be considered a necessity; but due regard must always be had to the duties of humanity. Reprisals should not exceed in severity the offense committed, and must not be resorted to when the injury complained of has been repaired. If the offender is within the power of the United States, he can be punished, after due trial, by a properly constituted military or naval tribunal. Such offenders are liable to the punishments specified by the criminal law.<sup>38</sup>

<sup>34</sup> Holls' Peace Conference, 131.

<sup>35</sup> *Ib.*, 127-130.

<sup>36</sup> Am. Naval Code, Art. 25.

<sup>37</sup> Semmes' Service Afloat, 766.

<sup>38</sup> Am. Naval Code, Art. 8.

## CHAPTER V.

### LIMITATION, SUSPENSION AND CONCLUSION OF HOSTILITIES.

§ 508. How non-hostile relations are established.—In the statements contained in the two preceding chapters as to the laws of war regulating the rights and duties of belligerents during hostilities on land and sea, no reference was made to those expedients through which particular individuals are protected against the operation of general rules by flags of truce, passports, safe-conducts, or licenses to trade; or to those wider means, such as cartels, suspensions of arms, armistices, truces and agreements for capitulation through which hostilities are entirely suspended for a time as to a part or the whole of the armed forces of the enemy. All such arrangements, substituting non-hostile for hostile relations, rest upon the assumption that they will be carried out with perfect good faith, under rules requiring a strict construction of all special permissions, and such a construction of all general stipulations as will secure to each belligerent the full benefit of their expressed or implied intention, without permitting either to use them as a cover for acts not contemplated by them.

§ 509. Cartels: postal and telegraphic communications; cartel ships.—Cartels really represent the first step taken in the establishment of that kind of non-hostile intercourse called by Vergil *commercium belli*,<sup>1</sup> because as agreements entered into during war, or in anticipation of it, they determine not only the extent to which hostile relations shall be suspended but also the mode in which such direct intercourse as may be permitted shall be conducted. While in contemplation of the constitution of the United States they are not treaties, cartels are of such force that the sovereign power cannot annul them. Every belligerent is bound to observe such contracts,<sup>2</sup> and it is their province to prescribe the rules regulating the reception of bearers of flags of truce, the treatment of the wounded and

<sup>1</sup> Æneid X, 432; Tacitus, Ann. XIV, 33. See 6 Webster's Works, 438. <sup>2</sup> Dana's Wheaton, §§ 254, 344; Halleck, Int. Law, II, p. 326 seq.; Martens, *Précis*, § 275; U. S. v. Wright, 2 Pitts. R. 440.

prisoners of war, the exchange of prisoners by land and sea, the interchange of postal and telegraphic communications and the like. Whether such communications are to be permitted at all is a matter to be determined in each case by the belligerents themselves, who likewise regulate the method of their exchange whenever an agreement is made to that effect. As each of the other subjects involved can be more conveniently treated elsewhere, it will only be necessary to consider here the special regulations concerning cartel ships employed in the conveyance of prisoners to and from the place of exchange. Such vessels usually sail under a safe-conduct issued by an officer called a commissary of prisoners, who resides in the enemy country, although, when the *bona fides* of the employment has been clear, the immunities of a cartel ship have been accorded to vessels sailing under an agreement with a commanding officer, not authenticated by formal documents. When properly authorized such a vessel is exempt from belligerent capture or molestation while actually engaged in the work of exchanging prisoners, whether she has prisoners on board or not. Such protection does not extend, however, to a voyage undertaken from one port to another of the state to which the cartel ship belongs for the purpose of transporting prisoners from the latter place to the hostile territory. Such a ship forfeits her privileges if she departs from the strict line of the special business to which she is assigned, or gives good reason for the suspicion that she intends to do so. No fraudulent use must be made of her to acquire information, and she cannot carry either merchandise or passengers for hire. While belligerents may employ vessels, either public or private, in their cartel service, these must not be in a condition to carry on hostilities; they are permitted only one gun for the purposes of salutes.<sup>3</sup>

§ 510. **Flags of truce.**—When a belligerent desires to negotiate with the enemy he is expected to send a negotiator accompanied by a person bearing a white flag, and a drummer or a bugler. While such a flag of truce (*parlamentärflagge*) must not be fired upon intentionally under ordinary circumstances, the bearer may be refused admittance or not parleyed with,

<sup>3</sup> The *Daifje*, 3 Rob. 141-3; the § 2117-9; Admiralty Manual of Venus, 4 Rob. 357-8; La Gloire, 5 Prize Law (Holland), 1888, p. 11-Rob. 192; The *Mary*, *Ibid.*, 200; 12; Duer, *On Ins.*, vol. 1, pp. 539 The *Carolina*, 6 Rob. 336; Calvo, *seq.*

provided a contrary course would be inconsistent with military conditions. If the flag is sent during an engagement, the sending detachment should cease firing, and so should the other if willing to receive it. A flag *per se* asks no cessation of hostilities except as to the party bearing it, for instance, the boat crew bringing it, if it be sent at sea.<sup>4</sup> Although firing need not always cease, "for the decisive moment of victory might pass," it would be very hard to justify an attack upon an enemy who, after ceasing his fire, shows his wish to parley.<sup>5</sup> At Cavite Arsenal Sostoa hoisted a white flag for a while in order to gain time to remove non-combatants. The Americans went ashore next day under the false impression that it meant surrender. When persons under the protection of a flag of truce are received by the enemy "the right of inviolability" attaches to them; they must be protected from personal injury, and permitted to return to their own lines. Every precaution can be taken, however, to prevent them from using their mission as a means of acquiring information. To that end they may be stopped at the outposts and their communications received from that point; they may be temporarily detained and shut off from all communication with persons other than those designated; or they may be subjected to blindfolding or any other necessary and reasonable precaution. While a person under a flag of truce may communicate to his chief any information he may have obtained without effort upon his part during his stay within the enemy's lines, any attempt to acquire knowledge surreptitiously makes him liable to punishment as a spy.<sup>6</sup> A flag of truce does not protect deserters whether they bear it or go in attendance upon it. They may be seized and executed, notice being given to the enemy of the reason of their execution.

**Political conferences.**—Sometimes political authorities meet under a flag of truce for purposes which may or may not be of a military nature. Thus Napoleon and Alexander met on the raft at Tilsit as sovereigns rather than as generals. One of the most notable recent instances of the kind occurred at Hampton Roads, February 3, 1865, near the close of the American civil war, when President Lincoln, Secretary of State Seward and other federal officials met Vice-President Steph-

<sup>4</sup> Mahan's Nelson, 486.

<sup>6</sup> Bluntschli, *Mod. Kr.*, § 181

<sup>5</sup> Maine, *Int. Law*, 189; Heffter, (681) et seq.; *Am. Reg.* 111, 113, p. 278, G. n. 5. 116. etc.

ens, and the other Confederate commissioners, by special agreement, in order to discuss the means of securing a permanent peace. During the hours in which the negotiators steamed about the roadstead in earnest conference, war did not cease on land or sea. On that day, from the Potomac to the Rio Grande, hostilities were suspended only upon the deck of the little vessel covered by the white flag.

§ 511. **Safe-conducts, passports, and safeguards.**—A safe-conduct (*sauvegarde*) or passport is a document given by a commander authorizing certain designated persons to pass within the limits occupied by his force. Its extent, therefore, varies with and follows the jurisdiction of such commander. While the term passport is usually limited to persons, safe-conduct extends to persons and things. One may be implied from circumstances, as when M. Schnabele, a Frenchman, was invited over the frontier by German officials. It was held that such an invitation implied the right to return.<sup>7</sup> A safe-conduct to go may, therefore, imply the right to return, and in all cases implies protection so far as it extends. If granted to a person by name, it covers his equipage, but not his family; if to a class, it covers all degrees of that class, as in the case of the clergy.<sup>8</sup> Neither passport nor safe-conduct is of value outside the district of the officer granting it. To be general, therefore, either must be given or confirmed by commanders-in-chief or their deputies *ad hoc*. A safeguard is a protection granted to institutions or to specially favored persons or property during military occupation.<sup>9</sup> It may cover a particular person, place or thing, and is usually granted for the protection of archives, libraries, museums and buildings of a like nature against injury by soldiery after an assault or battle. The concessions first named can be revoked only by an authority equal to that by which they are granted.<sup>10</sup> The death or suspension of the officer granting them does not *ipso facto* affect them.<sup>11</sup> While soldiers given as a safeguard cannot be attacked by the enemy, they can resort to the severest measures in punishing any violation of the safety of their trust.

§ 512. **Licenses to trade defined; by what authority granted.**—

<sup>7</sup> Maine, Int. Law, 190; 1 Kent  
Comm. 162; Vattel, III, ch. 17.

<sup>9</sup> Martens, *Précis*, VIII, ch. 3, §  
13.

<sup>8</sup> These rules are attributed to  
Grotius in 2 Wildman Int. Law, 29.

<sup>10</sup> Calvo, *Droit Int.*, II, 273-5.

<sup>11</sup> Heffter, § 142, Geffcken, n. 1.

Licenses to trade are permissions or safe-conducts to carry on commerce forbidden by the ordinary laws of war or by the municipal laws of the grantor; and are either general or special. They are general when granted by a state to all of its own subjects, or to all neutral or enemy subjects, as authority to trade in particular articles or at particular places; special, when given only to particular individuals as authority to trade in the manner prescribed by their terms. In either case all disabilities of the enemy are removed within the scope of the permission, by virtue of which the recipient can contract with the subjects of the hostile state and enforce his contracts in its courts.<sup>12</sup> Licenses may be granted directly by the belligerent government, or by a general in the field, with its sanction. If a license is granted by such an officer in excess of his authority, it is, as a general rule, valid as to the forces under his command.<sup>13</sup> It was held, however, by the Supreme Court of the United States that the act of Congress of July 13, 1861, authorizing the President to license certain commercial intercourse with the Confederate States, did not contemplate the exercise of that authority by subordinate officers without the express order of the executive. Therefore, when a certain firm in New Orleans obtained from an agent of the treasury department in that city a special permit, "approved" by Admiral Farragut, commanding the blockading force on that coast, as a license for the shipment of cotton from the port of Mobile, the ship and cargo were condemned as prize of war, after the seizure by the blockading squadron of which Admiral Farragut was the chief.<sup>14</sup> As the issuance of a license is a high act of sovereign power, depending upon an exact knowledge of the special circumstances, it is an implied condition of its validity that the application for it shall not be attended by misrepresentation of material facts. As Lord Stowell has expressed it a licence "is a thing *stricti juris*, to be obtained by a fair and candid representation and to be fairly pursued." A misrepresentation or suppression will invalidate it, although not made with the intent to deceive.<sup>15</sup>

<sup>12</sup> *Usparicha v. Noble*, 13 East, 341. In *Kensington v. Ingles*, 8 East, 290, Lord Ellenborough held, however, that an enemy trader in England can not sue in his own name, though he can through a British agent or trustee. *Halleck*, *il*, 343 seq.; *Hall*, § 196.

<sup>13</sup> *The Hope*, 1 Dodson, 229; *Woods v. Wilder*, 43 N. Y. 164.

<sup>14</sup> *The Sea Lion*, 5 Wall. 630. See also *Coppell v. Hall*, 7 Wall. 542.

<sup>15</sup> *The Vriendschap*, 4 Rob. 98; *Klingender v. Bond*, 14 East, 484; *the Jonge Klassina*, 5 Rob. 297.

**How licenses are to be construed.**—The general rule is that a license to trade is to be given a reasonable construction, with reference as well to the general conditions attending its issuance as to the special circumstances of the particular case. While it may not be to the interest of the grantor to construe it too literally, it should be so construed as to carry out his real intention entertained at the time. So where a license is granted to a particular person by name, or to a particular person and others, he may act either as principal or agent, although without interest in the property in which the trade is carried on under it. If a license is made negotiable, the transferee will be protected, although, as a general rule, it is not transferable.<sup>16</sup> For that reason when granted to a particular person, he cannot act under it as an agent for others, and in that way make his personal privilege a subject of transfer and sale. As to the character of the ship in which the goods are to be transported, it may be said that, as a general rule, her national character as described in the license is a necessary condition to be fulfilled. It is probable, however, that such condition would not be violated if, for the vessel of a particular nation specified, the vessel of another neutral should be substituted; or, if the terms of the license refer only to one vessel, the employment of two, provided both bear the same national character and there be no variation in the quantity or quality of the goods described in the license. As to the goods themselves in favor of which a license is given, limiting their quantity or specifying their character, there can be no condemnation when there is a reasonable general correspondence between the cargo conveyed and the terms of the license by which it is covered. If a permission, authorizing the importation of goods from an enemy's ship, is confined in terms to the goods, by a just legal construction it will be extended to the vessel also.<sup>17</sup> A neutral operating under a

<sup>16</sup> *Feize v. Thompson*, 1 Taunton, 121; *Warin v. Scott*, 4 Taunton, 605; *Robinson v. Morris*, 5 Taunton, 740. The privilege to trade under a license can be sold when it is perfectly general in its terms and not granted to specific individuals. *The Acteon*, 1 Dodson, 53. See also *Fenton v. Pearson*, 15 East, 419; *Grigg v. Scott*, 4 Campb. 340; *The Juno*, 2 C. Rob.

116; *Klingender v. Bond*, 14 East 484; *The Sarah Maria*, Edwards, 361; *The Ranger*, 6 Ch. Rob. 125.

<sup>17</sup> *Kensington v. Inglis*, 9 East, 273; *the Dankbaarheid*, 1 Dodson, 183; *the Vrow Cornelia*, 1 Edw. 340; *the Jonge Arend*, 5 Rob. 14; *the Goede Hoffnung*, 1 Dod. 257; *the Bourse*, 1 Edw. 369; *the Speculation*, 1 Edw. 344; *the Hoffnung*, 2 Rob. 162. "A privilege given by

license thereby becomes liable to capture by the other belligerent, even if the license is in fact unauthorized.<sup>18</sup> As between the belligerents themselves, the ship of a person navigating under an enemy's license is subject to condemnation by the state to which its possessor belongs.<sup>19</sup> Where a trade is licensed insurance on cargo is lawful as an incident to it.<sup>20</sup> To be effective the license must be on board at the time of the visitation.

**Course of voyage; time limited in license.**—The requirements of the license as to the port of shipment or delivery, of departure or destination, must be followed strictly; and the same may be said as to a direction that the ship shall stop at a particular port for convoy. If she touches for orders at an interdicted port, the license is forfeited, a result which would not follow an unauthorized deviation, for the same purpose, to a neutral or other port not forbidden, or a deviation from the prescribed course produced by stress of weather, or other unavoidable accident. Such are the leading exceptions to the general rule that deviation from the prescribed course entails confiscation. A limitation as to the time a voyage shall begin for the exportation of goods to an enemy's port is subject to a much more rigid construction than a limitation as to the importation of goods within a designated time. In the first case, where the license requires that the goods covered by it shall be exported on or before a certain day, a delay of a single day beyond the limit will render the license wholly void. In the second, when a date is fixed before which the vessel must arrive, allowance will be made for delays caused by stress of weather, the acts of hostile governments, or other like causes over which the holder of the license has no control.<sup>21</sup>

act of Parliament to ships belonging to any state in amity with Great Britain and manned with foreigners, to import merchandise, otherwise prohibited, does not extend to foreign built ships, British owned. (*Attorney-General v. Wilson*, 3 Price, 431.)" *Halleck*, ii, p. 351, note 1. See *Keir v. Andrade*, 6 Taunt. 498.

<sup>18</sup> *The Julia*, 8 Cranch. 181; *the Aurora*, Ib. 203, 444; *the Alliance*, *Blatchf. Pr. C.* 262.

<sup>19</sup> *The Hiram*, 1 Wheat. 440; *the*

*Ariadne*, 2 Wheat. 143; *the Julia*, 1 Gall. 233, 8 Cranch 181.

<sup>20</sup> *The Europa*, 1 Edw., 341; *the Minerva*, Ib. 375; *the Emma*, Ib. 366; *the Twee Gebroeders*, Ib. 97; *the Byfield*, Ib., 188; *the Manly*, 1 Dod. 257. But see *the Emma*, *Edwards*, 366.

<sup>21</sup> *The Sarah Maria*, 1 Edw. 361; *the Diana*, 2 Act., 34; *the Æolus*, 1 Dod. 300; *Williams v. Marshall*, 6 Taunt. 390; *Effurth v. Smith*, 5 Taunt. 329; *Siffken v. Glover*, 4 Taunt. 77; *Groning v. Crockatt*, 3 Camp. 55.



**Licenses to trade becoming obsolete.**—The complicated system of judicial rules thus laid down by the prize courts as to the construction of licenses was an outcome of the conflict between France and England for commercial supremacy at the end of the eighteenth and the beginning of the nineteenth century, during which a very large number were granted by both belligerents. Despite such relaxations, however, unfortunate neutrals, chief among whom was the United States, found their commerce seriously restricted by both sides. The right of neutrals to hold commercial intercourse with belligerents was almost denied by the efforts of each, under the guise of blockades which existed only on paper, to prevent all trades that could not be made subservient to its own interests. To prevent a repetition of such a condition of things, the Declaration of Paris, 1856, provided that blockades, in order to be binding, must be effective; and that enemy goods not contraband of war might be freely carried on neutral ships; “and it is quite certain that in future maritime struggles neutral powers will not again submit to such treatment as they received from France and England in the crisis of their great conflict for commercial supremacy.”<sup>22</sup> Licenses to trade were not issued during the Crimean War. Instead, Great Britain declared by an Order in Council of April 15, 1854,<sup>23</sup> that “all vessels under a neutral or friendly flag, being neutral or friendly property, shall be permitted to import into any port or place in Her Majesty’s dominions all goods and merchandise whatsoever, to whomsoever the same may belong; and to export from any port or place in Her Majesty’s dominions to any port not blockaded any cargo or goods, not being contraband of war, or not requiring special permission, to whomsoever the same may belong.” Like permission was granted to both subjects and neutrals by the governments of France and Russia.

**§ 513. Suspensions of arms, armistices, and truces.**—The word truce is a generic term which, in its broader sense, covers all cessations of military operation regardless of their extent as to time or place. In that sense it embraces a parley, a brief intermission confined to the immediate combatants; a suspension of arms, longer in duration but limited to a particular place; an armistice, a still longer cessation between larger

<sup>22</sup> Lawrence, Principles, p. 451.      *sito v. Bowden*, 7 E. and B. 763;

<sup>23</sup> As to the effect of that and like orders on the trade of a British subject with the enemy, see *Espo-*  
and the *Odessa*, Spinks Pr. R. 208.

bodies; and a truce proper between entire armies or countries for a general purpose, which may be political. The Truce of God in the tenth century affected all of Europe, while that between Holland and Spain in the seventeenth lasted twelve years. The various terms are often used, however, interchangeably. Such arrangements for military purposes are within the power of every independent officer so far as concerns the troops commanded by him. The object being temporary, everything at the end should be in the same position as at the beginning of the armistice,<sup>24</sup> and each army must refrain from repairing or strengthening works or making disposition of troops which could have been commanded by the enemy's guns if hostilities had continued. Thus the besieged cannot repair a breach and the besiegers cannot push troops to unoccupied points, although deserters may be received.<sup>25</sup> Either side may drill, bring up recruits and stores, and do any other thing by means of routes not occupied or commanded by the enemy when the armistice was declared.<sup>26</sup> According to Livy, Philip violated this rule by retreating while under a flag of truce,<sup>27</sup> and Arabi Pasha, who did the same thing at Alexandria in 1882, was afterwards tried and condemned for it. On the other hand, it was perfectly proper for Sherman to repair railroads during the armistice with Johnston, although the prime object was to use them for attack in the event the convention was not approved by the Federal government. Much depends, however, in each particular case upon the actual terms of the agreement, which are usually dictated by the stronger party.<sup>28</sup> While an intentional breach of truce authorizes the opposing commander to recommence hostilities without more, its violation by particular acts may be prevented by force by the other side without a general renewal of hostilities. When soldiers break an armistice and are captured, they are only prisoners of war. The officer giving the orders under which they act is alone responsible,<sup>29</sup> and redress must therefore be sought at headquarters. When a truce is to extend from such a day to

<sup>24</sup> Chaudordy, in D'Angeberg, Rec. No. 758; 1 Kent Comm. 159; Vattel, *Droit des Gens*, § 209.

<sup>25</sup> Am. Regulations, 143; Calvo, *Droit Int.*, II, 284, considers receiving deserters as a hostile act and therefore forbidden. Catching rain for a thirsty garrison is as reprehensible!

<sup>26</sup> Bluntschli, *Mod. Kr.*, §§ 188 (688), 191 (691), etc.; Vattel, *Droit des Gens*, III, ch. 16, § 239-260.

<sup>27</sup> Livy, lib. XXXI, c. 38.

<sup>28</sup> Calvo, *Droit Int.*, II, 285-7. See Thiers, French Revolution.

<sup>29</sup> Am. Regulations, 146.

another, it is often difficult to determine whether the term is inclusive or exclusive of the dates named. Puffendorf and Vattel maintain that both are included, while an English commission in 1831 held that the last was included and the first excluded,—thus requiring troops to continue fighting on the day they agree to cease.<sup>30</sup> When ambiguous, the terms of such an agreement are to be construed liberally.<sup>31</sup> Although they bind individuals only from the time they learn of them, the government responsible for a breach should make good to the other any injury inflicted in the meantime.<sup>32</sup> A truce according to some authorities authorizes private trade between opponents within the limits affected.

**Revictualling a besieged place.**—Because there has been no settled general rule as to the right of revictualling a besieged place during a truce, conventions have often been made to remove the difficulty in particular cases. Under the Armistice of Treviso in 1801 Mantua was to receive a fixed amount of provisions for the garrison from ten days to ten days,—the inhabitants being permitted at the same time to bring in supplies for themselves, subject to the supervision of the French military authorities, who reserved the right to prevent the quantity exceeding the daily consumption.<sup>33</sup> Under the Armistice of Pleiswitz in 1813 the commanders of the investing troops were to revictual the fortresses held by the French every five days, a commissary named by the commandant of each of the besieged places being charged with the duty of watching over the exactness of the supply.<sup>34</sup> These conventions recognized the right of revictualment, at short intervals, under the supervision of the besieger; and that should be the general rule in the absence of contrary stipulations, because, if that right is not allowed to the besieged, the general principle that at the end of a truce the state of things shall be unchanged in those matters which an enemy can influence will be set aside in a vital particular. As provisions are an exhaustible weapon of defense, the consumption of which cannot be suspended, the mere continuance of a truce must soon crush the besieged if they are not permitted to maintain the conditions existing at its beginning. And yet, despite that cogent

<sup>30</sup> Bluntschli, *Mod. Kr.*, 195 (695); Calvo, *Droit Int.*, II, 288; Halleck, *Int. Law*, 658.

<sup>32</sup> Heffter, § 142. See, however *Am. Regulations*, 141, *contra*.

<sup>33</sup> Martens (R.) vii, 294.

<sup>31</sup> 2 Wildman, *Int. Law*, 27; Vattel, *Droit des Gens*, III, § 244.

<sup>34</sup> Martens (N. R.) i, 584.

contention, the weight of opinion seems to favor the idea that in case the besieging army is in a position to prevent the introduction of supplies into a besieged place in the absence of truce, their introduction during its continuance is inadmissible unless authorized by an express permission to that effect. Upon that basis Prince Bismarck, during the Franco-Prussian war, refused to permit the introduction of supplies even in limited quantities. In November, 1870, he even refused to permit Paris to receive sufficient food for the subsistence of the population during a twenty-five days' armistice which it was then proposed to conclude in order that an assembly might be elected competent to decide the questions involved in the making of peace. In a circular addressed to the French diplomatic agents abroad, denouncing such conduct as a violation of the spirit of the armistice, M. de Chaudordy clearly defined, not what the settled rule of law is, but what it should be in all such cases.<sup>35</sup>

§ 514. *Capitulations.*—Capitulation or surrender is frequently the result of an armistice. Of the two words capitulation, whose terms vary with the generosity or strength of the conquering army, is generally regarded as the more creditable. Sometimes the besieged surrender without conditions, as Cronje to Roberts in the Boer war; sometimes they march out with honors of war, that is, with flags and drums, and ground their arms.<sup>36</sup> Sometimes they are allowed to withdraw to their own lines, as when Galvez in 1781 permitted Campbell to sail from Pensacola to New York; or as the Spaniards, who surrendered at Santiago to the Americans in 1898, were permitted to embark for Europe as soon as vessels were provided by their own country. The surrender of a town carries only so much territory as submits with it.<sup>37</sup> During the Franco-Prussian war, in the earlier capitulations, such as those of Sedan, Strasburg and Metz, the troops were sent prisoners of war to Germany, but in the later ones the officers were released on parole with their arms, horses, and effects. The *gardes nationaux* and *mobiles*, who belonged to the respective places, were not made prisoners, although all other soldiers

<sup>35</sup> "Pour tous les peuples en effet, la condition du ravitaillement est implicitement contenue dans le principe de l'armistice, puisque chaque belligérant doit se trouver, à la fin de la suspension d'hostili-

tés, dans l'état où il se trouvait au commencement." D'Angeberg, Rec. No. 758. Hall, § 192.

<sup>36</sup> Halleck, 660.

<sup>37</sup> Clark v. U. S., 3 Wash., 101.

were. The military equipment and the like was of course taken possession of by the conquerors.<sup>38</sup> Sometimes the surrender is on condition of parole for all the army, as in the case of Lee at Appomattox. In fact, capitulations and truces may assume any form that may be agreed on, provided no political conditions are inserted.

**Destruction of stores.**—Capitulation carries with it the tacit agreement not to destroy munitions then on hand, or otherwise alter the condition of the works surrendered. Nothing, however, prevents a commander when capitulation becomes inevitable from destroying everything possible beforehand, in order to minimize the success of the enemy.<sup>39</sup> Thus, in 1865, during the American Civil War, Gen. Page destroyed all the ammunition and stores he could before surrendering Fort Morgan, near Mobile, and a court martial of the enemy sustained him. Sarrazin's criticism of the action of the French at Almeida in 1811 in destroying stores and even fortifications before retreating seems to be groundless.

**When surrender is complete.**—Surrender is not complete until accepted, a fact usually but not necessarily evidenced by the tender and receipt of the sword of the conquered. While Washington received the sword of Cornwallis at Yorktown, Capt. Evans refused to accept that of the wounded Eulate when brought aboard the Iowa, and Shafter that of Toral tendered at Santiago. Such a ceremony may now be regarded as an archaism, departing with other symbolic forms of primitive law. It was not necessary for Lee to tender his sword to Grant; in point of fact he did not tender it, and Grant did not refuse it. Their minds met in a written capitulation which, by its terms, allowed the conquered to retain their side arms; nothing more was necessary. Pulling down the flag, or hoisting a white flag, is an offer to surrender, consummated when control, actual or symbolical, is assumed by the conqueror. After such an offer the conquered are bound to wait a reasonable time before renewing battle or attempting to escape; otherwise their action might be regarded merely as a trick to secure some advantage. If, however, the flag is immediately recalled before it is acted on, no law is violated, as in the case of the Santissima Trinidad in the battle of Cape St. Vincent.<sup>40</sup> If the offer is not accepted, the fight may be renewed, of course

<sup>38</sup> Calvo, II, 289.

<sup>40</sup> Mahan's Nelson, 236.

<sup>39</sup> Am. Regulations, § 144.

under colors, or escape may be effected. Acceptance is not a matter of course. The conqueror may not desire prisoners; he may not be in condition to consummate the matter; or he may be prevented by new circumstances from doing so. If the enemy is satisfied with a victory and marches off when the flag is shown, the weaker party cannot be considered prisoners, as their offer has in effect been rejected. If a relieving force routs the conquerors, prior to the acceptance of the white flag of their comrades, the offer of surrender is avoided, and there is no question of prisoners. In capitulations, as in all other agreements, the minds of both parties must meet; and if the forms appropriate to the particular occasion are not carried into effect, there is no contract.

§ 515. *Sponsions*.—In time of war certain conventions may be concluded without special authority by virtue of the implied powers incident to the offices of certain persons in high command. Such, for example, as truces made by generals and admirals suspending or limiting hostilities within the limits of their respective commands; cartels for the exchange of prisoners; or capitulations for the surrender of a city, province, or fortress. Unless there is a special reservation in the act itself, compacts of that kind do not generally require a ratification by the supreme power of the state to which the officer belongs.<sup>42</sup> The state is not bound, however, if its representative exceeds the limits of his authority, express or implied; or if he includes political conditions among the articles agreed to. Such engagements, when made without express authority, or beyond the limits of such as may be reasonably inferred, are called sponsions, and are not binding until confirmed either by express or tacit ratification. As Martens has expressed it: "Whatever the chief or the inferior promises beyond the limits of the authority intrusted to him is only a simple spension which nothing but a subsequent ratification, either express or implied on the part of the nation, can render obligatory."<sup>43</sup> As the ratification of neither party can be inferred, in the case of conventions concluded in excess of specific powers, from mere silence,<sup>44</sup> good faith requires that

<sup>42</sup> Grotius, *De Jure Belli ac Pacis*, III, c. 22, §§ 6-8; Vattel, *Droit des Gens*, II, c. 14, § 207.

<sup>43</sup> *Précis*, II, c. 11, § 48. "A simple spension, that is an agreement formed in the name of a state either by its representative or by a voluntary agent, they not having been authorized, is only obligatory when it is ratified by the state." Klüber, § 142.

<sup>44</sup> Dana's *Wheaton*, § 255; Hal-

the party who resolves to dissent from what has been done in its name should promptly indicate the fact to the other party so as to prevent the carrying of its part of the agreement into effect. And in the event that a state repudiating the act of its agent received some benefit or advantage as a result of the unauthorized agreement, or in the event that the other state has performed acts in accordance with it, it is the duty of the former either to give to the latter compensation, or at least to restore it to its original status.<sup>45</sup>

**Capitulation of El Arish in 1800.**—Passing over the examples of sponsions embodied in the capitulation made by the commanders of the Roman army while inclosed in the defiles of the Caudine Forks, repudiated by the Roman senate;<sup>46</sup> in the convention concluded at Closter-Seven, during the Seven Years' War, between the Duke of Cumberland, commanding the British forces in Hanover, and Marshal Richelieu, commanding the French army, for a suspension of arms in the north of Germany, annulled by the King of England in his capacity of Elector of Hanover; in the armistice and capitulation, granting amnesty to their revolted subjects under which the king and queen of Naples reëntered their capital in 1799, set aside as "infamous" by Lord Nelson, who compelled the rebels to surrender at discretion;<sup>47</sup> in the capitulation of the French under Rapp at Dantzic in 1814, on condition that they should return to France, disregarded by the Czar, who held them as prisoners of war; and in the convention ratified by General Butler in March, 1848, during the Mexican war, providing that the Mexican civil authorities were to be reëstablished in their respective offices, ignored by the American commander of the separate military department of California, special reference must be made to the capitulation of El Arish, notable as an illustration of an agreement made by a military commander contrary to his instructions, although, as it happened, in

leck, i, p. 277. Hall (§ 110) well says that "the writers who say that ratification cannot be inferred from silence are evidently thinking of conventions concluded in excess of specific powers, and not of agreements which are practically within the powers of the persons making them, but which are not technically binding from the moment of their conclusion, owing

to the signatories not being the persons in whom the treaty-making power of the state is theoretically lodged by constitutional law."

<sup>45</sup> Grotius, *De Jure Belli ac Pacis*, II, c. 15, § 16; III, c. 22, §§ 1-3; Vattel, II, c. 14, §§ 209-212; Rutherford's *Inst.* II, c. 9, § 21.

<sup>46</sup> 1 Mommsen's *Rome*, 471.

<sup>47</sup> Mahan's *Nelson*, 367.

ignorance of their terms. When in December, 1799, General Kleber, the commander of the French army in Egypt, perceived that he could not maintain himself permanently in the country, he made a proposal of capitulation to the Grand Vizier who was advancing through Syria, and to Sir Sidney Smith, acting on the coast as commodore, under the orders of Lord Keith, the admiral commanding the English fleet in the Mediterranean. Under such conditions Sir Sidney Smith assumed the responsibility of signing an agreement with General Kleber, on January 24, 1800, conceding to the French army in Egypt the right to evacuate the country, and to return to France through their own ports with their arms, baggage and other property. On February 22, 1800, a month after the signing of the capitulation, and after Kleber had already restored certain places to the Turks under its provisions, Sir Sidney Smith received orders from Lord Keith instructing him not to consent to any terms not involving the surrender of the French troops as prisoners of war. Such orders were based on instructions sent from London to Lord Keith on the previous 17th of December. When the French commander was thus informed that what Sir Sidney Smith had done was repudiated by his superior officer, under orders from his government, he renewed hostilities so vigorously as to gain a great victory over the Turks at Heliopolis on March 20, 1800. Before the news of these changed conditions reached England, the British cabinet resolved to ratify the capitulation which Sir Sidney Smith had made; but General Menou, who succeeded Kleber in June, believing that he could hold the country, refused to renew the agreement, which thus fell to the ground. Not until hostilities had been prolonged for more than a year did the remains of the French army surrender on substantially the same terms as those originally agreed upon at El Arish.<sup>48</sup> These facts demonstrate beyond question that there is no basis for a charge of bad faith against the British government, which simply exercised its undoubted right to refuse to ratify an agreement made by a subordinate commander beyond the limits of his authority.

**Capitulation of Gen. Joseph E. Johnston in 1865.**—After the American civil war had been brought nearly to a close by reason of the surrender of Gen. Lee to Gen. Grant, on April

<sup>48</sup> Martens (R.) vii, 1; De Gortory. XXXV, 587-97; Fyffe, Mod- den, *Hist. des Traités de Paix*, vi, ern Europe, I, 224-227. 210-14, 288; Parliamentary His-



9th, 1865, Gen. Joseph E. Johnston, who was still at the head of an army, addressed, on April 13th, to Gen. W. T. Sherman, a commander subordinate to Gen. Grant, a letter inquiring "whether, to stop the further effusion of blood and the devastation of property, you are willing to make a temporary suspension of active operations, \* \* the object being to permit the civil authorities to enter into the needful arrangements to terminate the existing war." On the next day Gen. Sherman replied: "I am fully empowered to arrange with you any terms for the suspension of hostilities between the armies commanded by you and those commanded by myself, and will be willing to confer with you to that end." From statements made by Gen. Sherman in his *Memoirs*<sup>49</sup> it may be inferred that his prior conversations with President Lincoln upon this very subject authorized him to say to Gen. Johnston that "I am fully empowered to arrange with you any terms for the suspension of hostilities." However that may have been, before the two generals actually met for conference the fateful assassination of President Lincoln occurred. As Gen. Johnston himself has expressed it: "As soon as we were without witnesses in the room assigned to us, General Sherman showed me a telegram from Mr. Stanton, announcing the assassination of the President of the United States."<sup>50</sup> Under these circumstances, on April 18, General Sherman offered and General Johnston accepted terms of capitulation embracing serious and far-reaching political conditions, and ending with the statement: "Not being fully empowered by our respective principals to fulfil these terms, we individually and officially pledge ourselves to promptly obtain the necessary authority, and to carry out the above programme."<sup>51</sup> Leaving that declaration entirely out of view, the successor of President Lincoln had a clear legal right to refuse to ratify the sponson in question because a subordinate commander had incorporated in its articles political conditions entirely beyond the limits even of his implied authority. A new convention was arranged on the basis of Lee's capitulation.

#### § 516. Hague rules regulating Capitulations and Armistices.

—Having now defined the general principles of international

<sup>49</sup> *Memoirs of General W. T. Sherman*, vol. ii, pp. 327, 330, 346, 347.

<sup>50</sup> Johnston's *Narrative*, p. 402.

<sup>51</sup> The "Memorandum, or Basis

of Agreement," is printed in full in Johnston's *Narrative*, pp. 405-7.

See also Grant's *Narrative*, ii, 514;

Davis's *Rise and Fall of the Confederate Gov.*, ii, 684 seq.

law relating to capitulations and armistices as they existed prior to the Peace Conference at The Hague, it will be convenient to place in juxtaposition with them the rules there adopted on both subjects:

“Capitulations agreed on between the contracting parties must be in accordance with the rules of military honor. When once settled, they must be scrupulously observed by both the parties.

“An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not fixed, the belligerent parties can resume operations at any time, provided always the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.

“An armistice may be general or local. The first suspends all military operations of the belligerent states; the second, only those between certain fractions of the belligerent armies and in a fixed radius.

“An armistice must be notified officially, and in good time, to the competent authorities and the troops. Hostilities are suspended immediately after the notification, or at a fixed date.

“It is for the contracting parties to settle, in the terms of the armistice, what communications may be held, on the theatre of war, with the population and with each other.

“Any serious violation of the armistice by one of the parties gives the other party the right to denounce it, and even, in case of urgency, to recommence hostilities at once.

“A violation of the terms of the armistice by private individuals acting on their own initiative, only confers the right of demanding the punishment of the offenders, and, if necessary, indemnity for the losses sustained.”<sup>52</sup>

<sup>52</sup> Second Convention, chapters The Peace Conference at the IV and V, Articles XXXV-XLI, Hague, 155 seq. both inclusive. See also Holls,

## CHAPTER VI.

### LAWS OF WAR AS TO ENEMY PERSONS.

§ 517. **Effect of domicil in an enemy's country.**—Having now considered the relations of belligerents during actual hostilities by land and sea, reference must next be made to the laws of war as to enemy persons originally non-combatant, and to such combatants as are placed *hors de combat*. In the first class are embraced private, unarmed residents of the belligerent country; in the second, prisoners, the wounded and their attendants. Upon the outbreak of war the status of every resident of a hostile state is seriously affected by the event. In war as in peace the national character of a person is for many purposes determined by his domicil, that is, by his actual residence as qualified by his intention of there remaining. As to such intention actions speak louder than words. That is to say, as actual residence is a fact, any intention of changing it should be shown by other facts rather than by mere statements which may be varied to suit interest.<sup>1</sup> The intention is to be derived from all the circumstances of the case, particularly from the occupation engaged in. Long continued residence raises such a strong presumption of intention to remain, that Lord Stowell says that "time is the grand ingredient in constituting domicil. In most cases it is unavoidably conclusive."<sup>2</sup> While that statement may give undue importance to mere length of residence, the fact is always very persuasive as an indication of the intention to remain, which, rather than the time evidencing it, when duly proved, is the grand ingredient of domicil.<sup>3</sup> The same eminent judge lays the proper stress on intention in citing the case of Whitehill, a British subject of that name who settled permanently in St. Eustatius only a day or two before the arrival of Admiral Rodney and the forces that conquered the island for England.<sup>4</sup> Lord Camden held that under those circumstances Whitehill had already acquired a foreign domicil before the British

<sup>1</sup> Wheaton's Elements' International Law, 245; Livingston v. Md. Co., 7 Cranch, 506.

<sup>2</sup> The Harmony, 2 Rob. Adm., 324.

<sup>3</sup> The Venus, 8 Cranch Rep., 253; Hylton v. Brown, 1 Wash. C. C. 312; The President, 5 Ch. Rob., 277.

<sup>4</sup> The Diana, 5 Rob. Adm., 60.

capture, and therefore that he, together with others who intended to remain there "ought to be considered resident subjects" of the Republic of the United Netherlands. From these cases it appears that time and intent are the two great elements that determine domicile. Enemy character attaches to all persons domiciled in the enemy's country, although they may be neutrals in fact, or even loyal citizens of the country to which they belong. Their enemy residence makes them for war purposes enemies *de facto*<sup>5</sup> no matter whether the war be civil or foreign. In like manner a citizen residing in a neutral state may lawfully trade with a country at war with his native country.<sup>6</sup> The "adventitious character" gained by residence alone ceases, however, from the moment a person puts himself in motion to leave permanently; such character being gained by residence, ceases with residence. When once *in itinere* for his own country, he becomes immediately its citizen again,<sup>7</sup> provided the return is not a mere casual visit, which does not alter domicile.<sup>8</sup> As Lord Stowell expressed it: "The character that is gained by residence ceases by non-residence. It is an adventitious character, and no longer adheres to him from the moment that he puts himself in motion *bona fide* to quit the country *sine animo revertendi*."

§ 518. **How far private rights are to be respected by a conquering army.**—The ancient principle and practice of considering an enemy as without any rights which the conqueror is bound to respect has been discarded. As it was still in force in the time of Grotius, he pleaded against it as unjust though lawful;<sup>9</sup> and since the Peace of Westphalia his view has gradually ripened into the now clearly recognized distinction between combatants and non-combatants. If the Duc de Grammont is correctly reported as saying to the Baden ambassador that in the war with Prussia not even women would be spared by

<sup>5</sup> Twiss, Law of Nations, War, § 152; Prize Cases, 2 Black, 635; The Venice, 2 Wallace, 258; Mrs. Alexander's Cotton, 2 Wallace, 419; The Wm. Bagaley, 5 Wall. 377; Gates v. Goodloe, 101 U. S., 612.

<sup>6</sup> The Danous, 4 Ch. Rob. 256, n.; The Ann, 1 Dodson 221; Notes in 2 Knapp, 301, 365; The Postilion, Hay & Marriott, 245; Bell v. Reid, 1 Maule & S., 727,

<sup>7</sup> The Indian Chief, 3 Ch. Rob. 12, 20; and note to p. 21; The Ocean, 5 Ch. Rob. 291; The Venus, 8 Cranch, 253; The Frances, 2 Gallison, 616; see also the Baltica, Spinks, 264; The Ernest Merck, Spinks, 89.

<sup>8</sup> The Friendschaft, 3 Wheat. 14; The Frances, 8 Cranch. 335.

<sup>9</sup> *De Jure Belli ac Pacis*, III, IV, VI-XIV.

the French,<sup>10</sup> his statement may be accepted as an extreme exposition of the ancient rule, under which Frederick II claimed the right even to increase his army in the invaded country by conscription. The modern rule is that private citizens who are non-combatant are to be protected in the exercise of all rights and privileges which do not conflict with the war necessities of the invader.<sup>11</sup> Such necessities justify a denial of the right of assembly, of freedom of speech, and of intercourse with the other portions of the country, as well as any occupation aiding the old sovereign or injuring the invader. Even women and children may be imprisoned when necessity requires it. In the absence of such necessity, however, mechanics, merchants and all other passive enemies engaged in peaceful pursuits are to be encouraged and protected in their business, according to the humane practice of Cyrus who did not disturb cultivators of the soil in his invasions.<sup>12</sup> While it is true that the absolute and despotic right of violence over the persons of all the inhabitants of a hostile country is still vested, as a physical fact, in the conqueror, its application is limited in practice by the mitigating principle now generally recognized that such right shall not be extended beyond the reasonable necessities of war. And in order that such necessities may not be made the equivalent for convenience, the civilized nations of the world have been for some time striving to agree upon a war code regulating the entire subject, a result at least partially attained in the second Hague convention. Under the laws of war now existing religion, speech, education, trades, and the honor of the conquered are, as far as possible, to be respected.<sup>13</sup> Although for special reasons, rules somewhat more stringent prevail as to private property at sea, the French went too far in 1870 in imprisoning merchant seamen because they might become of value to the German navy. The contrary contention of Napoleon I was the more reasonable;<sup>14</sup> and the American regulations (39) properly except from imprisonment all not *directly* promoting the objects of war.

§ 519. Killing and enslaving of prisoners—Ransom.—While Polybius says that the killing of captives was an old Roman custom, employed to inspire dread, it was not universal among

<sup>10</sup> Heffter, § 126 note 7 (Geffcken).

<sup>11</sup> Am. Regulations, 25.

<sup>12</sup> Cyropaedia, book V, ch. 4.

<sup>13</sup> Bluntschli, *Mod. Kriegsrecht*, § 24 (533) et seq.; Id. § 72 (577).

<sup>14</sup> Heffter, § 126 n. 8 (Geffcken).

the Greeks, whose later practice was to regard them as slaves. As explained heretofore the Greeks thought of non-Greeks or barbarians as having no rights whatever, and Aristotle even advocated war for the purpose of acquiring slaves.<sup>15</sup> Slavery itself was certainly a humane improvement on the savage practice of killing enemies, the Digest deriving "servus" from the humane selling of captives by the emperors, who thus "servare solent."<sup>16</sup> It was a rule of Edward III, during his wars in France, to reserve for execution a certain number of the inhabitants of besieged towns, and he was among the first to take important prisoners away from the actual captors. Less than a century later Henry V, after Agincourt, killed his prisoners in what he deemed self-defense, although he protected the peaceful population; as did the Chevalier Bayard, always humane in his invasions. The third Lateran Council in 1179, as well as the Eastern Church somewhat later, forbade the sale of Christian prisoners, under decrees not always obeyed. During the middle ages, when a knight could be slain but not enslaved, enslavement generally assumed the form of sending to the galleys, and that in turn gave way to ransom in favor of the individual captors, and then, after the institution of armies paid by the sovereign, to ransom in his favor,—the final transition being marked by the campaigns of Gustavus. As the abolition of slavery and ransom gave the captor less pecuniary interest in his captives, the change led for a time to an increase of bloodshed. Grotius, even before the Thirty Years' War, averred that "when arms were once taken up all reverence for law, divine and human, was abandoned, as if men were authorized to commit all forms of crime without restraint;" in 1690 a British commander threatened to send prisoners as slaves to America;<sup>17</sup> and throughout the seventeenth century treaties and state papers speak of galleys and ransom during the war and release at its close. In a cartel at Frankfort in 1743 a marshal's ransom was fixed at 32,000 florins.<sup>18</sup> The last instance of ransom occurred in 1780, between the French and English, when a marshal or admiral was

<sup>15</sup> Politics I, VIII; Livy XXXI, c. 29; Justinian Inst. I, iii, 3; Herod. VI, 30; Xen. Hellen. V, 4; Livy IX, 4; Tacitus, Annals II, 21. See the Antelope, 10 Wheat. 120.

<sup>16</sup> L. 239, 1 D. L. 19 de verb. sig.

<sup>17</sup> Grotius, *De Jure Belli ac Pa-*

*cis*, Prolegomena; Id. III, ch. 7, § 1-2, ch. 7, § 9, 2; Maine, Int. Law, 134; Hall, Int. Law, 427; Calvo, *Droit Int.*, II, 139; Bynkershoek, *Quaest. Jur. Pub.*, ch. 3; Heffter, § 129 and note.

<sup>18</sup> 1 *Causes Cel. du Droit des Gens*, Martens, 285.

valued at sixty men and a private soldier at one pound sterling. So firmly had the custom of taking prisoners become established by the time of the French Revolution, that after the convention in 1794, on motion of Barère, had decreed that no quarter should be given to the English, Hanoverians and Spaniards, the French soldiers nevertheless took prisoners from a sense of military honor and excused it to the government on the pretext that the men were *deserters*. The infamous decree was soon revoked,<sup>19</sup> even without a threat of retaliation. Ransom is not now exacted except for prisoners remaining after a general exchange, and then only by special national authorization.<sup>20</sup>

§ 520. Who are prisoners of war. Can they ever be slain rightfully?—All soldiers and sailors, public officials and others actively aiding the progress of war by word or act, and not criminals, coming into the hands of a combatant, are prisoners of war. They are in the power of the hostile government, but not in that of the individuals or corps capturing them.<sup>21</sup> Sovereigns are also treated as prisoners, as John of France at Poitiers, Napoleon III after Sedan, and Napoleon I after coming aboard the *Bellerophon*. The latter always denied that he had surrendered and claimed that in any event his subsequent detention at St. Helena was improper, because there was then no war. His treatment, in some respects unnecessarily harsh, was certainly due to fear of his influence.<sup>22</sup> The release of Napoleon III after the Franco-Prussian war was more in accord with modern thought and practice. Prisoners constitute a somewhat broader class than combatants, or enemies who may be killed in battle. Reporters, sutlers, contractors, and others accompanying an army, whom the conqueror sees fit to detain, have a right to be treated as prisoners of war if provided with a certificate from the commander of their army.<sup>23</sup> Every prisoner of war, if questioned, is bound to declare his true name and rank, and, if he disregards this rule, he is liable to a curtailment of the advantages accorded to

<sup>19</sup> Twiss, *Law of Nations, War*, § 66, 177; 3 Ch. Rob., App. A; Vattel, *Droit des Gens*, III, ch. 17, 278; Macaulay, essay on Barère; Calvo, *Droit Int.* II, 144, note (1); 3 Phillimore 156.

<sup>20</sup> Am. Regulations, 74, 108.

<sup>21</sup> Hague Second Convention, Art. IV.

<sup>22</sup> See Lord Roseberry's *Napoleon, the Last Phase*, (1900) for an incisive arraignment of the English government's treatment of their captive.

<sup>23</sup> Hague Second Convention, Art. XIII.

the prisoners of war of his class.<sup>24</sup> While it is conceivable that prisoners may be slain under exceptional circumstances, such circumstances present, as Burke expressed it, cases "at which morality is perplexed and reason staggered." Henry V, as stated above, killed his prisoners after Agincourt to free the hands of all his men, and Napoleon in 1799 shot three or four thousand Turks captured at Jaffa, who would not respect parole,<sup>25</sup> because he could not feed or escort them. On the other hand Charles XII, after Narva, released his captives, under similar circumstances.

§ 521. Treatment of prisoners: Wills, burials, employment, pay, escape, neutral territory, enlistment.—Prisoners are to be supported and cared for by their captors, in sickness and health, a rule grossly violated by the Spaniards in 1809 when they placed seven thousand on Cabrera Island, where two-thirds of them died like beasts. The Hague rules provide that prisoners of war must be humanely treated, and that the government into whose hands they fall is bound to maintain them. In the absence of a special agreement between the belligerents, prisoners of war are to be supplied with food, quarters, and clothing on the same footing with the troops of the government which has captured them.<sup>26</sup> They cannot of course expect to receive better food or accommodations than the captors themselves, or to enjoy privileges which imperil their conquerors. Thus, when Admiral Anson found himself with more prisoners than crew, he had to keep them in the hold, despite their sufferings there. While prisoners of war may be detained in a town, fortress, camp, or any other locality, and bound not to go beyond certain fixed limits, they can only be confined as an indispensable measure of safety.<sup>27</sup> They are subject to the laws, regulations, and orders of the army of the state into whose hands they have fallen. Any act of insubordination warrants the adoption as regards them of such measures of severity as may be necessary,<sup>28</sup> but in general they shall enjoy every latitude, even in the exercise of their religion, including attendance at their own church service, provided only they comply with the regulations for order and the police ordinances issued by the military authorities. Prisoners shall be

<sup>24</sup> *Ib.* Art. IX.

<sup>27</sup> Hague Second Convention,

<sup>25</sup> See *passim*, 1 Bourrienne, ch. Art. V.  
XVIII.

<sup>28</sup> *Ib.* Art. VIII.

<sup>26</sup> Hague Second Convention,  
Art. IV, VII.



kept in restraint, with as little constraint as is consistent with their safety, until the end of the war or until exchanged.<sup>29</sup> Although all their personal belongings, except arms, horses and military papers, are regarded as private, some writers say that if valuable these may be kept from them until release.<sup>30</sup> The wills of prisoners of war shall be received or drawn up on the same conditions as for soldiers of the national army; and the same rules shall be observed regarding their death certificates and burials, due regard being paid to their grade and rank. They may be employed at work not unsuited to their condition and not directly hostile to their own army and country, and this Bluntschli and Calvo construe into an authorization for their employment on distant fortifications, a claim properly condemned by Geffcken on principle. If they desert and proffer information, it may be received; but they cannot be compelled to give it or be punished for false information when given.<sup>31</sup> Prisoners should not be employed to strengthen their captor's military position, for this tends to release a corresponding number of his soldiers for service at the front. The more modern practice confines their labor to what contributes to their own welfare. The Hague rules authorize a state to utilize the labor of prisoners of war according to their rank and aptitude. Their tasks shall not be excessive, and shall have nothing to do with military operations. Prisoners may be authorized to work for the public service, for private persons, or on their own account; and work done for the state shall be paid for according to the tariffs in force for soldiers of the national army employed on similar tasks. When the work is for the other branches of the public service or for private persons, the conditions shall be settled by agreement with the military authorities. The wages of the prisoners shall go toward improving their position, and the balance shall be paid them at the time of their release, after deducting the cost of their maintenance.<sup>32</sup> It has been sometimes the practice, now sanctioned by The Hague Conference, for officers to receive their regular pay, or some proper pay,

<sup>29</sup> *Ib.* Art. XVIII.

<sup>30</sup> Brussels Project, Art. 23; Am. Reg. 50, 53, 72; Bluntschli, § 601; Heffter, § 121, Geffcken, n; Hague Second Convention. Art. IV.

<sup>31</sup> Bluntschli, *Mod. Kr.*, § 91 (593), 608, etc.; Calvo, § 1853;

Heffter, § 129, n. 3; 6 Webster's Works, 437; Am. Regulations, 80, 76; Halleck, *Int. Law*, 436; Wharton, *Int. Law Dig.*, § 348d.

<sup>32</sup> Davis, *Int. Law*, p.235n; Calvo, *Droit Int.*, II, 145; Hague Second Convention, Art. VI.

from their captors, who in their turn balance accounts on this score with the enemy. Thus in 1870-1 the Germans paid French officers, and the French paid captive officers and men also.<sup>33</sup> As the object of imprisonment is security, not punishment, Peter's conduct in exiling his prisoners to Siberia after Pultowa is indefensible. Punishment may be inflicted for breaches of rules; and for conspiracy for a joint escape even the death penalty may be imposed.<sup>34</sup> It is not legal, however, to imprison the companions left behind as a deterrent to further attempts, as the Prussians did in 1870. When a prisoner attempting to escape is recaptured before rejoining his own army he is liable to disciplinary punishment, and he may be killed while escaping. If he succeeds in rejoining his army, he cannot be punished for such escape when made prisoner subsequently, even if in escaping he has killed his guard.<sup>35</sup> While imprisonment is lawful, it is equally so to escape if opportunity offers. In 1870 the Government of National Defense offered a reward of seven hundred and fifty francs to each officer who should escape from German imprisonment. A person seized by way of reprisals is entitled to be treated like a hostage, whose life is sacred.<sup>36</sup> Captivity is not like imprisonment for crime, and does not affect civil rights. A will, for instance, is valid although the testator be a prisoner of war. Prisoners set ashore in a neutral port, though under guard, become free, a result which does not follow if with an army having the right of transit. If retained on the ship, however, prisoners are not affected by the neutrality of the port, Bynkershoek to the contrary notwithstanding.<sup>37</sup> The question has been much debated as to the enlistment of prisoners, formerly customary. After Breitenfeld, Gustavus Adolphus was able not only to fill up the gaps in his ranks, but even to create new regiments out of his numerous captives. While enlistment, if voluntary, is no more objectionable than the acceptance of deserters, such recruits can expect no quarter if they fall into the hands of their old sovereign.

§ 522. Bureau of information and relief societies.—The Hague

<sup>33</sup> Hall, *Int. Law*, 424 n; Calvo, *Droit Int.* II, 145; Hague Second Convention, Art. 17.

<sup>34</sup> Bluntschli, *Mod. Kr.*, § 109 (611); Halleck, *Int. Law*, 430; Am. Regulations, 39, 77, 78; Calvo, *Droit Int.* II, 146.

<sup>35</sup> Hague Second Convention, Art. VIII.

<sup>36</sup> Vattel, *Droit des Gens*, II, c. 18, § 351; III, c. 14, § 220; Bluntschli, *Droit Int. Cod.*, § 738; Hague Second Convention, Art. 19.

<sup>37</sup> Bynkershoek, *Quaest. Jur. Pub.*, ch. XV.

rules provide that a Bureau of Information for the benefit of prisoners of war shall be instituted at the commencement of hostilities in each of the belligerent states, and, when necessary, in the neutral countries on whose territory belligerents have been received. This bureau is intended to answer all inquiries about prisoners of war, and shall be furnished by the various services concerned with all the necessary information to enable it to keep an individual return for each prisoner of war, including internments and changes, admissions into hospital and deaths. It is also the duty of the bureau to receive and collect all objects of personal use, valuables, letters, and the like found on battlefields or left by prisoners who have died in hospital or ambulance, and to transmit them to those interested. The bureau shall have the privilege of free postage, and all letters, money orders, and valuables, as well as postal parcels destined for prisoners of war or dispatched by them, shall be free of all postal duties, both in the countries of origin and destination, as well as in those they pass through. Gifts and relief in kind for prisoners of war shall likewise be admitted free of all duties and charges, including payments for carriage by government railways.<sup>38</sup> Relief societies for prisoners of war, regularly constituted in accordance with the law of the country for the purpose of serving as intermediaries for charity, shall receive from the belligerents, for themselves and their duly accredited agents, every facility, within the bounds of military requirements and administrative regulations, for the effective accomplishment of their humane task. Delegates of such societies may be admitted to places of internment for the distribution of relief, as also to the halting places of repatriated prisoners, if furnished with a personal permit by the military authorities, on giving engagements in writing to comply with all their regulations for order and police.<sup>39</sup>

§ 523. **Parole and its obligations.**—Captured troops may at the option of the captor be released on their written parole or agreement to do or not to do certain things after discharge, including, as a general rule, a promise not to serve against the captor or his allies for a reasonable time, not to exceed the duration of the existing war. The parole, which must be given by commissioned officers, if any, for their soldiers, when in due form consists of the exchange of two documents giving

<sup>38</sup> Second Hague Convention,    <sup>39</sup> *Ib.* Art. XV.  
Articles XIV, XVI.

name, rank, and the like. Paroles cannot be forced; they must rest on the free consent of the prisoners. A mere declaration that prisoners are free on parole is an unconditional release;<sup>40</sup> and there can be no paroling during battle or in masses immediately afterwards.<sup>41</sup> The Hague rules provide that prisoners of war may be set at liberty on parole if the laws of their country authorize it; and, in that event they are bound on their personal honor scrupulously to fulfill, both as regard their own government and the government by whom they were made prisoners, the engagements they have contracted. Their own government shall not then require or accept of them any service incompatible with the parole given.<sup>42</sup> While a prisoner cannot be forced to accept his liberty on parole, on the other hand the hostile government is not obliged to assent to his request to be set at liberty in that manner.<sup>43</sup> Any prisoner of war liberated on parole and recaptured, bearing arms against the government to whom he has pledged his honor, or against the allies of that government, forfeits his right to be treated as a prisoner of war, and can be brought before the courts.<sup>44</sup> Parole does not, however, deny to the released soldier the right to drill recruits, to accepting civil employment, or to fight other enemies, or to perform any other act except service in the field against the combatant releasing him.<sup>45</sup> While Geffcken may be right on principle in declaring that such released prisoners should remain neutral and do nothing that would release other troops for active service, practice does not go so far. If the government to which the prisoner belongs refuses to assent to the terms of the parole, he must surrender himself and become a prisoner again; and, if the enemy then refuses to receive him back, he is free without parole or conditions.<sup>46</sup> The national faith is sacredly pledged to fulfillment of the obligations of parole, unless the nation to which the released prisoners belong has forbidden acceptance of such release, and at the same time provides for their support during imprisonment.<sup>47</sup>

<sup>40</sup> Bluntschli, *Mod. Kr.*, § 116 (618) et seq.; Maine, *Int. Law*, 165, etc.; *Field Int. Code*, §§ 816, 822; Heffter, § 129, n. 2 (Geffcken); *Am. Regulations*, 119-134.

<sup>41</sup> *Am. Regulations*, 128; Bluntschli, *sup.*, § 120 (622).

<sup>42</sup> *Hague Second Convention*, Art. X.

<sup>43</sup> *Ib.* Art. XI.

<sup>44</sup> *Ib.* Art. XII.

<sup>45</sup> *Am. Regulations*, 130.

<sup>46</sup> *Am. Reg.*, 130-1; Bluntschli, *sup.*, § 122 (624) et seq.; Heffter, § 129, n. 2; Maine, *Int. Law*, 167.

<sup>47</sup> *U. S. v. Wright*, 15 L. Repr. N. S. 459; Halleck, 438.

The Germans complained that French officers violated their paroles in 1870 and that their government put them in active service again.<sup>48</sup> In every war, however, there are accusations of bad faith, and it is generally difficult to be certain as to the facts. Napoleon assuming that many of the defenders of Jaffa were Turks whom he had just paroled at El Arish, beheaded them after recapture. This extreme penalty is allowable for breach of parole, after the fact has been ascertained and declared by a court martial.<sup>49</sup>

§ 524. Exchange of prisoners.—Exchange of prisoners, the agreement for which is called a cartel, is customary and proper, but not compulsory. The contention that if exchange is refused by one side the other may put his prisoners to labor in order to pay for their maintenance, or treat them with any unnecessary severity, is unsupported by international law. Thus Grant was within his strict rights when he refused to exchange with Lee, in order thereby to prevent reinforcing the Southern army,<sup>50</sup> a course pursued by the British with the same motive during the recent Boer War. The cartel may be made before or during the war, the first known dating, according to Dumont, from 1673. While Gustavus and Wallenstein and other early commanders exchanged prisoners, it was only late in the eighteenth century that we find exchange employed (by the Dutch) as a regular system. Unless otherwise agreed, exchanges are made on the basis of man for man, rank for rank, in equal health, excluding spies, traitors and war rebels. If there is a disparity in rank, it is usual to agree on so many privates for particular ranks of officers. During the Franco-Prussian War, as the Germans held nearly three hundred and fifty thousand prisoners against a few thousands in the hands of the French, there could be no equal exchange. Whether, after exchange, there shall be further service during the war or not is a matter to be settled by agreement in each case. In the absence of an express agreement that those exchanged may serve, Bluntschli holds that it is implied that they shall not.<sup>51</sup> In order to facilitate exchanges it is usual for each combatant to have one or more commissioners within the lines of the enemy, who are treated as neutrals so long as they do

<sup>48</sup> Heffter, § 129, n. 6.

<sup>49</sup> Am. Regulations, 124.

<sup>50</sup> Bluntschli, *Mod. Kr.*, § 110 (612), 112 (614) et seq.; Maine, *Int. Law*, 165; Field, *Int. Code*, §§

827-828. As to health of prisoners, see Washington's Works, IV, 439, 454, App. XIII, XIV; White's Lee, 393, 444; Calvo, *Droit Int.* II, 146.

<sup>51</sup> *Mod. Völk.*, § 613.

not attempt to aid their principals by departing from the line of their duty. Napoleon did not facilitate exchanges with the English, because they at first refused to exchange Frenchmen for any prisoners not English; and when they finally agreed he distrusted their intentions.<sup>52</sup> He won the enthusiastic friendship of the Emperor Paul by sending back without any equivalent ten thousand Russian soldiers captured while acting with the armies of England and Austria, after those countries had refused to receive them in exchange for French prisoners.<sup>53</sup> There were cartels during the American Revolution, as in 1778. And a cartel entered into in 1813, covering equivalents for unequal ranks, provided that British agents might reside in American towns, and American agents in Halifax and elsewhere.

§ 525. **The giving of hostages.**—While the exaction of hostages is not favored, they may be given as pledges for the fulfillment of any agreement between belligerents, or as security for the payment of indemnity. It is not lawful to take prominent citizens as hostages in order to insure the tranquillity of a district, because in that way the innocent may be punished without securing the desired result. Neither is it permissible to put prominent people of the country on railroad trains in order to insure the safety of traffic, as was done during the war of 1870-1, in the case of the "notables" who were forced to ride on the locomotive from Nancy to Toul, from Toul to Commercy, and from Commercy to Bar-le-Duc. The Germans also took forty persons from Dijon, Gray and Vesoul by way of reprisals for the imprisonment at Clermont-Ferrand of as many captains of merchant vessels captured by the French.<sup>54</sup> When outrages occur the better plan is to fine the district responsible therefor. An extreme case occurred when Bacon during his Virginia rebellion stationed the wives of his enemies on entrenchments he was building so as to protect his own men from the fire of the government troops. Hostages are to be treated as well as the prisoners of war, excepting only the right to exchange. They are not liable to death or personal injury, but merely to detention by such means as are necessary for enforcing the pledge. If a hostage die, the giver, in the absence of express agreement, is not bound to supply another.<sup>55</sup> During recent years, the

<sup>52</sup> Calvo, *Droit Int.*, II, 148.

(600); Calvo, *Droit Int.*, II, 151,

<sup>53</sup> 1 Bourrienne, ch. III.

152; Heffter, § 128, Geffcken, n. 2.

<sup>54</sup> Bluntschli, *Mod. Kr.*, § 98

<sup>55</sup> 3 Phillimore, *Int. Law*, 68;

growth of good faith between enemies has rendered the exaction of hostages practically obsolete. The special status of hostages on a ransomed ship will be discussed elsewhere.

§ 526. **Punishment of military offenses by martial law.**—Robbers, marauders, guides misleading the army, insurgents after occupancy (sometimes called war rebels), persons giving information after such occupancy to their old government (war traitors) and all others injuring the invading army or the peace of the occupied territory, are subject to martial law and punishable even by death.<sup>56</sup> While patriotism may inspire some of these deeds, the safety of the army requires severe repression of all. Heffter classifies those who are beyond the protection of the laws of war as, (1) those who make war on their own account, unauthorized by the sovereign; (2) combatants or noncombatants who themselves violate such laws, such as marauders; (3) those who commit treason or hostilities against the enemy in occupancy; (4) deserters and spies.<sup>57</sup> The treatment of such persons may be rigorous beyond the ordinary rules; they are denied exchange, and may be tried and punished, always provided the terms of their surrender do not forbid, as faith must be kept even with traitors.<sup>58</sup> Pirates are hung because they are enemies of the human race, and spies when caught in the act, to prevent a recurrence of their visits. Napoleon, while a republican general, approved the detention of an *émigré* who had been sent by the enemy as the bearer of a flag of truce, but no further harm was done him, although Frenchmen considered the prisoner as a parricide.<sup>59</sup> The British government acquiesced in General Jackson's execution of Arbuthnot and Ambrister, two Englishmen who were condemned by a court martial in 1818 because they had incited savages to ruthless warfare. Ordinary treason is not a military but a civil offense, and as such triable by due process of law after the conclusion of hostilities. That it is a wise policy to conciliate rather than exasperate the vanquished by such prosecutions was happily illustrated at the close of the great civil war in the United States. Despite the assassination of President Lincoln and the conflict of his successor with Congress, General Grant was able to hush the attempt made

Field, *Int. Code*, §§ 824-826; *Am. Regulations*, 54, 55.

<sup>56</sup> *American Regulations*, 52, 84, 85, 90-2, 95, 101, etc.; *Blunt-*

*schli, Mod. Kr.*, § 139 (640), etc.; *Calvo, Droit Int.*, II, 158-160.

<sup>57</sup> Heffter, § 126, IV.

<sup>58</sup> Heffter, § 128.

<sup>59</sup> 1 *Bourrienne*, ch. IV.

to arrest General Lee for treason, and successfully to maintain that the Confederate commander was protected by the terms of his surrender. When there has been what can be properly styled a rebellion, there is, however, no question as to the principle authorizing the rightful sovereign to punish all active rebels whose terms of surrender do not guarantee immunity.<sup>60</sup> The fact that communities harboring criminals or abetting their deeds may be punished by fine or otherwise, does not justify the practice of mulcting an innocent district because it happens to be their place of abode. Such an offense as that of spying may be extinguished by a successful return of its author to his own army, while others, like those of assassination, poisoning, perfidy, and cruelty to prisoners, are not so purged or limited.<sup>61</sup> As the delictum of sailing under the enemy's pass is not purged by the voyage, both vessel and cargo may be seized after arrival in the United States.<sup>62</sup> Sex does not enter into the question of guilt or punishment.<sup>63</sup> Detention of suspected persons by the military is justifiable.<sup>64</sup> In an extreme case, branding is still permissible among military punishments.

§ 527. **Care of the wounded. Neutralization of certain persons and things.**—There is a class of combatants whose fate calls for even more care and sympathy than that of prisoners. While they need only to be guarded, wounded soldiers must be removed from the battlefield for surgical aid and nursing, a service often performed during hostilities under a flag of truce. The duty thus begun does not cease with the battle and is not limited to the soldiers of one side. The wounded regardless of nationality are to be cared for by the victor, that is, by him who remains master of the field;<sup>65</sup> and in order to facilitate the work of humanity, physicians, surgeons, nurses, hospitals, ambulances and their attendants and equipments are regarded as *quasi* neutral when properly distinguished, as by a red cross on a white ground. Such is the beneficent result of the Geneva Convention of 1864, said to be the outgrowth of "Souvenir de Solferino,"—an article by the Genevan physician Dunant<sup>65a</sup> describing the horrors of the battlefield and its hospitals,—just

<sup>60</sup> Wharton, Int. Law Dig., § 348a.

<sup>61</sup> First Steps Int. Law, 225.

<sup>62</sup> The Caledonian, 4 Wheat. 100.

<sup>63</sup> Am. Regulations, 102.

<sup>64</sup> Luther v. Borden, 7 How. 1.

<sup>65</sup> Martens, *Précis*, VIII, ch. 3, § 15.

<sup>65a</sup> This is the statement of Bluntschli (*Völkk.* § 586) who adds that "the first incentive to this treaty, one of the noblest achieve-



as the organization of the Teutonic Knights for care of the wounded was the outgrowth of the siege of Acre in 1190 during the Third Crusade. The growing tendency upon the part of combatants to provide for the wounded, and to some extent for suffering prisoners,—especially noticeable since the days of Gustavus Adolphus, himself a pioneer in his care for his soldiers,—has in our own time transformed the Roman maxim, *hostes dum vulnerati fratres*, into a positive system of recognized duty. The spirit of humanity which is attempting to set limits to weapons and hostilities, and to protect the unarmed residents of the seat of war, is equally careful to cover with the ægis of neutralization all who now minister to the physical and spiritual needs of combatants on land and sea. Chaplains, physicians, druggists and nurses are not to be made prisoners so long as they take no part in active warfare, although they may be compelled to aid the wounded of either side if necessary.<sup>66</sup> By a converse process to that by which munitions of war are enemized, these agents of mercy are neutralized whenever engaged in the noble work for which they have been specially prepared.

§ 528. Geneva Convention of 1864, supplemented in 1868, inadequate to new conditions.—The general meaning and intent of the Geneva Convention is always noble, although its wording is sometimes obscure. Under its provisions the wounded may, when practicable, be delivered to the outposts of their army, and, even when cure leaves them unfit for war, must be sent back home. The provision for paroling them when cure has made them fit for service has, however, proven unwise in practice, and during the Franco-Prussian war was disregarded by both sides. Hospitals and their equipment may be retained by the captors, but ambulances and their equipment and all sanitary officials must be restored to their own army. People giving shelter to the wounded are under special protection and

ments of progressive humanity, was given by an article of Dunant, the Genevan physician, under the title *Souvenir de Solferino*, wherein he painted the horrible impressions which had been given him by a visit to the battlefield of Solferino and the military hospitals. Moynier, President of the Geneva Society of Public Utility, took up the thought that ambulances

should be neutralized; and both friends of humanity applied then to different governments in order to attract their attention to this important question. Everywhere sprang up voluntary associations for the benefit of wounded soldiers and their support."

<sup>66</sup> Geneva Convention; Blunt-schli, *Mod. Kr.*, § 90 (592a).

are exempted from military contributions.<sup>67</sup> The sick and wounded captured at sea are to be similarly treated and sent home on parole, in the absence of some special and imperative reason to the contrary.<sup>68</sup> And yet, no matter how humane the intentions of the civilized nations may be, it is to be feared that future wars will involve at least as much suffering as has been witnessed in the past, for the reason that improvement in weapons has exceeded that in hospital equipment. To the increase of range, accuracy and rapidity of fire, and the greater numbers under arms, must be added the fact that a single bullet or shell will disable many more people now than formerly. While some authorities consider the new bullet as more humane because it more often wounds than kills, others observe that its greater velocity scatters the liquids of the body in such a way as to produce a result more damaging than that of the tabooed explosive missiles. The increase in the number of the wounded will render it still more difficult to provide sufficient attendants and safe places for hospitals. Even during the Franco-Prussian war thousands were forced to lie on the fields for days; and in the Turkish war of 1877-8, and in the American-Spanish and the Boer wars like conditions prevailed. If every increase in range or other improvement in firearms shall heighten the difficulty, Prof. Bilroth may be correct when he says that in order to be perfectly efficient the sanitary corps must equal the combatants,—which is of course impracticable. Should future wars between well-armed nations become more and more bloody,<sup>69</sup> international law must improve upon existing remedies. That the Convention of Geneva is already inadequate to the new conditions is evidenced by the fact that its adoption at The Hague was coupled with a call for its revision.<sup>70</sup> The vital principle has, however, been firmly settled. It will never more be necessary, unless in the far East, to debate as Napoleon did in Syria the propriety of poisoning the wounded rather than leave them to the mercy of the enemy.<sup>71</sup>

<sup>67</sup> Geneva conventions; given in Wharton, § 348; Davis, *Int. Law*, 429, seq. See also Bluntschli, *Mod. Kr.*, § 81 (586), et seq.; Maine, *Int. Law*, 156.

<sup>68</sup> *Id.*; see also Bluntschli, *Mod. Kr.*, § 90 (592a).

<sup>69</sup> Bloch's *Future of War*, Part 1, chapter VII.

<sup>70</sup> Hague Second Convention, Art. XXI; Holls' Peace Conference, 377.

<sup>71</sup> 1 Bourrienne, ch. XIX.

## CHAPTER VII.

### LAWS OF WAR AS TO ENEMY PROPERTY ON LAND.

§ 529. How far property of the enemy, public and private, may be appropriated during war.—As belligerents apply force to each other in order to exact damages for and security against wrongs, real or assumed, the seizure of the enemy's territory or other property is an effectual means to that end. In fact it may be said that war implies primarily the direct exercise of force against property, while it calls for force against individuals only incidentally, so far as they resist its application to the former.<sup>1</sup> It will be necessary, therefore, to consider here how far property of the enemy, public and private, may be used or appropriated during war. The general principle is that only such property is affected as is susceptible of military use, or capable of strengthening the enemy, a principle whose application involves distinctions not only between property of the state and that of the subject, but also between different classes of subjects, and between different kinds of property, even though belonging perhaps to the same person. Consideration will be given, first, to the method of seizure or capture; second, to the property subject to such appropriation, with reference to the class to which it belongs. The administration of captured property, when it assumes the form of a district or territory, will be treated in the chapter specially devoted to military occupation and administration.

§ 530. When title to personal property captured on land passes.—The title to personal property captured on land is now supposed to pass from the moment of capture. Under the Romans it was not complete, on land or sea, until the goods were brought into a safe place, *perductio infra præsidia, locum tutum; en loch salvo*, according to the Consolato. Only then did it become proof against recapture. While it is generally stated that from the sixteenth century the rule has been that title passed after twenty-four hours' possession, Bynkershoek<sup>2</sup> denies that such a rule ever existed anywhere except in the imagination of Grotius. As to ships it was adopted, however,

<sup>1</sup> Twiss, Law of Nations. War. III, c. 6, § 3, n. 1 and 2; Bynkershoek, *Quæst. Jur. Pub.*, c. IV; Preface.

<sup>2</sup> Grotius, *De Jure Belli ac Pacis*, Goss v. Withers, 2 Burr. 683.

by the French ordinance of 1799; and it is a part of the present Prussian law as to personal property on land. The Code Napoleon established or reaffirmed the principle of actual detention as determining title; and then, if not before, the twenty-four hours rule ceased to prevail except on sea.<sup>3</sup> A land capture is perfect, therefore, as soon as the property is seized or taken from hostile possession under orders of a commanding officer and reduced to firm possession; and a subsequent sale is good even against the former owner.<sup>4</sup> While reduction to possession of a city or district involves a more complicated process than the seizure of a musket, each case is governed by the same principle, analogous to that involved in adverse possession, which, although varying with the object in question, must in all cases be suited to the particular property. In that respect, it makes no difference whether the property is public or private, real or personal. As a general rule public property passes instantly to the conqueror as the result of his victory, while private property does not until its proprietor is ousted by forcible acts in his individual case. The principle thus remains unaffected that whatever divests the possession of the original owner and substitutes the military in his place is a good capture.

§ 531. State personal property subject to seizure as booty.—When we consider what property is subject to valid capture, and what disposition is to be made of it after it has been reduced to possession, the nature of the object becomes important. As to personal or movable property belonging to the opposing state as such, it may be said that everything may be appropriated or destroyed by the invading army so far as it is useful for military operations. Money, arms, stores, supplies, ships, means of transportation or communication, and everything else directly serviceable in warfare is regarded as booty (*prædia bellica, kriegsbeute*) which may be used, destroyed, or otherwise disposed of at will. Because of their public character, railroads, rolling stock, steamers, telegraph and other means of communication are dealt with in the same way even though owned by citizens and not by the state, subject to the

<sup>3</sup> Calvo, *Droit Int.*, II, 174; Martens, *Précis*, VIII, ch. 3, § 11; Hall, *Int. Law*, 472; Bynkershoek, *Quæst. Jur. Pub.*, ch. IV.

<sup>4</sup> Alexander v. Duke of Wellington, 2 Russell & Mylne, 35; U. S.

v. Padelford, 9 Wall. 540; Lamar v. Browne, 92 U. S. 195; Young v. U. S., 97 U. S. 39; Coolidge v. Guthrie, 8 Am. L. Reg., N. S., 22. See Field, *Int. Code*, § 843; Heffter, § 136.

owner's right to have them restored at the end of the war with indemnity for their use.<sup>5</sup> Telegraphs and cables within military zones may also be seized, operated, or destroyed, or their business subjected to military supervision or censorship, even though owned by neutrals, so far as necessary for war operations. The Manila cable was cut during the recent war, and the Americans even attempted to isolate Cuba by severing all cables leading from that island.<sup>6</sup> Postoffices may be seized, and as in Napoleon's time mails may be opened at will to gain information. Taxes, dues, tolls and other regular or special revenues may be collected and used, although, under existing rules, they must be first applied, as far as possible, to the administration of government on substantially the same scale as under the prior legal government.<sup>7</sup> Arms, horses, and the like may be appropriated from enemy soldiers, but not money or personal property, except that the dead may be despoiled when such goods would have to be buried or otherwise lost. Flags, cannon, munitions, military chests and all other military articles become the property of the army or state, according to Grotian maxim, *bello paria cedunt reipublicæ*. The ownership in captured articles the Roman Law gave to him who first took possession; "quod maxime," says Gaius, "sua esse credebant quae ex hostibus cepissent." When the right to take booty, now strictly limited by the necessities of military operations, is exercised at all, the fruit usually becomes the property of the state or the army as an organism. While such is the general rule, an exception still exists in favor of the individual captors as to money, clothing, utensils and the like found on the battlefield, but not as to money or valuables on prisoners,<sup>8</sup> nor as to bells, which under a curious old rule used to go to the chief of the besieging artillery.<sup>9</sup> In Great Britain, by the terms of 3 and 4 Vict., ch. 65, sec. 22, booty, like prize, is within the jurisdiction of the Admiralty Court, which passes on questions of co-operation on land as on those of joint capture at sea.<sup>10</sup>

§ 532. Dangers of pillage and its abolition.—At Waterloo Napoleon owed his escape to the fact that the Prussians nearest to him were so busy pillaging camp equipages that they

<sup>5</sup> Hague Second Convention, Art. § 1, etc.; Heffter, § 130; Gaius, IV, 53.      <sup>16</sup>; Am. Regulations, 72.

<sup>6</sup> See Am. Naval Code, Art. 5.

<sup>9</sup> Heffter, § 135 and note.

<sup>7</sup> *Ib.* Art. 48, 49.

<sup>10</sup> Construed in *Banda & Kirwee Booty* (1866), 1 L. R. Adm. & Ec. 109.

<sup>8</sup> Calvo, II, 184; Digest, Lib. I,

did not see him. Even in the Franco-Prussian, the last great war between civilized powers, there was much ground of complaint. While the Germans claim that the "Recueil de documents sur les exactions" is exaggerated, Geffcken admits that the "Retten und Rollen" of the second half of the war was a great wrong, similar to the excesses of the Prussians about Paris in 1815. Much must be attributed, however, to a spirit of revenge against the French growing out of their conduct in Prussia under Davoust and Clarke. Although in the Russo-Turkish war of 1877, which was to some extent, as Thiers expressed it, a war between two barbarians, no advance was made; in the Boer war, particularly on the British side, private property was more respected. That such respect is no less in the interest of policy than of morals clearly appears from the terms of Napoleon's proclamation before landing in Egypt, in which he wisely said that "pillage will only destroy our resources, for it converts into enemies the people whom it is our interest to have for friends."<sup>11</sup> By The Hague Conference pillage was absolutely prohibited;<sup>12</sup> and it is to be hoped, despite discouraging instances to the contrary occurring during international expeditions into China in 1900, that it will soon disappear from the practice of civilized nations.

§ 533. Exemption in favor of holders of public securities.—While war acts as a suspension of the right of private citizens of one country to sue citizens of another, states, on grounds of public faith and policy, do not permit war to interfere with the payment of their own public debt, even to enemies. When in 1854 Great Britain was asked because of war with Russia to repudiate the moiety of a Russian-Dutch loan, assumed on the fall of Napoleon in consideration of retaining the Dutch colonies, a motion to that effect was emphatically negatived in Parliament.<sup>13</sup> Such a guarantee in favor of public funds has caused much surplus capital to be thus invested the world over. Although the capture of the evidence of debt does not give to the captor as assignee the right to collect, possession of both evidence and owner would accomplish that result after the final subjection of such owner had made the conqueror its universal successor.<sup>14</sup> Unless there is annexation or other

<sup>11</sup> 1 Bourrienne, ch. XIII.

Vattel, *Droit des Gens*, III, ch. 5, §

<sup>12</sup> Hague Second Convention, Art. 47.

77. As to the Silesian loan, see above, p. 442.

<sup>13</sup> Twiss, *Law of Nations, War*, § 58; Maine, *Int. Law*, 203, 206;

<sup>14</sup> Vattel, *Droit des Gens*, III, c. 14, § 112; 3 *Phill. Int. Law*, § 561-2;

full and permanent conquest there is no power acquired to remit a public debt.<sup>15</sup> There must be something more than mere temporary occupation to create that right. On the other hand, if the legal government has sold public property on installments, the occupying state cannot appropriate the payments as they mature, representing as they do the principal, that is, the property which when in specie was exempt from appropriation.<sup>16</sup>

§ 534. **Exemption in favor of works of art, libraries and museums.**—It is now generally conceded that works of art and the contents of museums, even though public property, are not to be seized as booty. They must be protected, not removed.<sup>17</sup> This very modern view is not recognized, however, by the American Regulations, which provide for the seizure and removal of such objects if practicable, when they are the property of the government. While the Romans recognized a still more stringent rule in their earlier practice, as many articles even now in Italian collections witness, they were so far converted to the more civilized view, that, when the time came for their own territories to be overrun, Belisarius endeavored, though in vain, to restrain the destroying hand of Totila. Venice in her glory was adorned with foreign spoil; and Napoleon during his campaigns accumulated in the Louvre the choicest treasures of Europe, particularly of Italy,—which the pasquinade said should have been sculptured by Canova not as draped but stripped. The treaty which restored Louis XVIII left these articles undisturbed, and the Allies do not seem to have thought of them until the second occupation of Paris in 1815, when Napoleon, the only one who could have resisted their reappropriation, was a prisoner. Then it was that Wellington declared this “spoil to be contrary to the practice of civilized warfare,” and with Blücher held that the Allies should restore all such acquisitions to their original owners.<sup>18</sup> But when the effort was made to give effect to that resolve by the forcible removal of such articles from the Louvre, a doctrine kindred to *cy pres* was invoked in order to

Halleck, Int. Law, 451-3. As to Alexander and the Thessalian debt, see *post*, Termination of War.

<sup>15</sup> Grotius, *De Jure Belli ac Pacis*. III, ch. VIII, § 4; Calvo gives several instances in point, *Droit Int.*, II, 205, etc.

<sup>16</sup> Heffter, § 133, Geffcken, n. 3.

<sup>17</sup> Halleck, Int. Law, 439, 454, 456; Am. Regulations, 36.

<sup>18</sup> Wellington's Despatch, September 23, 1815.

enable any one of the Allies who had then absorbed the original owner to appropriate on return all works of art belonging to him,—a rule under which the Vatican acquired many treasures which had been in abolished or changed religious houses. A restoration to true owners of such things as had been acquired as booty would have been fair enough, especially if the Allies had been willing to release all their own acquisitions of a similar nature, except for facts peculiar to this case explained in part by Romilly.<sup>19</sup> Not only had many of the articles in question been acquired by express treaties; but there was not a country represented among the Allies that had not at some time concluded treaties with Napoleon expressly or impliedly recognizing the identical or like acquisitions. Those treaties should have been respected and only such objects removed, if any, as now became legitimate booty of the Allies outside of their terms. If such treaties were made under duress, so is almost every one concluding a war. The fact is that Wellington seems to have rested the removal more upon the ground of giving France a “great moral lesson” of the strength of united Europe than on principle of any kind.<sup>20</sup> On the other hand the Germans during their occupation of Versailles in 1871 set a noble example, not only by not taking anything away, but by keeping everything under guard.<sup>21</sup> In America at a much earlier day Dr. Croke, of the vice-admiralty court at Halifax, restored to the Philadelphia Academy of Arts the Italian paintings and prints captured by a British cruiser in the war of 1812,<sup>22</sup> and, as the same rule now applies to libraries and museums of all kinds, a like decision was rendered by a United States District Court in Pennsylvania during the civil war as to two cases of books consigned to the University of North Carolina.<sup>23</sup> Before such a rule existed the love of literature often led to the appropriation of libraries by the conqueror. In the Thirty Years’ War even Gustavus Adolphus after Würzburg was stormed sent the cathedral library to Upsala by way of reprisals for the taking of the more precious library of Heidelberg to the Vatican; and at a later day he made Oxenstiern a present of that at Mayence,

<sup>19</sup> Romilly’s Life, 404; 32 Hansard, 759, 760.

<sup>20</sup> See the despatch, No. 997, p. 897 in Gurwood’s collection.

<sup>21</sup> Bluntschli, *Mod. Kr.*, § 150 (650), etc.

<sup>22</sup> The Marquis de Somerueles, Stewart’s V. Ad. 445, 482 (Nov. Sco.).

<sup>23</sup> The Amelia, 4 Phila. 417, 1 Fed. Cases, 595.



with the result that it was lost in the Baltic with the ship in which it was embarked. In the sack of Prague by Königsmarck, after the King's death, Ulphilas' famous Gothic manuscript of the Gospels was taken from the Jesuit college and sent to the library of Upsala, where it still remains.

§ 535. **Right of occupying army to use state property. Its alienation.**—Public lands and buildings, with their incomes, are subject to use for public purposes by the occupying army, but not to injury or destruction,—use in their case being a different thing from capture. Parks, monuments, archives and the like, which are not prize of war, are to be guarded and administered. According to the rule adopted at The Hague, the occupying state shall only be regarded as administrator and usufructuary of the public buildings, real property, forests, and agricultural works belonging to the hostile government, and situated in the occupied country. Such state must protect the corpus of these properties, and administer it according to the rules of trusteeship.<sup>24</sup> When in the fall of 1814 the British general Ross, acting under strict orders from home, occupied Washington and destroyed the capitol, president's home and navy yard, as Admiral Cochrane had burned Havre de Grace and Georgetown on Chesapeake Bay the year before, the excuse was that the American troops had burned Newark, Long Point and St. David in Canada. As retaliation in kind was not justifiable even if the United States had not disavowed such acts and punished their authors, the occurrence was reprobated by Englishmen, as well as by Americans.<sup>25</sup> On April 11, 1815, Sir James Mackintosh called the attention of Parliament to the fact that while during the preceding twenty-five years every capital on the continent of Europe had been occupied without injury to state property, it had been reserved for Great Britain to destroy in the capital of the United States objects exempt among civilized nations from the ravages of war.<sup>26</sup> About the same time Blücher, if he had not been restrained by the Allies, would have committed a like atrocity by blowing up the Bridge of Jena and the Column of Austerlitz. In striking contrast stands the notable

<sup>24</sup> Hague Second Convention, Art. 55.

<sup>25</sup> Twiss, *Law of Nations, War*, § 69; Calvo, *Droit Int.*, II, 178-180; Green says in his *History of the English people*: "Few more

shameful acts are recorded in our history," and even Alison admits it tarnished the luster of the victory. See also Maine, *Int. Law*, 198; Wharton, *Int. Law Dig.*, 318, 249.

<sup>26</sup> 30 Hansard, *Debates*, 526-7.

example of Emperor Francis, who, when he ordered the execution of Napoleon's designs for the Simplon arch, despite the fact that one of them showed Napoleon at Vienna, contented himself with simply adding another showing him also at Fontainebleau. In somewhat the same spirit, after the French had erected a fountain at Coblenz with a boastful inscription as to the invasion of Russia then begun, the Russian general Priest, crossing two years later in the opposite direction, added "Vu et approuvé," with his name and office,—thus bringing history up to date.<sup>27</sup> Prussians in France in 1870-1 and English and French at an earlier date in China were less considerate. When after the close of the Franco-Prussian war, the French stopped the contractors to whom the Germans had sold for cash during their occupancy the right to cut from the public forests near Nancy, the latter assented to the correctness of the French position. All rules designed to prevent devastation are most often violated during civil wars, because of hatreds engendered by counter accusations of treason and oppression. During the American civil war, which constitutes no exception, many acts of vandalism occurred, especially in the South, the main seat of hostilities.<sup>28</sup> The same humanity should, however, be exacted in all wars; and the difficulty of securing it only makes the duty the more imperative.

While it is sometimes denied that lands and other property in the hands of the conqueror can be sold or otherwise alienated, it is probably more correct to say that such alienation is inchoate until the issue of the war settles the ownership. If confirmed to the alienor, his disposition of it is ratified; if otherwise, it is invalid. In neither event can the subject of the original owner become the purchaser unless his allegiance be also changed.

§ 536. **Exemption of churches, cemeteries and the like.**—Churches, hospitals, schools, and charitable institutions of all kinds are entitled to protection. The buildings may be used temporarily for needs of the conqueror, although alien to their purposes, but the property must not be injured, and shall either remain in custody of the owners or be ultimately returned to them in good order after its temporary use has

<sup>27</sup> Baedeker's *Rhine*, p. 95.

<sup>28</sup> See White's *Lee*, 289, 397 n., 408; and Calvo, *Droit Int.*, II, 177, 182, where he speaks of "les excès

sanglants qui ont marqué les luttes de la Pologne contre la Russie, ainsi que la guerre de secession aux Etats-Unis."

ended.<sup>29</sup> While to Christianized Rome *sepulcra hostium nobis religiosa non sunt*,<sup>30</sup> cemeteries and their monuments are now sacred. It is to be hoped that the Royalist desecration of Cromwell's remains and the Republican violation of the tombs of St. Denis will never have a parallel. In the hope of preventing such excesses, more characteristic of race wars than of those between civilized nations, The Hague Conference declared that the property of the municipalities, that of religious, charitable, and educational institutions, and that of art and science, even when state property, shall be treated as private property. All seizure, destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be prosecuted.<sup>31</sup>

§ 537. **Exemption of private property.**—Private property according to existing rules is treated even more favorably than that of the public. Except in extreme cases, to be mentioned hereafter, it is both respected and protected. At The Hague it was declared that family honor and rights, individual lives and private property, as well as religious liberty and worship, must be respected. Private property cannot be confiscated.<sup>32</sup> Such regard for private property is, however, of modern date. The Greeks, unlike the Hindoos, sometimes cut down even olive vineyards, and the agreement of Maréchal Brisac with the Spanish general in 1552 to spare forests is famous because exceptional.<sup>33</sup> Grotius did not rise higher than the Roman principle that, as an enemy had no rights, property formerly his can be appropriated because without an owner. Gustavus Adolphus, who kept a copy of Grotius by him in camp, did not act on that theory, preferring to set his face against "pilfering and spoiling," while his contemporary Wallenstein was earning the title of prince of plunderers. All private property, even that of the individual sovereign, is now respected, at least in theory, and booty therein is not permitted.<sup>34</sup> As Zachariä expresses it, private property of the enemy can be touched only so far as the necessities of war require, for it is part of

<sup>29</sup> Am. Reg. 34; Bluntschli, *Mod. Kr.*, 148 (648), etc.; Maine, *Int. Law*, 195.

<sup>30</sup> L. 4 D. *de sep. viol.*; L. 36 D. *de relig.*

<sup>31</sup> Hague Second Convention, Art. 56.

<sup>32</sup> Second Convention, Art. 46.

<sup>33</sup> Bluntschli, *Mod. Kr.*, §§ 161 (661), 163 (663).

<sup>34</sup> Am. Reg. 88; Bluntschli, secs. 152 (652), 157 (657); Frederick II, *Oeuvres*, XXVIII, 91; White's Lee, 200, 228, 286, 289.

the war power of its country only so far as that country could itself exercise dominion over it.<sup>35</sup>

§ 538. **Requisitions.**—Quarters, food, forage, supplies, clothing, fuel, arms, horses, draft animals, transportation, cattle, and similar necessities may under the name of requisitions be taken by an army from private citizens. Inhabitants, such as carpenters, smiths, drivers, tradesmen and laborers, may be compelled to work for military purposes, and soldiers may be billeted in private houses. While nothing not a military necessity should be taken, if the army chest runs low, even money in banks is sometimes appropriated, as in the notable example given by Davoust at Hamburg in 1814. It was the practice of Frederick II to direct that such supplies should be contributed gratis,<sup>36</sup> and that has been the general rule, to which the Mexican and Crimean wars present exceptions, the former, however, only through the exercise of General Scott's personal influence.<sup>37</sup> Although a state may decline during war to pay any money to its opponent, it should do so if it is due citizens, because in that form it is impressed with the character of private property.<sup>38</sup> In accordance with that idea, the theory, at least, is now settled that requisitions shall be paid for or that vouchers (*bons de requisition*), signed by proper officers, shall be given to the owners of the property so appropriated,<sup>39</sup> entitling them to future remuneration by the enemy or their own country. Heffter, Bluntschli, De Garden and Calvo hold<sup>40</sup> that international law requires such payment, and The Hague Conference has sanctioned this view by declaring that neither requisitions in kind nor services can be demanded from communes or inhabitants except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country. These requisitions and

<sup>35</sup> See Heffter, § 130, n. 7.

<sup>36</sup> *Oeuvres* 28, p. 91.

<sup>37</sup> General Orders, No. 358, Nov. 25, and Dec. 31, 1847. While the American generals were permitted to use their discretion in the enforcement of the right of requisition, its existence was expressly affirmed in the instructions under which they acted. See Mr. Marcy's Instructions to Gen. Taylor quoted

by Halleck, ii, 112. The Treaty of Guadalupe Hidalgo provided that in future hostilities requisitions shall be paid for "at an equitable price if necessity arise to take anything for the use of the armed forces."

<sup>38</sup> Bluntschli, sec. 158 (658).

<sup>39</sup> Am. Regulations, 38.

<sup>40</sup> Calvo, *Droit Int.*, II, 189-190. Marcy in the Mexican War denied

services shall only be demanded on the authority of the commander in the locality occupied. The contributions in kind shall, as far as possible, be paid for in ready money; if not, their receipt shall be acknowledged.<sup>41</sup> Wellington gave such receipts after Waterloo, not as guarantees of future payment, but as evidence that requisitions had already been made upon their holders for provisions and forage. Napoleon was guilty of excessive requisitions, and he lived to attribute his reverses in Spain to such conduct there.<sup>42</sup> The daily supplies requisitioned by the Germans at Versailles are said to have been 120,000 loaves, 80,000 pounds of meat, 90,000 pounds of oats, 27,000 pounds of rice, 7,000 pounds of roast coffee, 4,000 pounds of salt, besides 20,000 litres of wine and 500,000 cigars.<sup>43</sup> From official reports it appears that in the thirty-four invaded departments damages proven amounted to 141,000,000 francs from fire and the like, and 264,000,000 francs from the loss of personal property taken without requisition, say \$80,000,000 in all lost without remuneration. Wine and cigars were almost always exacted as a part of such requisitions, especially champagne for the officers, articles which can scarcely be classed as necessities for the support of the invader.

§ 539. **Distinction between requisitions and contributions.** Washington.—There is a distinction between requisitions and contributions, the former being levied in kind, as supplies or services for the army, the latter as gifts really exacted as much by force as requisitions, with the advantage to the invader that they are never to be accounted for. In their origin contributions were a substitute for plundering,—a commutation for booty, generally but not necessarily in money.<sup>44</sup> Although Gustavus Adolphus, exceptionally mild for his time, punished plunderers with death, he did not hesitate to levy forced contributions, as at the surrender of Mayence, where he imposed a contribution of \$160,000, of which half was paid by the clergy. At Munich and elsewhere he was equally exacting. Bluntschli's contention that contributions were

that international law required payment.

<sup>41</sup> Hague Second Convention, Art. 52.

<sup>42</sup> Calvo, *Droit, Int.*, II, 183, 187. On page 194 Calvo states that the French contributions in 1870-1

were 39 million, imposts 49 million, requisitions 327 million francs, making the same total of 415 millions. See also Hall, 444 n.

<sup>43</sup> Halleck (Baker ed.) ii, p. 73, note.

<sup>44</sup> Calvo, II, pp. 188, 194.

abolished with the booty for which it is a substitute was not sustained by the Brussels Conference, which, after his book was published, sanctioned them with the proviso that they should be levied by commanding generals only. The same limitation was imposed by The Hague Conference, whose rule provides that if, besides the taxes mentioned, the occupant levies other money contributions in the occupied territory, this can only be for military necessities or the administration of such territory. No contribution shall be collected except under a written order and on the responsibility of a commander-in-chief.<sup>45</sup> This collection shall only take place, as far as possible, in accordance with the rules in existence and the assessment of taxes in force. For every contribution a receipt shall be given to the person paying.<sup>46</sup> By the irony of history the origin of the word "requisition" has been attributed to that most considerate of generals, Washington,<sup>47</sup> although the practice is as old as war itself. In his time requisitions were first employed by the Assembly of Massachusetts, for the purpose of regularly supplying his army around Boston with firewood and hay from the towns not more than twenty miles distant.<sup>48</sup> The word generally used by Washington is "contribution," as when in 1777 he directs Hamilton to procure from the inhabitants of Philadelphia "contributions of blankets and clothing \* \* in proportion to the ability of each."<sup>49</sup> It is true that he does speak repeatedly of "specific requisitions," the constitutional phrase then employed to describe the requisitions of Congress on the several states for provisions,—a phrase applicable to demands for supplies made by the general on local governments, but not to forced supplies exacted by military chiefs from the country.<sup>50</sup> He seems to have used the term "forage" oftener than any other to indicate the process of collecting supplies, such as hay, grain, cattle, hogs, sheep, and horses, for which he directed receipts to be given.<sup>51</sup> When referring to its application to his own people he speaks of it as "assessing a proportion of the productions of the earth," and he

<sup>45</sup> Bluntschli, §§ 154-5 (654-5); Twiss, War, § 64.

<sup>46</sup> Hague Second Convention, Arts. 49 and 51. Mr. Holls (p. 449) has fallen into an error, which is liable to create confusion, by translating "contributions" as "taxes." Their collection as distinguished from that of contribu-

tions is provided for in Art. 48. <sup>47</sup> Halleck, pp. 459-460; Hall, 443 n; Calvo, II, pp. 188.

<sup>48</sup> Washington Works (Sparks), III, p. 190, n.

<sup>49</sup> *Ib.* V, 67.

<sup>50</sup> *Ib.* VII, 158 and often.

<sup>51</sup> *Ib.* VII, 173, in 1780.

condemns it as ineffectual, burdensome and oppressive.<sup>52</sup> A different yet very effective kind of contribution was that levied by the United States military authorities during the Mexican war on imports, neutral and even American, into Mexican ports.<sup>53</sup> Scott's levy of \$150,000 for his soldiers on occupying the City of Mexico was, however, of the older type, and the fund resulting therefrom was devoted afterwards to the founding of a Soldiers' Home at Washington.<sup>54</sup>

§ 540. **Confiscation and sequestration.**—The right of confiscation has been fully upheld by the United States Supreme court, whether it be applied to property on land or to cargoes afloat in American ports,<sup>55</sup> when authorized by an act of Congress. Such legislation as that of July 13, 1861, August 6, 1861, July 17, 1862, and March 3, 1863, is not objectionable even when it confiscates the property of loyal adherents of the United States, their residence in the enemy's country making them enemies also.<sup>56</sup> While these acts contain some provisions subject to constitutional limitations because enforceable under the municipal powers in the Constitution, the general right of confiscation flows from the war powers of Congress, which have no limitations except those recognized by international law. Confiscation of property or stocks, as well as the freeing of slaves, are war rights conferred by those acts.<sup>57</sup> If the invader is a slave-holding state, its occupation makes no difference in the condition of slaves. If, on the other hand, the invader does not recognize slavery, his occupation puts slaves in an intermediate position, amounting to emancipation only in the event the territory is permanently retained. The Czar of Russia thus solved the question submitted to him as arbitrator between England and the United States after the war of independence.<sup>58</sup> The American Regulations go further, however, and provide that fugitive and captive slaves become free and are beyond any question of postliminy. The freeing of slaves by proclamation of President Lincoln has been justified as a war measure on the ground that slaves are contra-

<sup>52</sup> *Ib.* VII, 369 (1781).

<sup>53</sup> Wharton, *Int. Law Dig.*, § 339.

<sup>54</sup> 9 *Stat. Large*, 596.

<sup>55</sup> *Brown v. U. S.* 8 Cranch, 110, and 228, 229; *The Emulous*, 1 Gallison, 563; Kent, *Commentaries*, 56-60.

<sup>56</sup> *U. S. Stat. Large*, 255, 319, 589, 762; *Miller v. U. S.* 11 Wall. 268.

<sup>57</sup> *Miller v. U. S.* 11 Wall. 268, 305, 309, 311; *Tyler v. Defrus*, *Id.* 331. *The Confiscation Cases*, 20 Wall. 92, and a number of others deal more with procedure than principle.

<sup>58</sup> Calvo, *Droit Int.*, II, 170; *Am. Regulations*, 43.

band, and the result was clothed with legality by the subsequent amendment of the Constitution declaring that neither slavery nor involuntary servitude, except for crime, shall exist in the United States. If the Southern Confederacy had triumphed the proclamation would have been of no effect, of course, in law or fact. Debts between individuals of belligerent states may be confiscated by special legislation, as by both governments during the American civil war, and such action will be sustained to the extent payment has been actually compelled. Confiscation during mere military occupation of the enemy's country is so far upheld as to excuse the debtor from second payment when he shows *vis major*, but not otherwise.<sup>59</sup> The requisites are (1) proof of payment, (2) that the debt was due, (3) that payment was not delayed by the debtor, and (4) that there was compulsion, either by actual force or by threatened punishment.<sup>60</sup> Although it was declared in 1807, in *Wolffe v. Oxholm*, that the confiscation of private debts is invalid, Story held in 1814 just the contrary. Confiscation is now confined almost exclusively to civil wars, involving the question of allegiance.<sup>61</sup> The principle underlying the right of confiscation must not be confused with that which justifies the destruction or seizure of buildings for military use; or with the rule providing, that, if non-combatants fire on troops from dwellings or otherwise use them for hostile purposes, these may be demolished as a punishment. Confiscation is usually enforced not as a penalty but a supposed military necessity. While its employment can never be justified as a means of extinguishing the title to real property simply because it belongs to an alien enemy, the income of such property may be sequestered to prevent its remittance to the enemy's country.<sup>62</sup> Sequestration differs from confiscation in that it does not divest property, and only suspends remedies during the war.<sup>63</sup> It may, therefore, be said that the three exceptions to the rule commanding that private property shall be respected are embodied in the toleration (1) of booty, in the limited form in which it survives, (2) of contributions and requisitions, and (3) of penalties and confiscations.

§ 541. Right of seizure as affected by owner's domicil.—As

<sup>59</sup> Bynkershoek, *Quaest. Jur. Pub.* ch. VIII; Calvo, *Droit Int.*, II, 206.

<sup>62</sup> Vattel, *Droit des Gens*, III, ch. 5, § 76; III, ch. 13, § 200.

<sup>60</sup> First Steps Int. Law, 352.

<sup>63</sup> *Georgia v. Brailsford*, 3 Dallas

<sup>61</sup> Maine Int. Law, 202; See 1. Hamilton's Camillus Letters.



stated heretofore domicile is so important in distinguishing friend from foe that a neutral domiciled in one belligerent country thereby becomes the foe of the other belligerent. In the matter of the Laurents, who had money in the Mexican treasury to pay for confiscated church property for which that government had not delivered a deed, General Scott confiscated the fund as public property, and it was held by arbitrators that it was rightfully subjected, because its owners were *pro hac vice* Mexicans.<sup>64</sup> The rule may be so extended as to make a subject or citizen an enemy even of his own country for certain purposes. While such domicile does not necessarily change his citizenship or his permanent allegiance, or affect him criminally at all, it may make him an enemy so far as concerns his property connected with his residence. It may stamp enemy character upon such property, and in that way subject it to the treatment awarded to that of an enemy,<sup>65</sup> a rule extensively applied by the Federal authorities during the American civil war. In that struggle neither the neutrality nor loyalty of cotton owners prevented the military seizure of their property, however strongly such facts may have appealed to the legislature for compensation afterwards.<sup>66</sup> On the other hand, so long as he does not forfeit his privileges of neutrality by participating in active hostilities, even an enemy domiciled in a neutral country is a neutral, and his property there is also neutral. Thus an American residing in the Danish island of St. Thomas, who traded with the French colonies while France and United States were hostile, was protected by his neutral residence.<sup>67</sup> The share of an enemy in a partnership doing business in a neutral country is, however, subject to seizure.<sup>68</sup> On the continent of Europe, where the nationality of the owner controls rather than his domicile or the accidental location of the property itself,<sup>69</sup> different principles prevail.

<sup>64</sup> Calvo, *Droit Int.* II, 210. The Ann Green, 1 Gallison, 274.

<sup>65</sup> The Venus, 8 Cranch, p. 253; 2 Wheaton Rep., App. Note I, p. 27; The Danous, 4 Rob. 225, n.; Miller v. U. S., 11 Wall. 268; Woods v. Wilder, 43 N. Y. 164.

<sup>66</sup> The Vigilantia, 1 Ch. Rob. 1; The Immanuel, 2 Ch. Rob. 148; The Anna Catherina, 4 Ch. Rob. 107; The Rendsborg, 4 Ch. Rob. 121; The Vrow Anna Catherina, 6 Ch. Rob. 269; The Dree Gebroed-

ers, 4 Ch. Rob. 235; The Phoenix, 5 Ch. Rob. 20; The Jonge Klassina, 5 Ch. Rob. 299, 303; Hhd. v. Boyle, 9 Cranch, 191, 197; See also Calvo, *Droit Int.*, II, 48 et seq.; Wharton, *Int. Law Dig.*, §§ 203, 224-8, 353, 373.

<sup>67</sup> Murray v. Charming Betsy, 2 Cranch, 120.

<sup>68</sup> The Antonia Johanna, 1 Wheat. 159; The Friendschaft, 4 Wheat. 109.

<sup>69</sup> Calvo, *Droit Int.*, II, 59; Heff-

§ 542. Right of seizure as affected by situs of the property itself.—As property situated in the enemy state is so far personified as to be treated as enemy property, even though the owner is friendly or a neutral and resides in his own country,<sup>70</sup> it appears that the situs of the property itself must sometimes be considered independently of the domicile of the owner. The reason of such a rule is to be found in the fact that as the wealth of a nation is made up of the property of all its residents, everything permanently within its bounds is liable through taxation or otherwise to support the government carrying on hostilities. Justice requires that all property should be equally subject to the fortunes of war, regardless of the actual allegiance or residence of the owners, whether belligerent, neutral or loyal, and that the products of the soil should be placed in the same category as the soil itself.<sup>71</sup> While in the case of a neutral confiscation relates only to property in the enemy domicile, in the case of an enemy by domicile all his property is liable, wherever it can be seized. Because citizens wishing to withdraw their property from an enemy's country must do so seasonably,<sup>72</sup> it might be inferred that conversely an enemy's property in a neutral country would be protected. Upon the contrary, whenever it can be reached it is captured; its neutral location does not make it neutral.<sup>73</sup> Even the hostile use by the enemy of neutral property makes it subject to capture, although the owner or master devotes it to such use only while acting under duress. Neither state courts nor prize courts can enter into such questions between individuals and the other country; when they ascertain that certain property was used by or for the enemy state, they must act accordingly. And so in the case of the transport of an official or dispatches from an enemy port;<sup>74</sup> of a neutral sailing under

ter, § 124, Geffcken note 1; Bykershoek holds to the English rule in *Quaest. Jur. Pub.* ch. III.

<sup>70</sup> The *Vigilantia*, 1 Rob. Adm. p. 1; The *Susa*, 2 Id. p. 255; The *Portland*, 3 Id. p. 41; The *Jonge Klassina*, 5 Id. pp. 297, 302; The *Johanna*, 1 Wheat. p. 159; The *Freundschaft*, 4 Id. p. 105; Mrs. Alexander's *Cotton*, 2 Wall. 404; The *Venus*, 8 Cranch, 253; The *Hiawatha*, Blatchford, Pr. Cases, 1. 16; The *Mary Clinton*, Id. 556; The *Anna Catherina*, 4 Rob. 119;

The *Gray Jacket*, 5 Wall. 342; The *Mary and Susan*, 1 Wheat. 46; *Calvo*, II, p. 54; *Bentzon v. Boyle*, 9 Cranch, 191.

<sup>71</sup> Vattel, *Droit des Gens*, I, ch. 14, sec. 182; Prize Cases, 2 Black, 635; The *Cheshire*, 3 Wall. 231; The *San José Indians*, 2 Gall. 268.

<sup>72</sup> The *St. Lawrence*, 9 Cranch, 120; The *Mary*, Ib. 126; The *Gray Jacket*, 5 Wall. 342; The *Wm. Bagaley*, 5 Wall. 377.

<sup>73</sup> The *Venus*, 8 Cranch, p. 253; *Calvo*, *Droit Int.* II, 54.

<sup>74</sup> The *Carolina*, 4 Ch. Rob. 261;

the enemy's license or convoy, or otherwise identifying himself with the enemy; or even in the case of citizens of a belligerent country allowing their property to be found under an enemy's flag.<sup>75</sup> Such rules apply equally to merchants who are consuls of neutral states.<sup>76</sup> Although France and Russia recognize the sale of a ship to a neutral only when complete before declaration of war, England and America uphold it at any time if *bona fide* and absolute.<sup>77</sup>

§ 543. When cotton or other articles may be "constructive contraband."—Striking instances of property personified as an enemy, even by both sides, occurred during the American civil war, in which cotton, and in a lesser degree sugar, rice, and tobacco, although privately owned and without a military character, were treated as subject to capture by the Federals and to destruction by the Confederates themselves whenever such capture seemed probable. The legality of such a proceeding was recognized by legislation on the one side,<sup>78</sup> and by practice on the other. Rather than permit cotton, the chief reliance of the Confederacy for the purchase in Europe of munitions of war, to fall into the hands of the Union forces, the Southern armies devoted it, however owned, to destruction. It is estimated that a stock, to the value of \$80,000,000 was destroyed in that way at New Orleans just before its capture by the Federal forces. When captured by such forces, it was appropriated and sold, regardless of ownership, by the government; the soldiery could not legally seize it as booty or for the sake of gain.<sup>79</sup> While, in a popular sense, cotton thus came to be known as "contraband," it was, under the circumstances surrounding it, rather enemy property of such an exceptional character as to justify its distinction under a

The *Atalanta*, 6 Ch. Rob. 460; The *Julia*, 8 Cranch, 189; The *Nereid*, 9 Cranch, 388; The *Neutralitet*, 3 Ch. Rob. 296; The *Hart*, 3 Wall. 559.

<sup>75</sup> The *Wm. Bagaley*, 5 Wall. 377.

<sup>76</sup> The *Indian Chief*, 3 Ch. Rob. 27, and citations.

<sup>77</sup> Heffter, § 124, Geffcken note, 1.

<sup>78</sup> See Acts of confiscation of Aug. 6, 1861, designed to weaken the enemy, not to punish the owner (12 Statutes at Large, 319); and of July 17, 1862, designed to punish

disloyal owners (*Id.* 591); and that of March 12, 1863 (*Id.* 820), for the collection of abandoned property. See also *Kirk v. Lynd*, 106 U. S. 315; *Confiscation Cases*, 20 Wall. 92, 109; and *U. S. v. Winchester*, 99 U. S. 372, 376, which seem to conflict with *Pelham v. Rose*, 9 Wall. 103, and *Miller v. U. S.*, 11 Wall. 268; *U. S. v. Bales of Cotton*, *Woolworth*, 236.

<sup>79</sup> 1 *Kent's Commentaries*, 92, 93; *Prize Cases*, 2 Black. 687; *Mrs. Alexander's Cotton*, 2 Wall., 404, 420, 422; *Young v. U. S.*, 97 U. S. 39.

special rule, dictated, according to Kent, by the necessary operations of war. Although such cotton as the produce of enemy soil was enemy property, and although, strictly speaking, residence in the enemy's country made its owners enemies, Federal legislation, distinguishing between "rebel" and "loyal," provided for payment to the latter by the government of the net proceeds of sale.<sup>80</sup> European writers have, however, sharply questioned the American extension to private property on land of the well-settled principle that produce, used to maintain the enemy's cause, is at sea subject to confiscation or destruction.<sup>81</sup> The argument is that if cotton or wheat may be treated, under the special conditions of war in the United States, as "constructive contraband," any other article may be so treated under the special conditions of war elsewhere. The unusual severity with which cotton and certain other articles were treated during the American civil war does not accord with the theories and tendencies of modern international law.

§ 544. **How a district may be internationalized.**—While under ordinary conditions international law concedes to national or municipal law the exclusive right to regulate the conduct of military authorities within the limits of their own country, a suspension of that principle sometimes occurs, especially during an invasion, in which a district of country becomes in a measure enemized, or hostilized, by the force of circumstances. When, for instance, civil government is suspended and military occupation ensues temporarily, with all its consequences, in a certain part of one's own country, such part is treated as hostile, and private property is necessarily appropriated for the army or to prevent its falling into the hands of the enemy.<sup>82</sup> In England and America there is no law to cover such a condition of things, occurring not infrequently on the continent of Europe, where it is called a state of siege. As military rights and duties are practically the same under such abnormal conditions as in the event of a hostile invasion, they need not be discussed separately. For instance, private property may be appropriated for public use, or, what is the same thing, destroyed to prevent its falling into the enemy's hands for his use. During the Anglo-Boer war such appropriation was generally called "commandering." The exercise of

<sup>80</sup> Act of March 12, 1863, sec. 6  
(12 Statutes at Large, 821).

<sup>82</sup> Prize Cases, 2 Black, 635, 674  
(Justice Grier).

<sup>81</sup> Heffter, § 135, Geffcken note 2.

this despotic war power can be justified, however, only by extreme and pressing necessity. Thus while dike-cutting by the Dutch, and the burning of Moscow by its inhabitants cannot be condemned, because justified by sound military reasons, the threatened destruction of the Johannesburg mines would have been criminal. As a general rule, for all purposes of this chapter, the opposing parties in a civil war are to be considered as enemies of each other; and where "the boundary is marked by lines of bayonets, which can be crossed only by force," either side of it is enemy's territory to the other, with all the rights and duties which the laws of war impose.<sup>83</sup> As an exception to that rule, whenever any district is so affected by hostilities as to place it in the abnormal condition defined in this section, it may be said to be internationalized so long as such condition continues.

<sup>83</sup> Mitchell v. Harmony, 13 Howard, 115.

## CHAPTER VIII.

### LAWS OF WAR AS TO ENEMY PROPERTY AT SEA.

§ 545. **Property liable to capture at sea.**—The only property liable to capture at sea is personalty, either public or private. The former embraces all public vessels and their appurtenances and war supplies on board designed for naval use, or in the course of transportation to fortified places; the latter, with certain exceptions, all vessels and cargoes belonging to an enemy. From the decisions of the prize courts it appears, however, that the laws of war are much more concerned with private property than public, that is, with its violent appropriation or capture by belligerents. Whatever belongs to an enemy, except certain craft exempt for humanity's sake, and property, not contraband, under a neutral flag, may be violently taken by his opponent, with the result that the captor becomes actual owner thenceforth *jure belli*. The present chapter therefore relates mainly to captures, whose consideration involves, in the first place, the question, what property is subject to capture and what is not; in the second, what constitutes a valid capture, including both the acts of possession by the captor, and the acts of the prize court recognizing and validating the change of ownership. While that method of treatment reverses the order pursued in regard to captures on land, the change is desirable here because of the consideration which must be given to prize courts in connection with sea captures.

§ 546. **Property exempt from capture for humanity's sake. Hospital and cartel ships, and fishing boats.**—There are but few exceptions to the rule that all enemy property afloat is subject to the fate of war. The first place on the list of such vessels as are exempt from liability to capture should be given to hospital and cartel ships, neutralized by common consent and now protected by The Hague rules, on account of their humane missions. The same spirit has for a long time guaranteed more or less perfect protection to other harmless or specially useful craft, such as coastwise fishing boats, which, with their crews and appurtenances, are exempt from capture during war so long as they confine themselves strictly to their legitimate pursuit. The exemption so far as concerns France and England dates back at least to 1403; and as to France and Hol-

land to the arrangement regulating the herring fishery made in 1536. France declined to recognize it for a short time after 1692 because certain persons claiming to be fishermen were regarded as spies; and in the time of Napoleon England also captured fishermen on the charge that their boats transported military stores.<sup>1</sup> And so during the American Revolution Paul Jones in his warship the *Providence* and the American privateers generally captured fishing boats off the banks of Newfoundland,<sup>2</sup>—an example that would not be followed now. When in 1854 the British destroyed boats and dwellings of fishermen in the sea of Azof, they claimed that such action was necessary for military purposes. Although Lord Stowell speaks of the exemption in question as existing “by a rule of comity only and not of legal decision,” the Supreme Court of the United States has recently declared, in a notable judgment heretofore referred to, that “the word ‘comity’ was apparently used by that great judge as synonymous with courtesy or good will. But the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested on custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law.”<sup>3</sup> The exception does not apply, however, to vessels engaged in whaling or other deep sea fisheries or to those in which the catch is for salting and commercial use.<sup>4</sup>

**Vessels engaged in scientific expeditions.**—The exemption in favor of vessels engaged in scientific expeditions is of more recent growth. Probably the first prominent instance occurred when the French naval authorities issued orders for the protection of the English explorer, Captain Cook, during his circumnavigation of the world in 1776,<sup>5</sup> the principle of which has

<sup>1</sup> Bynkershoek, *Quaest. Jur. Pub.* ch. III; Halleck, *Int. Law*, p. 493; Bluntschli, *Mod. Kr.*, §§ 165 (665), 173 (673), etc.; Young Jacob, etc.; 1 *Rob. Adm. Rep.* 20; 2 Azuni, I, ch. I, Art. V.

<sup>2</sup> Cooper.

<sup>3</sup> *The Paquete Habana*, 175 U. S. 677.

<sup>4</sup> Hall, § 148; *The Susa*, 2 Ch. Rob. 251; *The Johan*, Edw. Adm. R. 275 & App. L. The American naval code expresses the excep-

tions as follows: “All public vessels of the enemy are subject to capture, except those engaged in purely charitable or scientific pursuits, in voyages of discovery, or as hospital ships under the regulations hereinafter mentioned. Caravel and other vessels of the enemy, furnished with a proper safe-conduct, are exempt from capture, unless engaged in trade or belligerent operations.”—Art. 13.

<sup>5</sup> Halleck, *Int. Law*, p. 493.

been recognized several times since. Flinders had a different experience at Mauritius in 1803, because the passport on which he relied, expressly covering the ship *Investigator*, was held by the French authorities not to embrace the *Cumberland*, for which the *Investigator* had been exchanged.<sup>6</sup> Great Britain and France, by a convention made in 1843 and extended in 1856, have likewise exempted mail packets until notification; an exemption of no great importance, as the exchange of mail must necessarily cease at an early day in every war.

**Vessels in distress.**—As the precedents on the subject are conflicting it is going too far to say as some writers do that international law exempts from capture vessels driven into an enemy port by stress of weather, or entering there in ignorance of the existence of war. The commendable course was certainly that pursued by the governor of Havana who in 1746, after refusing to accept the surrender of the shattered British warship *Elisabeth*, aided her to refit.<sup>7</sup> There is, however, a more distinct agreement that ships and cargoes wrecked on an enemy coast shall be exempt from capture.<sup>8</sup> As such a rule of comity rests upon the best impulses of honor and humanity it is to be hoped that, as in the case of fishing boats, it will soon ripen into law. Such an exemption of shipwrecks would represent a notable departure from the primitive notion which regarded them as treasure trove, if not direct gifts of God to the dwellers of the inhospitable coast.<sup>9</sup>

**Merchant vessels afloat at declaration of war.**—As heretofore observed, merchant vessels of the enemy that have sailed from a port within the jurisdiction of the belligerent, prior to the declaration of war, shall be allowed to proceed to their destination, unless they are engaged in carrying contraband of war or are in the military service of the enemy. Merchant vessels of the enemy, in ports within the jurisdiction of the belligerent at the outbreak of war, are generally allowed some reasonable period after war has begun to load their cargoes and depart, and shall thereafter be permitted to proceed to their destination, unless they are engaged in carrying contraband of war or are in the military service of the enemy. Merchant vessels

<sup>6</sup> 2 Flinders Voyages, ch. 3-9.

<sup>8</sup> Bluntschli, *Mod. Kr.*, § 165

<sup>7</sup> Lawrence, *Int. Law*, 381; as to neutrals, see the *Hurtige Hane*, 3 Rob. 326; Raynal's *Hist. du Commerce*, XIV, ch. 17; 2 Azuni, II, ch. IV, Art. I, note.

(665), 173 (673), etc.; Halleck, *Int. Law*, p. 494.

<sup>9</sup> 1 Kent's Commentaries, 8, 13.



of the enemy which have sailed from any foreign port for any port within the jurisdiction of the belligerent before the declaration of war, are likewise generally permitted to enter and discharge their cargoes and thereafter to proceed to any port not blockaded. The American naval code thus states these principles, the substance of which is now generally recognized and acted on.<sup>10</sup>

§ 547. **Tendency to exempt all private property not contraband from capture at sea.**—There has been for a long time a persistent effort upon the part of certain states to exempt all private property, not contraband, from capture at sea. While evidence of preceding attempts in the same direction are to be found, the most definite early enunciation of the principle occurs in the American-Prussian treaty of 1785, in which Frederick II and Franklin attempted to establish for their respective countries a rule which has not been generally observed, even in subsequent treaties between such countries. In 1823 Secretary J. Q. Adams tried to induce England, France and Russia to adopt it; and in 1856 Mr. Marcy urged the powers to incorporate it in the Declaration of Paris along with the abolition of privateering. When in 1859 the Bremen Chamber of Commerce declared that the exemption in question is demanded by the legal conscience of the age, it gave expression to the spirit in which the freedom of commerce should be advocated, a spirit firmly upheld by the United States in its consistent efforts to give permanent and final effect to Franklin's initiative. As it is now even beyond the power of the fleets of Great Britain to guard her world-wide commerce, Hall wisely contends that the time has come for that power to withdraw her long-continued opposition to the adoption of a rule that proposes to place private property at sea, as well as private property on land, under the protection of a principle which declares, that, as war is a struggle not between private individuals but between states as such, it should not affect either private persons or property on land or sea. It cannot be successfully maintained, however, that such a theory is carried out at all completely in the practice regulating the seizure of private property on land, as all such property is liable in an invaded district to requisitions, contributions and the ravages of war. While domestic trade may go on to some extent, foreign commerce is suspended wherever the invader's arms control. For such reasons an exemption from sea cap-

<sup>10</sup> Am. Naval Code, Art. 15; The Buena Ventura, 175 U. S. 384.

ture would not equalize the perils of property on land and sea; it would rather render sea commerce the more secure of the two. The best reason, therefore, for maintaining the present condition is to be found in the fact, that, as contraband is a more important subject by sea than by land, a general suspension of commerce by sea cripples an enemy more than a like suspension by land. A country may be thus distressed and the prosecution of a war rendered more difficult by the cutting off of sea commerce, whose interruption makes more inconvenient and expensive the introduction of many things, including often the necessities of life. Such "crippling of commerce" is an effective means of war.<sup>11</sup> When fully carried out, an interruption of that kind amounts to a blockade of the whole enemy country, save so far as the same is modified by railroad commerce with adjacent countries, an alleviation that could not extend to island states like Great Britain and Japan. Such was the condition of the Southern Confederacy when, with an enemy only on its northern borders, it was practically cut off from all trade by sea; and such might be the condition of Spain in the event of a war with France. Practically it makes no difference whether private commerce is prevented by blockaders at the entrance of a harbor or by captures made on the high sea; and as blockade and capture of private cargoes rest upon the same principle, that of weakening the enemy country, their abandonment, for humanitarian or other reasons, must inevitably render war less humane by prolonging its duration. And in this connection the fact should not be overlooked, that, as it is generally more difficult to provide a naval than a military base of supplies, it very often becomes necessary for ships at sea to secure the same by captures from the enemy. In 1782 the great French admiral Suffren, without a port or resources, lived from the enemy's shipping for six months at a time;<sup>12</sup> in the American civil war Captain Semmes with only two vessels succeeded to a great extent in living on the enemy; while during 1796 the British fleet was actually driven from the Mediterranean for want of ports in which to obtain provisions and water. On long cruises, particularly in hostile waters, all fleets must to some extent depend upon their own resources. Nelson's orders in the expedition in which was fought the battle of the Nile were to supply his fleet in any way at the cannon's mouth.<sup>13</sup>

<sup>11</sup> *Esposito v. Bowden*, 7 E. & B. 779.

<sup>12</sup> Mahan's *Sea Power*, 445.

<sup>13</sup> Mahan's *Nelson*, 283.

**Should property taken at sea be paid for?—Convoy.**—As private property when taken on land is now supposed to be paid for, the same rule should be extended to like seizure and appropriations made at sea. In point of fact, it is often provided in treaties that when such losses have been ascertained by a mixed commission they shall be paid for, as in agreements made between France and Spain in 1823, between France and Mexico in 1865, and between the English and Dutch in 1812 when vessels captured from the latter were returned. Such efforts in the right direction may be said to represent international law in the process of formation. On some occasions practice has even gone further, as in the war of England and France with China, in the Crimean war, and in that between Italy and Austria in 1866, when the belligerents expressly or tacitly agreed on the entire exemption of private property at sea from capture, a rule in which France, with a stronger navy, refused to coincide when initiated by Prussia in 1870. Such instances are, however, beyond the present stage of international law. As yet private property of the enemy, sailing under his flag, is subject to capture; and, if compensation is allowed at all, it is only in the subsequent treaty of peace. Part of the contention as to neutrals—accepted in America and on the continent of Europe<sup>14</sup>—is that when vessels sail under convoy the word of the commanding officer of the squadron should suffice,—the contention of Denmark in 1801 which made British victory at Copenhagen possible.<sup>15</sup> The most formidable obstacle to the establishment of the rule of convoy is to be found in the fact that the present extent of merchant shipping makes it practically impossible to supply sufficient warships to escort it.

§ 548. **Rules defining enemy property at sea. Actual ownership; suum cuique.**—Admitting that private property of the enemy at sea is liable to capture, an attempt must be made to define, with special reference to cargoes, what enemy property on the sea really is. Does the flag of the ship or the actual ownership of the goods control? While such is not yet the rule, and while historically the practice has been far different, the present tendency perhaps is to make the nationality of the vessel conclusive as to the cargo, that is, to make the flag, except

<sup>14</sup> Am. Naval Code, Art. 30.

<sup>15</sup> Mahan's Nelson, 457. Geffcken thinks that the exemption of private property must be established,

if at all, rather through treaties than discussion. Heffter, § 139, note.

in cases of deception, cover the goods on board. As the question whether property is enemy property *vel non* is the crucial one in capture, and the one most difficult of solution, special consideration must be given here to four different systems or theories touching the subject which have prevailed at different times and in different countries. For the first we must look to the *Consolato del Mare*, a code said to have been compiled at Barcelona in the latter part of the fourteenth century (or at Pisa, according to Azuni) in which is contained the earliest collection of the laws and customs of the sea in time of war.<sup>16</sup> In that source is expressed the natural view that the ownership of the ship determines the right of its capture, and that the ownership of the goods determines the right of their capture. Although either may be captured if belonging to the enemy, neither shall be captured if belonging to a neutral. In that way the goods and the vehicle are separately considered, and neither affects the other. Hostile goods, for instance, may be taken out of a neutral merchant ship which is released.<sup>17</sup> This principle of *suum cuique*, which Chief Justice Marshall considers to be the original law of nations on the subject of captures, has been called the common law of the sea. Its origin may be traced even back of the *Consolato*, as it was the basis of a compact between Arles and Pisa in 1221. Spreading with other customs of the Mediterranean to the western and northern seas, by the fifteenth century it had become the general rule of the civilized world, and still prevails in Great Britain and the United States.<sup>18</sup> In one respect, however, the English differs from American practice,—the former regarding it as a departure from neutrality if the goods are laden on an armed enemy vessel, the latter holding that fact to be immaterial.<sup>19</sup> The presumption that the goods are of the same nationality as the ship—*res in hostium navibus præsumuntur esse hostium donec probetur*—can be overcome by papers on board at the time of the visit.<sup>20</sup> In no event can enemy property be seized in neutral waters or on public ships of a neutral,

<sup>16</sup> *Consolato*, ch. 273; Twiss, Law of Nations, War, § 76; The Venus, 8 Cranch, 253; 2 Azuni, II, ch. III, Art. 1. III, § 19; Jefferson to Genet, July 24, 1793, 4 Works, 24.

<sup>17</sup> Bynkershoek, *Quæst. Jur. Pub.*, ch. XIV.

<sup>18</sup> The Nereide, 9 Cranch, 388, 418; Kent's Commentaries, 124, 129; Wheaton's Elements, IV., ch.

<sup>19</sup> Twiss, Law of Nations, War, § 77; The Fanny, 1 Dodson, 443; The Nereide, 9 Cranch, 388; The Atalanta, 3 Wheaton, 409.

<sup>20</sup> The London Packet, 5 Wheat. 132.

who, as he has the right to remain on friendly terms with both belligerents, can carry his goods, and ship in their vessels just as in time of peace. The liability such as it is, is *ex re*, not *ex delicto*,<sup>21</sup> and the *res hostis* alone suffers. The belligerent's right to take the cargo must be exercised so as not to conflict with the neutral's right to earn freight by carrying it. If, therefore, one belligerent takes the goods of the other out of a neutral ship, it must be without damage to the ship; he must pay the vessel, not *pro rata itineris*, as Zouch argues, but the whole freight which it would have earned by completing the voyage, capture being equivalent to delivery.<sup>22</sup> The measure of the freight to be paid is that of peace, as a belligerent does not have to pay the war premium caused by fear of the very capture which he has the right to make.<sup>23</sup> The case is entirely altered, however, if the neutral endeavors to cover the property from lawful belligerent seizure, because in that way he identifies himself with the opposite belligerent;<sup>24</sup> and if enemy property is fraudulently blended in the same claim with neutral, all must be condemned.<sup>25</sup> While the captor must pay the freight due on the enemy goods taken out, he is not liable for freight on neutral goods which happen also to be on the ship, nor for damages or losses caused by delay or otherwise. Such are the misfortunes of the neutral,<sup>26</sup> and like many others resulting from war must be borne where they fall.

§ 549. **Doctrine of the Consolato first changed by the French. Hostile infection.**—The rule in question, called the "common law of the sea," was first changed by the French, who introduced the doctrine of hostile infection under which the carriage of a hostile cargo rendered the ship also liable to capture, and the loading of a neutral cargo on a hostile ship rendered both liable. A *règlement* of Francis I, of 1543, introducing this new principle, was followed by another of similar nature in 1584. No matter whether Sir Leoline Jenkins is right or wrong in supposing that such ordinances were passed merely *in terrorem*, to put an end to neutral frauds, the prin-

<sup>21</sup> 1 Kent Comm. 124, 126; The Atlas, 3 Rob. 304, n.; Am. Naval Laws, Art. 2.

<sup>22</sup> The Copenhagen, 1 Rob. 245 (Am.).

<sup>23</sup> The Twilling Riget, 5 Robinson, 82; The Antonia Johanna, 1 Wheaton, 159; Vattel, *Droit des Gens*, III, ch. 7, § 115.

<sup>24</sup> Schwartz v. Ins. Co., 3 Wash. C. C. 117; The Hart, 3 Wall. 559; The Rugen, 1 Wheat. 61.

<sup>25</sup> The St. Nicholas, 1 Wheat. 417.

<sup>26</sup> The Antonia Johanna, 1 Wheat. 159. See the Ann Green, 1 Gallison, 274.

principle of infection contained in them became a part of the *Ordonnance de la Marine* of Louis XIV,<sup>27</sup> and continued to be French practice down to the Declaration of Paris. The result of the innovation has been embodied in the formula:

Enemy ship—enemy goods,  
Enemy goods—enemy ship.

Although Grotius states the Dutch law to be otherwise, Bynkershoek says the rule thus formulated obtained in his day. He contends that the fact that goods are found on an enemy vessel should raise only a removable presumption of hostile ownership.<sup>28</sup>

§ 550. Further variations established by the Dutch. Nationality of ship.—The Dutch established the further variation that the nationality of the ship controls that of the cargo, a rule embodied in the formula:

Free ship—free goods,  
Enemy ship—enemy goods,

which, after having been adopted by Turkey as early as 1604 in a treaty with Henry IV of France, prevailed during the greater part of the eighteenth century. The two propositions embodied in the respective phrases of the above formula are, however, severable; and they have been so treated in the United States, where only the first is insisted on. The second, as a departure from the original common law of the sea, has found less general acceptance;<sup>29</sup> Grotius was only willing to accept the principle involved in it as a rebuttable presumption.<sup>30</sup> Bynkershoek properly excepted from the operation of the first contraband of war on its way to the enemy.<sup>31</sup>

§ 551. Declaration of Paris, 1856. Free ships—free goods.—The Declaration of Paris of 1856 substantially adopts the first half of the Dutch variation of the common law of the sea in these words: "Neutral flag covers enemy cargo, except contraband of war."<sup>32</sup> This final acceptance *pro tanto* of the principle declared by Russia and the other parties to the Armed Neu-

<sup>27</sup> Twiss, *Law of Nations, War*, § 84; Grotius, *De Jure Belli ac Pacis*, III, ch. 6, title 6; Azuni, 2 § 83.

<sup>28</sup> Bynkershoek, *Quaest. Jur. Maritime Law*, 163.

<sup>29</sup> *Pub.*, ch. XIII, XIV.

<sup>30</sup> The *Nereide*, 9 Cranch, 388, *Pub.*, XIV; 2 Azuni, II, ch. III, 418.

<sup>31</sup> Bynkershoek, *Quaest. Jur.*

<sup>32</sup> Martens (N. R.), XV, p. 792.

<sup>30</sup> Twiss, *Law of Nations, War*, <sup>32</sup> Martens (N. R.), XV, p. 792.

tralities, and long contended for by the United States, grew immediately out of its provisional adoption by France and England during the Crimean War.<sup>33</sup> While the executive department of the United States from Jefferson's presidency, if not earlier, has strenuously insisted that the rule—free ships, free goods—not only ought to be but actually is international law, the judicial department from the time of Marshall has as resolutely followed Lord Stowell to the contrary. When in 1780 and 1800 two concert of continental Europe organized armed opposition to several features in the practice of Great Britain, she managed, by her superiority at sea, either to break up these alliances or otherwise to neutralize their effects. And yet in the end the right has so far triumphed that all the civilized world, except Spain and the United States, have now adopted the declaration of free ship, free goods. In point of fact both of these countries do act upon this part of the Declaration, although they opposed other portions; and during the American civil war both sections virtually accepted it. In 1861, when the United States offered to give its formal adhesion to the Declaration, Great Britain declared "that Her Majesty does not intend thereby to undertake any engagement which shall have any bearing, direct or indirect, on the internal differences now prevailing in the United States." The answer made was "that the United States must accede to the Declaration of the Congress of Paris on the same terms with all the other parties to it, or that they do not accede to it at all." The British and French governments through their consuls in Charleston arranged with the Southern Confederacy that it should respect all the articles of the Declaration except that as to privateers,<sup>34</sup> but the United States, refusing to recognize a qualification suggested from abroad, took no further steps in the matter. It must be noted here that the correlative French principle of enemy ship, enemy goods was not adopted at Paris. As to neutral cargoes in enemy ships, therefore, the common law still prevails and such goods are exempt from capture. The principle of protection by flag now applies to all goods, not contraband, under the neutral flag. The terms of the Declaration on that subject are: "Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag."

<sup>33</sup> *Ib.* III, p. 158; 1 Kent Comm. 126; Wharton, *Int. Law Dig.*, § 342.

<sup>34</sup> Wharton, *Int. Law Dig.* § 342.

§ 552. **Nationality of vessel; change of ownership.**—From a commercial point of view, property at sea is either vessel or cargo. As to the first, nationality generally appears from the flag, while ownership of the vessel itself is shown by the ship's papers, of which the certificate of registry best proves the nationality and owner, passport, muster roll or crew list, and log book being also of value. The charter party will be found useful only when the vessel is hired.<sup>35</sup> A *bona fide* sale of a ship to a neutral, even during war, is recognized in England and America, although regarded with suspicion, but the purchase of an enemy vessel which has taken refuge in a neutral port has been disregarded.<sup>36</sup> Liens are not upheld, except such obvious ones as the lien of a ship on the cargo for freight. On the continent of Europe, especially in France and Russia, a sale during war is disregarded.<sup>37</sup>

§ 553. **Cargo; questions as to consignments.**—The difficulty of determining the true ownership of property at sea is greatest as to cargoes, the nicest questions arising perhaps out of consignments. Generally goods are shipped by a seller in one country to a buyer in another. Sometimes they are paid for before shipment, but oftener not. Upon capture of the vessel in mid-ocean, to whom do the goods belong? The generally accepted rule of law is that if shipped under order and on account of and at the risk of the consignee, they are his; but not if any interest is left in the consignor, or election to accept is given to the consignee. Under such conditions a complete title cannot be said to have passed. Delivery to the carrier is delivery to the buyer only when made without conditions.<sup>38</sup> Usage and special agreement may alter the rule as between the parties, but not as regards a captor. The consignor is often, perhaps generally, a neutral, and, if he could save the goods by assuming risks, he would always do so, and thus captures at sea would practically cease. For the same reason

<sup>35</sup> The American naval code calls for register, crew and passenger list, log book, bill of health, manifest of cargo, charter party, invoices and bills of lading as generally expected (Article 23). Hübnér reckons eleven papers, but Galliani, Lampredi, and Azuni are content with five. 2 Azuni, II, ch. II, Art. IV.

<sup>36</sup> The *Minerva*, 6 Rob. 396; The *Ga.*, 7 Wall. 32; The *Soglasie*, 2 Spinks, 101.

<sup>37</sup> *Sorenson v. Reg.*, 11 Moore Priv. C. C. 119; Heffter, § 124, G. n. 1.

<sup>38</sup> The *Mariana*, 6 Ch. Robinson, 24.



no change of ownership pending the voyage is recognized, except in case of stoppage *in transitu* for insolvency of the consignee; or a transfer made *bona fide* before war is declared.<sup>39</sup> If a transfer or other contract is made in contemplation of impending war, it is void, as defrauding a belligerent of his right of capture.<sup>40</sup> Bills of lading, invoices and all other papers throwing light on the question of ownership are to be consulted, as cargoes are often documented as neutral in order to avoid capture. For that reason in every case the papers, which are strictly construed, must show definitely who the real owner is. As a consignment to the order of the shipper does not divest him of the title, the goods remain liable to capture, if he be an enemy.

§ 554. What constitutes capture at sea.—Passing from the question of liability to capture to capture itself, it may be said that capture at sea consists in a belligerent's taking firm possession of the enemy's property, which is then called prize. As such property is necessarily either a vessel or a cargo or other property upon a vessel, its capture is often confounded with surrender of the crew manning the ship. Surrender, as heretofore defined, consists of an offer to submit on the one side, generally signified by hoisting a white flag, and of its acceptance on the other, by receiving the commander's sword or otherwise assuming control. And yet, although almost invariably preceding its capture, surrender of the crew is not essential to capture of the property they control. It is conceivable that victors might take possession of a ship covered with dead or wounded without the flag having been struck; and it not infrequently happens that a ship is abandoned to the enemy by its crew when they are able to escape. The Consolato, following the Roman rule in land war, required the property to be taken to port or other safe place, *infra præsidia*, before it could be recognized as a complete prize. While in later times capture has on the continent of Europe been considered incomplete until after possession of a night, or of twenty-four hours, the generally accepted rule of British and

<sup>39</sup> The Frances, 8 Cranch, 183; The Francis & Cargo, 1 Gallison, 445; The St. Jose Indians, 1 Wheat. 208; The Josephine, 4 Ch. Robinson, 25; 3 Phillimore Int. Law, 610, 612; Service Afloat, 483; Halleck, Int. Law, 474; The Frances, 1 Gallison, 448, 8 Cranch, 354; The Vrow Margaretha, 1 Ch. Rob. 337; The Packet de Bilboa, 2 Ch. Rob. 133.  
<sup>40</sup> The Rendsborg, 4 Ch. Rob. 121; The Jan Frederick, 5 Ch. Rob. 133; The Bernon, 1 Ch. Rob. 102.

American courts now is that capture becomes complete upon firm possession taken, just as on land, except that in sea captures recognition by a prize court is also necessary to validate the otherwise perfect act. The captor is not bound to leave the crew on the ship, nor are they bound to navigate her, although after possession taken prisoners left on board on parole are not at liberty to escape. Possession is usually consummated by sending a prize crew on board, or by some equivalent act manifesting intention to seize and hold.<sup>41</sup> One man, as prize master, is sufficient if he takes complete control. In fact, as Lord Stowell has decided, no one at all need be sent if the ship follows the orders of her captors, as when she has been compelled to steer in a prescribed direction.<sup>42</sup> The essential element, therefore, is change of control from one belligerent to the other, which, when effected to the satisfaction of a prize court, changes the ownership from the one to the other. Lord Stowell properly regarded as mere chimeras the views of those publicists who maintain on theoretical grounds that a capture at sea, like an appropriation of realty, can be validated only by a treaty of peace.<sup>43</sup> As in the nature of things there must be a distinction in the treatment of realty and personalty, it can hardly be doubted that the present practice is well grounded and essentially right.

§ 555. **Naval capture on land.**—The prize jurisdiction is exercised in cases of belligerent naval capture on land just as in cases of belligerent capture on the high seas, whether the capture be by the naval force alone or in conjunction with the army.<sup>44</sup> As unarmed transports not commanded by government officers are not war vessels, they do not make land captures prize.<sup>45</sup> Pine timber, which at low tide rests in the mud at one end, is property on land and if taken is land and not naval prize.<sup>46</sup> A ship seized at anchor in a conquered port is a droit of the admiralty.<sup>47</sup>

<sup>41</sup> The *Grotius*, 9 Cranch, 368; *Goss v. Withers*, 2 Burr. 683; *Valin sur l'Ordonnance*, III, tit. 9, Art. 8.

<sup>42</sup> The *George*, 1 Mason 24; The *Hercules*, 2 Dodson 368; The *Edward & Mary*, 3 Ch. Rob. 306; The *Grotius*, 9 Cranch, 370; Halleck, *Int. Law*, 727, 730 n.; *Mauran v. Ins. Co.*, 6 Wall. 10.

<sup>43</sup> Martens, *Ueber Capere*, § 40,

45; Heffter, § 192. See also *Linguet and Jouffroy, passim*.

<sup>44</sup> *Le Caux v. Eden*, Douglas Rep. 594; *Lindo v. Rodney*, Douglas Rep. 620; *Camden v. Home*, 4 Term R. 382; *Smart v. Wolff*, 3 Term R. 323; *The Cape*, 2 Rob. 216.

<sup>45</sup> *U. S. v. Bales of Cotton*, 1 Woolw. 236, 257.

<sup>46</sup> *Brown v. U. S.*, 9 Cranch, 139.

<sup>47</sup> *The Foltina*, 1 Dods. 450.

§ 556. Joint capture.—As constructive assistance is recognized in captures, each war vessel in sight is held to participate, because she may have contributed by intimidating the enemy.<sup>48</sup> A privateer, revenue cutter, or other armed vessel not bound to participate must, however, in order to share show some actual participation, the same being presumed of a public vessel, even when the actual capture is made by a privateer.<sup>49</sup> Transports are not held to participate as joint captors, although their presence with men of war may in fact intimidate the enemy; and the same is true of a ship's boats in sight at the time of capture but not actually aiding.<sup>50</sup> Where a boat, dispatched from a ship makes the capture, it enures to the benefit of the whole ship and not to the boat's crew alone. In the absence of statute the proceeds of the prize are distributed among joint captors in proportion to their respective force. It is not universally agreed, however, how far such force depend on the guns and how far on the men. The simpler rule, applicable at least to privateers, estimates not according to the instrument, but to the men behind the guns, who make them effective.<sup>51</sup> Land forces are not held to share in a capture unless they actually co-operate.<sup>52</sup> When Wellington's army captured Oporto and English vessels there were thus released, the army was given salvage for the English ships, but not for those of their allies, the Portuguese. No antecedent or subsequent services will *per se* enable one to share as a joint captor. In America, a joint capture enures to the United States only, as there is no law covering prize money in such a case.<sup>53</sup>

§ 557. Bringing prize in for adjudication. Destruction.—When a captor takes possession of a prize there are four or five courses open to him. His general duty is to bring or send the vessel into the nearest suitable port for adjudication by a

<sup>48</sup> *La Flore*, 5 Ch. Rob. 268; *The Virginia*, 5 Ch. Rob. 126; *The Galen*, 2 Dodson, 19; *The Arthur*, 1 Dods. 423.

<sup>49</sup> *L'Amitié*, 6 Ch. Rob. 267; *The Virginie*, 5 Ch. Rob. 124; *The Santa Brigada*, 3 Ch. Rob. 52; *The Bellona*, Edw. 65; *La Flore*, 5 Ch. Rob. 270; *The William & Mary*, 4 Rob. 312 (Am.).

<sup>50</sup> *The Cape of Good Hope*, 2 Ch. Rob. 216; *The Odin*, 4 Ch. Rob. 327; *U. S. v. Bales of Cotton*, 1 Woolw. 236, 257.

<sup>51</sup> *Roberts v. Hartley*, 3 Douglas, 311; *Duckworth v. Tucker*, 2 Taunton, 7; *The Dispatch*, 2 Gall, 2.

<sup>52</sup> *The Dordrecht*, 2 Rob. 53 (Am.); *Oakes v. U. S.*, 174 U. S. 778.

<sup>53</sup> *The Siren*, 13 Wall. 389.

prize court.<sup>54</sup> The prize should be delivered to the court as nearly as possible in the condition in which she was at the time of seizure, and to this end her papers should be carefully sealed at the time of seizure and kept in the custody of the prize master for delivery to the court. All witnesses whose testimony is necessary to the adjudication of the prize should be detained and sent in with her, and if circumstances permit, it is preferable that the officer making the search should act as prize master. If bringing in is difficult, from unseaworthiness, disease, lack of men, or other cause, the captor may appraise and sell the prize, if he can find a purchaser; he may destroy it, saving of course the persons on board; he may release it on a ransom bond; or he may use it as a tender to his own ship, putting some of his own crew aboard under his commission.<sup>55</sup> The course last named was pursued in the case of the Federal bark *Conrad*, captured by the *Alabama* and converted into the Confederate war vessel, *Tuskaloosa*, afterwards seized by the British at Cape Town with the view of restoring her to the original owners. Because the seizing government concluded that they could not go back of her commission, an order was finally made directing her return to the Confederate authorities, the commission of any *de facto* government being sufficient to authorize captures.<sup>56</sup> During the war of 1812 the Americans systematically burned their prizes in order to cripple British commerce, although ports and courts were open to them. Capt. Semmes of the cruiser *Alabama* burned most of his captures during the civil war, for the reason that the Federal navy had blockaded all Confederate ports, and England, France and other neutral nations refused to permit prizes to be brought into their own. Unless he ransomed them, as he did whenever neutral goods were aboard, there was no other course but destruction. Bluntschli, who opposes that remedy except in cases of necessity (or *force majeure*, as Geffcken expresses it), denies that even blockade of the home ports is a ground for burning.<sup>57</sup> If, however, the blockade is general, covering all home ports, and neutral harbors are closed, it is difficult to imagine a better reason. When under such cir-

<sup>54</sup> *The Anna*, 5 Ch. Rob. 373, 384. Ins. Co., 47 Pa. St. 166; *Dole v.*

<sup>55</sup> Wharton, Int. Law Dig., § 328; Am. Naval Code, Arts. 46-50. Merch. Co., 51 Me. 464.

<sup>56</sup> *Service Afloat*, 627, 743; *Mauran v. Ins. Co.*, 6 Wall. 1; *Dole v. N. Eng. Co.*, 6 Allen, 373; *Fifield v.*

<sup>57</sup> *Mod. Völkerrecht*, § 672; Semmes, *Service Afloat*, 141. Geffcken approves such destruction; Heffter, § 138, n. 5.

cumstances the Russians burned ships in the Black Sea in 1877 their right was fully recognized by the Institute of International Law at Turin, 1882. In 1870 the Desaix burned two German ships because there were too many prisoners for the French to spare prize crews. It is generally agreed that a neutral prize should never be burned. The American rule is that whenever captured vessels, arms, munitions of war, or other material are destroyed or taken for the use of the belligerent before coming into the custody of a prize court, they shall be surveyed, appraised, and inventoried by persons as competent and impartial as can be obtained; and the survey, appraisement, and inventory shall be sent to the prize court where proceedings are to be held.<sup>58</sup>

§ 558. **Ransom; hostage.**—The right to take a ransom or a ransom bond (*billet de rançon*), not exceeding the value of ship and cargo, exists from the moment of capture, and applies to property of a neutral as well as to that of an enemy.<sup>59</sup> The ransom bond or bill is usually in duplicate, one being kept by the captor and the other by the master of the prize, to whom it serves as a pass against all enemy cruisers. Unless the course prescribed as well as other conditions are followed so far as possible, the vessel is liable to a second capture. While that event would discharge the bond, the second captors must out of the proceeds of their prize pay the amount of it to the first captors. The loss of the vessel by perils of the sea does not discharge the bond; and in a suit upon it is presumed that the capture was justifiable. Ransom is sometimes described as a repurchase, by which a new property is acquired,<sup>60</sup> and the bill is valid even when given to a pirate. As a stronger assurance, a hostage is often given in addition to the bond. If a captor vessel is herself captured with bill and hostage, with the hostage only, or with bill alone, if there is no hostage, the ransom is discharged;<sup>61</sup> but not if both are safe elsewhere. When a bill of exchange has been given, the rule is different, if it has

<sup>58</sup> Am. Naval Code, Art. 14.

<sup>59</sup> *Maissonnaire v. Keating*, 2 Gallison, 337; *The Gratitude*, 3 Ch. Rob. 258; Hall, *Int. Law*, 479; Halleck, *Int. Law*, 672; 1 Kent Comm. 105.

<sup>60</sup> Valin, *Traité des Prises*, ch. 11, §§ 1-3; 2 Azuni, II, ch. IV, Art. VI; *Miller v. Resolution*, 2 Dallas, 15; *Cornu v. Blackburne*, 2 Douglas,

650, etc.; *Yates v. Hall*, 1 Term R. 73; *The Resolution*, 6 Ch. Rob. 23; 1 Kent Commentaries, 105; *Maissonnaire v. Keating*, 2 Gall. 325; Calvo, *Droit Int.* II, 277; *Ricord v. Bettenham*, 3 Burr. 1734.

<sup>61</sup> Emerigon, *Traité des Assurances*, ch. 12, sec. 23, § 8 (combating Valin); Calvo, *Droit Int.*, II, 280.

been negotiated, for the reason that the *bona fide* purchaser for value must be protected. Though it is not necessary to take a hostage, he is useful, for he can sue the master and owner in their own country to compel performance of the ransom contract, which, in England, an enemy captor could not do. The hostage himself has a claim for expenses.<sup>62</sup> The escape or death of the hostage, who is merely a collateral security, does not avoid the bond, nor does the loss of the ransomed ship by stress of weather. In France a vessel ransomed by giving hostages is seized by the admiralty immediately on her arrival in order to compel the more expeditious performance of the contract.<sup>63</sup> The practice of giving hostages has, however, everywhere fallen into desuetude.

§ 559. How captor's rights may be lost. Recapture and postliminy.—Property acquired by capture may be lost by recapture, abandonment, escape, rescue by the captured crew, and of course by discharge. Although abandonment cannot be passed on by neutrals, salvage on an abandoned vessel will be allowed by a neutral court. In such a court, however, the captor's rights will not be adjudged forfeited by abandonment,<sup>64</sup> and no contractual lien can operate to cut them off.<sup>65</sup> Recapture gives rise to the doctrine of postliminy. While the capture is complete as between the two belligerent states when the captor takes possession, such possession must be firm enough to stand the scrutiny of a prize court. If the prize be lost, the owner has an equity as against third parties upon rescue or recapture (*recuperatio, recousse, reprise, wiedernahme, recobro, ricupero*), by ships of his own country, unless, according to the American doctrine, this be after condemnation by a prize court. Upon recapture arise the rights of postliminy, which do not apply if the enemy obtained possession in any other way than by force. Thus, the right has been denied when the master fraudulently sold the vessel to the enemy, and also when the possession was under a wrongful condemnation before the war for violation of revenue laws.<sup>66</sup> The rule dates back to the Consolato and is derived from the Roman law as to a citizen,—*antequam in presidia perducatur*

<sup>62</sup> The Hoop, 1 Ch. Rob. 20; 1 Kent Commentaries, 107; 2 Azuni, II, ch. IV, Art. VI.

<sup>63</sup> Azuni, 2 *Droit Maritime*, ch. 4, Art. VI, § 5; Calvo, *Droit Int.* II, 279-280.

<sup>64</sup> McDonough v. Dannery, 3 Dallas 188.

<sup>65</sup> See *ante*, notes 37 and 39.

<sup>66</sup> Oakes v. U. S., 174 U. S. 778; The *Jeune Voyageur*, 5 C. Rob. 1.

*hostium manet civis.* From the Institutes we also learn that *postliminium fingit eum qui captus est in civitate semper fuisse.* As to ships not taken into port or other property not reduced to firm possession, Bynkershoek observes, it is not so much postliminy as incomplete capture.<sup>67</sup> According to the theories of medieval Europe the right of postliminy upon recapture was to be recognized upon the owner's allowing compensation, called salvage, for the rescue,<sup>68</sup> provided the claim was made before the prize was brought *infra prasidia*, as to the main fleet or dock; and provided, according to the Grotian rule heretofore noted, such claim was set up before twenty-four hours' possession in the recaptor cut it off. As the Digest (I, 3, 20) truly says *non omnium quæ a majoribus constituta sunt ratio reddi potest*, the latter rule, for want of a better origin, is derived from the Lombard custom limiting the right of the hunter to recover the animal which he had wounded to twenty-four hours. The present rule is that capture is complete when the article is brought to a safe place.<sup>69</sup> Although recapture is generally effected by a third vessel, postliminy also results when the original crew recapture the ship, because a rescue is not part of their duty.<sup>70</sup> A neutral master, however, violates the laws of war if he attempt a rescue.<sup>71</sup> The rescue of an attacked ship by the approach of a superior force has the same result as its recapture after surrender.<sup>72</sup> Rescue and safe return to port terminate the rights of the captor.<sup>73</sup> For that reason when the British ship *Emily St. Pierre*, captured by the Federals during the American civil war, was rescued by her crew, the British government declined to return her to the captors. A similar incident had occurred in 1800, the United States then declining to surrender the *Experience*, a rescued ship.<sup>74</sup> Abandonment by captors does not revive the title of the original owner.<sup>75</sup>

<sup>67</sup> *Consolato del Mare*, ch. 295 (290); Digest XLIX, tit. XV, c. 5, § 1; Bynkershoek, *Quæst. Jur. Pub.*, ch. V.; Grotius, *De Jure Belli ac Pacis*, III, ch. 6, § III, 1; The Ceylon, 1 Dodson, 116.

<sup>68</sup> *Consolato*, c. 287, §§ 1136, 1138.

<sup>69</sup> The Santa Cruz, 1 Robinson, 60; Hall, *Int. Law*, 473; Bynkershoek, *Quæst. Jur. Pub.* ch. V.

<sup>70</sup> The Two Friends, 1 Rob. 241; The Short Staple v. U. S., 9 Cr. 55; 2 Azuni, II, ch. IV, Art. V, n.

<sup>71</sup> The Short Staple, 9 Cr. 55; Dederer v. Del. Ins. Co., 2 Wash. 61; The Catherine Elizabeth, 5 Ch. Rob. 206.

<sup>72</sup> The Ann Green, 1 Gallison, 274.

<sup>73</sup> 3 Opin. Attys. Gen. 377.

<sup>74</sup> Heffter, § 192 G. n. 3; The *Emily St. Pierre*, Snow Cas. 361-3; 3 Whart., *Int. Law Dig.* § 328.

<sup>75</sup> The Mary Ford, 3 Dallas, 188, 198.

**Salvage.**—The rate of salvage is by no means uniform, varying in Great Britain, for instance, since the act of 1692, from one-eighth to one-fourth, according to danger, while France and Prussia allow one-third.<sup>76</sup> In Europe it is sometimes estimated on the net value, in the United States on the gross value of the ship.<sup>77</sup> It is to be noted that salvage applies to prize at sea only, property recaptured on land reverting to the owner without cost when it can be identified. An army may, however, earn and receive salvage if it compels a naval surrender. If the original crew are the recaptors, they sometimes receive salvage, as in France in the case of the *Sainte Anne*.<sup>78</sup> As a rule, salvage is not allowed on neutral property retaken.<sup>79</sup>

§ 560. **Exceptions to postliminy.**—If the captured vessel is “set forth” by the enemy, that is, has been employed with or without a commission<sup>80</sup> in his public military service, whether regular or privateer, it becomes the property of the enemy state and the right of the original owner generally ceases for all purposes.<sup>81</sup> If, after condemnation, a neutral has bought the vessel, there is no postliminy; and the extension of the right does not necessarily cover neutral ships when rescued. Both English and American laws and courts so extend it only when the neutral state in question does so; and the French so extend it according to Portalis (in the *Statira*) only when the enemy state grants a similar extension. As stated by Hautefeuille, recapture does not literally apply to the case of neutrals; for, as it is presumed the capture will not be sustained by the courts, the recapture also is unlawful.<sup>82</sup> A recapture by an ally, not having a less favorable rule himself, is subject to postliminy in favor of the original owner, unless a privateer be the recaptor, because allies stand in the position

<sup>76</sup> Naval Prize Act, 1864, 27 & 28 Vict. cap. 25, § 40; Heffter, § 192, G. n. 4.

<sup>77</sup> Act Mar. 3, 1800, ch. 14, § 1 (2 Stat. L. 16); Act June 30, 1864 (13 Stat. L. 314); *The Adeline*, 9 Cranch, 244; *The Star*, 3 Wheat. 78.

<sup>78</sup> *The Two Friends*, 1 Rob. 241; *The Short Staple v. U. S.* 9 Cr. 55; 2 Azuni, II, ch. IV, art. V, n.

<sup>79</sup> *The Carlotta*, 5 Ch. Rob. 55.

<sup>80</sup> *The Ceylon*, 1 Dods. 105.

<sup>81</sup> *Nostra Signora*, 3 Ch. Rob. 10;

*The Ceylon*, 1 Dodson, 105; *The Georgiana*, 1 Dodson, 401; *L'Actif*, Edwards, 186; *The Horatio*, 6 Ch. Rob. 320.

<sup>82</sup> *The Star*, 3 Wheaton, 92; *Talbot v. Suman*, 1 Cranch, 1; *The Adeline and cargo*, 9 Cranch, 244, 288; *The Carlotta*, 5 Rob. 54; 2 Azuni, II, ch. IV, Art. V. The rules of several states are given in Twiss, *Law of Nations, War*, § 175. See 1 Kent Commentaries, 112; Hautefeuille, III, p. 352; Heffter, § 192, G. n. 3.



of one's own state for purposes of the war. Such is the application in this connection of the rule of reciprocity.<sup>83</sup>

§ 561. Ownership of the prize. Rule as to privateers.—Because the rights of making war and of granting commissions are royal prerogatives, the power to dispose of the acquisitions of war belongs to the state. "Prize," declares Lord Stowell, "is altogether a creature of the crown."<sup>84</sup> *Parla bello cedunt reipublicæ*. It may, as in case of seizure on land, retain all, or waive its rights in whole or part. Before the statute of Anne (6 Anne, ch. 13) vesting the prize, after adjudication, in the captors, captures under commissions belonged to the crown, those without commissions to the admiral. Since then the subject has received much attention, each state for itself regulating the amount of prize money to which captors are entitled, and its distribution among them according to rank. In Great Britain the Act of 27 and 28 Vict., c. 25, controls; in United States the act of 1864, c. 174. (R. S. 4613-4652).<sup>85</sup> While domestic courts will thus distribute the proceeds according to the local municipal law, foreign courts consider the property and possession as that of the captor's sovereign.<sup>86</sup> The captor has right in and to his prize, insurable and valuable, from the moment of taking possession; but it is a defeasible right, one not complete until adjudication by a court of admiralty. A prize can be released by the government only before condemnation. The right of prize is superior to contractual liens such as mortgages.<sup>87</sup> In the case of privateers captures enure to the captors themselves, who have thus a greater interest in prizes because of the special right to make them granted by such states as have not yet assented to the abolition of privateering itself.

§ 562. Damages for wrongful capture.—Every marine capture must be made at the peril of the seizing belligerent; unless he can show grounds for force, the captor is liable for damages.<sup>88</sup> The right of seizure is dependent upon the lawful

<sup>83</sup> Vattel, *Droit des Gens*, III, ch. 14, § 207; The Santa Cruz, 1 Rob. 50. So between France and Spain, 1780, etc.; 2 Azuni, II, ch. IV, Art. V.

<sup>84</sup> The Elsebe, 5 Ch. Rob. 184; 1 Kent Commentaries, 100; Home v. Earl Camden, 2 H. Blacks. 533; Bluntschli, 165 (655), 173 (673);

Halleck, 727, 730 n; The Dos Hermanos, 10 Wheat. 306.

<sup>85</sup> See Dewey v. U. S., 178 U. S. 510.

<sup>86</sup> The Santissima Trinidad, 7 Wheaton, 283; The Florida, 101 U. S. 37.

<sup>87</sup> The Hampton, 5 Wall. 372.

<sup>88</sup> The Resolution, 2 Dall. 1;

use of the war power by the captors.<sup>89</sup> If the grounds of capture are good, the ship is condemned and the captors receive their share of the proceeds of sale as prize money. On the other hand, if there was not probable cause, the captor may be made to pay costs and damages. Where there were grounds of suspicion, cleared up only in court, the vessel is released, in whole or in part at the expense of the owner, according to circumstances.<sup>90</sup> The measure of damages for an unlawful capture by a privateer, as against the owners, is the full value of the property injured or destroyed.<sup>91</sup> The commander of a United States ship of war, if he seizes a vessel on the high seas without probable cause, may be held liable to make restitution in value, with damages and costs, notwithstanding the vessel is afterwards taken out of his possession by a superior force.<sup>92</sup> Where the captor transcends his powers and rights, he becomes guilty of a marine trespass, and is amenable in damages for the injury sustained; and where the vessel has been lost in consequence of such illegal acts, the value of the vessel, the prime cost of the cargo, with all the charges and the premium of insurance, are to be allowed in ascertaining the damages.<sup>93</sup> While in case of an illegal seizure, if there be gross and wanton outrage, the actual wrongdoers may be made responsible beyond the loss actually sustained. The owners of a privateer, who are only constructively liable, are not bound to the extent of vindictive damages.<sup>94</sup> Freight is a proper item for allowance in estimating the damages arising from an illegal capture, where the cargo has been lost, or the vessel been unliveried; but it is not to be allowed where the vessel has been restored with the cargo on board,

The Grand Sachem, 3 Dall. 333; The Charming Betsy, 2 Cranch, 64; The Thompson, 3 Wall. 155; Hollingsworth v. The Betsy, 2 Pet. Adm. 330.

<sup>89</sup> The Jane Campbell, Blatchf. Pr. Cas. 101; The Anna, 5 Ch. Rob. 373.

<sup>90</sup> The Nayade, Newb. Adm. 366; The Olinde Rodrigues, 174 U. S. 510; The Joseph, 8 Cranch, 451; The Liverpool Packet, 1 Gall. 513; The Rover, 2 Gall. 240; Maisonnaire v. Keating, 2 Gall. 325; The Charming Betsy, 2 Cranch, 64; Maley v. Shattuck, 3 Cranch, 458;

The Venus, 5 Wheat. 127; The Thompson, 3 Wall. 155; The Springbok, 5 Wall. 1; The Dashing Wave, 5 Wall. 170; The Peel, 5 Wall. 517; The Teresita, 5 Wall. 180; The Jenny, 5 Wall. 183.

<sup>91</sup> The Grand Sachem, 3 Dall. 333.

<sup>92</sup> The Charming Betsy, 2 Cranch, 64; Maley v. Shattuck, 3 Cranch, 458.

<sup>93</sup> The Anna Maria, 2 Wheat. 327; Heffter, § 138, G. n. 2.

<sup>94</sup> The Amiable Nancy, 3 Wheat. 546.

and in such a condition as to be capable of performing the voyage.<sup>95</sup> If captors wantonly injure the captured crew, a prize court will award damages for personal ill usage. Misconduct on the part of the captors, such as wrongful spoliation of property on board a prize, or separation of the officers or crew from her, may even destroy the legality of the capture, and subject the captors personally to punishment for infringement of the laws of maritime warfare. As the condemnation is not a criminal proceeding, the President cannot remit forfeitures in captures made *jure belli*.<sup>96</sup>

§ 563. **Prize courts.**—Although firm possession constitutes capture, it must be recognized as adequate by the prize court,—such adjudication or condemnation, as it is called, being necessary to complete the inchoate right acquired by capture of private property at sea. The title to property seized as prizes is changed only by the decision rendered by the prize court.<sup>1</sup> No decree of admiralty is necessary, however, to validate in any way the capture or destruction of the enemy's war vessels, that being an act of war which, like all others of its class, is subject only to the regulations of the political department of the government and not to those of the judicial. The rule is different only when neutral or private enemy property is concerned. As mail and telegraphic communications make the military commander practically present everywhere, all questions of booty and capture on land can be decided summarily; and such was formerly the case at sea when the cruise was made by a fleet under the admiral, who satisfied himself by a summary examination of persons and papers, after the prize was taken alongside his ship.<sup>2</sup> The prevalence of privateering and later the overhauling of neutral trade made such inquiry always necessary in order to prevent the abuse of commissions, and to avoid war with other states. Finally, after the admiral was stripped of his judicial powers, commissions to adjudicate on land became as common as commissions to make captures at sea; and they apply to captures of private property by regular ships of war as well as to those by privateers. Out of such beginnings has grown

<sup>95</sup> The Lively, 1 Gall. 315.

Twiss, Law of Nations, War, § 186;

<sup>96</sup> 10 Opinions Attys. Gen. 452;

The Santa Cruz, 1 Ch. Rob. 65;

11 Id. 484; The Grey Jacket, 5

Camden v. Home, 4 Term R. 382;

Wall. 342; The Hampton, 5 Wall.

Lindo v. Rodney, 3 Term R. 613.

372.

Semmes held a kind of admiralty

<sup>1</sup> Am. Naval Code, Art. 49.

court aboard the Alabama; Service

<sup>2</sup> 4 Rymer's *Foedera*, 14 (1357);

Afloat, 483.

a regular practice as to prize,—in France since the institution of an admiral in 1373, in England since 1414.

§ 564. **Prize jurisdiction, its nature and extent.**—Prize jurisdiction, bestowed by special commissions or instructions in Great Britain, and except for a short time in France, is in the United States a part of the admiralty law administered by the district courts, which possess both instance and prize jurisdiction.<sup>3</sup> The tribunal must belong to the captor's country, and for its acts the state creating or permitting it is responsible.<sup>4</sup> "Where the responsibility of the captor ceases," says Wheaton, "that of the state begins." A neutral court of admiralty will pass on a belligerent capture only when it comes before it incidentally as a part of its rightful jurisdiction, as when an abandoned prize is liable for salvage and the question of ownership of surplus comes up between captor and original owner.<sup>5</sup> The only exception to the rule of direct non-interference by neutral courts is where a capture is made under circumstances affecting the neutrality of the nation in question, as when made within the neutral's territorial waters, or by a vessel equipped in violation of neutral rules, and the like. Jurisdiction is then taken in order to vindicate violated neutrality.<sup>6</sup>

§ 565. **Where prize courts should be held.**—A prize court, as declared by Lord Stowell in a famous case already quoted, and even more clearly by Sir James Mackintosh, is not municipal, but emphatically a court by virtue of the law of nations.<sup>7</sup> The mandate of that law is that it must be held in the captor's country; neither the decree of her consul or of any other court in a neutral country need be recognized.<sup>8</sup> When complaint

<sup>3</sup> *Glass v. The Betsy*, 3 Dall. 6. The reinstatement of the council of prizes in France in 1800 will always be associated with the name of Portalis, the public attorney, some of whose opinions, as in the case of the American ship *Statira*, are classic. See above pp.

<sup>4</sup> Halleck *Int. Law*, 750, 752; 2 *Rutherford Inst.* 595, 596 (*Cambr. ed.*); *Wharton, Int. Law Dig.* § 329.

<sup>5</sup> *The Schr. Adeline*, 9 *Cranch*, 191; 11 *Opin. Attys. Gen.* 445. As to the origin of English admiralty jurisdiction and its transfer to America, see *Origin and*

*Growth of the Eng. Const.*, vol. 1, 547-551.

<sup>6</sup> 3 *Phillimore*, 479; *La Satanique v. L'ary et Maria*, 1 *De Pist. et Duver.*, 191.

<sup>7</sup> Mackintosh in *The Erin*, and in *The Minerva*, 2 *Life Mackintosh*, 317. "The seat of judicial authority," says Lord Stowell (in the *Maria*, 1 *Ch. Robinson* 350), "is, indeed, locally here, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality."

<sup>8</sup> *The Flad Oyen*, 1 *Ch. Rob.* 135.

was made by Great Britain that Genet was attempting to establish such courts in the United States, President Washington insisted on his removal by France, as the toleration of such courts would have been a breach of neutrality.<sup>9</sup> While it is unusual to have such a court in an ally's country, such a course has been defended on the principle that allies make up one nation for purposes of the war,—*unam constituunt civitatem*, as Bynkershoek has it in another connection.<sup>10</sup> A court of admiralty is merely an arm of the government and the sovereign is responsible in damages for its wrong decision. As such responsibility could not be assumed for the courts of an ally, any more than for the army of an ally, the employment of foreign admiralty courts is subject to the objection that either the captor country would be without responsibility for a wrong capture, or would have to defend a judicial act of another nation, either of which is opposed to international principles. The vessel itself, however, need not be brought into the captor's port. It is sufficient if it be secured in a harbor of an ally or of a neutral; and even if destroyed at sea, or sold, or ransomed, the cause is nevertheless heard.<sup>11</sup> Neutral nations generally prohibit the bringing in of prizes, on the ground of public policy, but for that reason no doubt a greater number of them are destroyed at sea.<sup>12</sup>

§ 566. Procedure in prize cases.—The prize proceeding is summary, *in rem*, and in the first instance turns largely upon the ship's papers,—an order for further proof being made always with extreme caution, and only when the ends of justice clearly require it. Spoliation of papers at the time of

Marshall as secretary of state recognized such consular decrees of the French in Spain but held that state responsible. Whart., Int. Law Dig., § 329.

<sup>9</sup> 1 Pres. Messages, 146; Wharton, Int. Law Dig., §§ 399-400, 329; 4 Jefferson Wks. 39. So Geffcken in Heffter, § 138 n. 6; 3 Phillimore, 581; Martens, § 37; Wheaton, Elements, § 15; Wheelwright v. Depeyster, 1 Johns. R. 481; Glass v. The Betsy, 3 Dall. 6.

<sup>10</sup> The Christopher, 2 Ch. Rob. 209; The Flad Oyen, 1 Ch. Rob. 146; The Divina Pastora, 4 Wheat-

on, 52; 1 Kent Comm. 103; Bynkershoek, *Quaest. Jur. Pub.*, ch. XV.

<sup>11</sup> Hudson v. Guesteer, 4 Cranch, 293; The Invincible, 2 Gall. 29; Smart v. Wolff, 3 Term R. 329; The Herstelder, 1 Rob. 100; The Hendrick & Maria, 5 Rob. 35; Rose v. Himely, 4 Cranch, 241.

<sup>12</sup> Semmes' Service Afloat, *passim*; Crawford v. Lucena, 3 B. & P. Exch. 269; Le Cras v. Hughes, East 22 G. III; Boehm v. Tell, 8 T. R. 154; The Nemesis, Edw. 50; The Josefa Segunda, 5 Wheat. 338.

capture therefore warrants the most unfavorable inferences.<sup>14</sup> The practice applies to recapture as well as original capture,<sup>15</sup> and in America proceedings should be begun in the name of the United States.<sup>16</sup> The three questions to be settled are these: (1) Was the subject of capture lawful prize; (2) was the captor impressed with military character; (3) were the place and mode of capture and detention legal?<sup>17</sup> The burden of proving neutrality rests on the claimant, and that beyond a reasonable doubt.<sup>18</sup> The court will not go behind the commission of the ship.<sup>19</sup> When made, a decree of condemnation overrides all existing liens,<sup>20</sup> and affects the title as of the beginning of the voyage; the transfer or incumbrance of a vessel at sea being invalid as against the captor.<sup>21</sup> The judgment of condemnation should state or be accompanied with a statement of the grounds on which it is based.<sup>22</sup>

§ 567. **Finality of decree.**—The decree of a court of admiralty as to the question of title,—the sale of a ship, for instance, under a regular proceeding,—is *in rem* and valid, whether the decision itself be right or wrong. If wrong, the government responsible for the court should, by treaty or otherwise, provide an indemnity, as frequently happens. No question can

<sup>14</sup> The *Zavalla*, Blatchf. Prize Cases, 173; The *Jane Campbell*, *Ib.* 101; The *George*, 1 Wheat. 408; The *Dos Hermanos*, 2 Wheat. 76; The *Pizarro*, 2 *Id.* 227; The *Grey Jacket*, 5 Wall. 542; The *Ann Green*, 1 Gallison, 274. The English practice is given in the letter of Sir John Nicholl and Sir Wm. Scott of 1794 to John Jay, the American envoy, in the appendix to 1 Ch. Robinson, edition of Little, Brown & Co., 1853. The standing interrogatories in prize cases in the English courts are to be found in the same appendix.

<sup>15</sup> The *Bermuda*, 3 Wall. 514; The *Adeline*, 9 Cranch, 244, 286.

<sup>16</sup> The *Palmyra*, 12 Wheat. 1; *Jecker v. Montgomery*, 18 How. 110.

<sup>17</sup> Field's Int. Code, § 895. The English practice is given in Wharton, Int. Law Dig., § 330.

<sup>18</sup> The *Amiable Isabella*, 6

Wheat. 1, 78; 2 Azuni, II, ch. III, Art. IV; *U. S. v. Hayward*, 2 Gall. 485.

<sup>19</sup> The *Sant. Trinidad*, 7 Wheat. 283; *La Nereyda*, 8 Wheat. 108.

<sup>20</sup> *McDonnough v. Dannery*, 3 Dall. 188; *L'Invincible*, 1 Wheaton, 238.

<sup>21</sup> The *Battle*, 6 Wallace 498; The *Sally Magee*, 3 Wallace, 451; The *Marianna*, 6 Ch. Rob. 24; The *Tobago*, 5 Ch. Rob. 218; The *Ariel*, 11 Moore, P. C. 119.

<sup>22</sup> *Hobbs v. Henning*, 17 C. B. (N. S.) 791; Field's Int. Code, § 898, and citations. The courts of admiralty for several countries are given in Heffter, § 138, Geffcken n. 3; Wharton, Int. Law Dig., §§ 399, 329; The *Estrella*, 4 Wheat. 298; *La Amistad*, 5 Wheat. 365. The *Sant. Trinidad*, 7 Wheat. 283; *Brig Alberta v. Moran*, 9 Cranch, 359.

ever be raised, however, as to the validity of titles and acts under the decree where the court had jurisdiction.<sup>23</sup> Such a reëxamination of British decrees as Prussia undertook in 1753, international law can recognize only as a means by which the dissatisfied sovereign can determine whether to demand damages or not. In 1794, a joint commission was organized by Great Britain and the United States with authority to pass on American claims for wrongful captures by British cruisers, and there have been many such mixed commissions since. A foreign admiralty decree is not examinable elsewhere, as was declared in the case of French condemnation under the Milan decree as to trading with England,—a decree declared by Congress a violation of international law.<sup>24</sup> As the Confederate States were not recognized as a government by their opponents, the proceedings of a Confederate prize court are of no validity in the United States and convey no right or title.<sup>25</sup>

<sup>23</sup> Wharton, *Int. Law Dig.*, § 329a.

<sup>25</sup> *The Lilla*, 2 Sprague 177; *Oakes v. U. S.*, 174 U. S. 794.

<sup>24</sup> *Williams v. Armroyd*, 7 Cranch, 423.

## CHAPTER IX.

### MILITARY OCCUPATION AND ADMINISTRATION.

§ 568. **Ancient theory of substituted sovereignty.**—The subject involved in this chapter has been reserved for special treatment in this place because military occupation and administration by a conquering army is, as a general rule, the prelude to the termination of war by a treaty of peace, or other means converting occupation, a momentary possession of territory, into conquest, a definitive and final appropriation of it. Or to state the matter in another form, conquest in the military sense, which takes place when the army of one belligerent state drives that of the other out of a certain territory and holds it by force, does not ripen into conquest in the legal sense until the victorious state permanently assumes sovereignty over such territory by some adequate diplomatic act indicating its purpose to remain and govern it as a part of its dominions. Thus it appears that the right of mere military occupation (*occupatio bellica*) falls far short of the right of complete conquest (*debellatio, ultima victoria*). Obvious and well defined as the distinction now is between these two essentially different conditions, it was so entirely overlooked in the formative period of modern international law that it was then assumed that as an invader entering a hostile country drives before him the forces of the owner he is clothed with the rights of full sovereignty by the bare fact of military possession, regardless of his intention or power to convert such possession into a definitive appropriation. This ancient theory of substituted sovereignty rested on the rule of Roman law which provided that all property, including territory, after it had become *res nullius* by passing out of the hands of its owner in war, belonged to any person able to seize it for so long as he could retain it.<sup>1</sup> In accordance with that doctrine the occupying sovereign, no matter how transient or precarious his possession might be, could deal with the occupied territory as his own, and with its inhabitants as their legitimate ruler so long as he could hold on to it. As such ruler he could require such inhabitants not only to renounce their fealty to their legitimate sovereign, but to acknowledge him either by the promise

<sup>1</sup> See above, p. 128.



of fidelity and obedience, or more often by the taking of an oath of allegiance.<sup>2</sup> In logical accord with that premise was the further contention that such inhabitants were bound to render to the invader all other services due to their former sovereign, including, as Frederick II claimed, the right to bring his army up to its full strength by forcible recruiting in the enemy country; "if the local authorities are willing to hand over recruits, so much the better, if not, they are taken by force."<sup>3</sup> With equal consistency it was also claimed that, while the final issue of hostilities was still in doubt, the captor of the *res nullius* could transfer his title to a third power, as in the case of the Swedish province of Bremen conquered by the king of Denmark in 1712, and sold by him three years later, along with Verden, to the Elector of Hanover.<sup>4</sup>

§ 569. **Modern theory of quasi sovereignty of belligerent occupant.**—The fact that the ancient doctrine of substituted sovereignty had been very seriously discredited by the middle of the eighteenth century is put beyond all question by Vattel from whom we learn that "a third party cannot safely purchase a conquered town or province till the sovereign from whom it was taken has renounced it by a treaty of peace, or has been irretrievably subdued, and has lost his sovereignty: for, while the war continues,—while the sovereign has still hopes of recovering his possessions by arms,—is a neutral prince to come and deprive him of the opportunity by purchasing that town or province from the conqueror? The original proprietor cannot forfeit his rights by the act of a third person; and if the purchaser be determined to maintain his purchase, he will find himself involved in the war. Thus, the king of Prussia became a party with the enemies of Sweden, by receiving Stettin from the hands of the king of Poland and the Czar, under the title of sequestration."<sup>5</sup> After the close of the Seven Years' War the distinction between the right of control over hostile territory incident to mere military occupation, and the right of sovereignty incident to completed

<sup>2</sup> "In the seventeenth century express renunciation of fealty to the legitimate sovereign was sometimes exacted." Hall, p. 482, note 1. See also Martens, *Précis*, § 280; Heffter, § 132; Moser, *Versuch*, ix, i, 231, 280, and ix, ii, 27; Memorial of the Elector of Hanover to the

Diet of the Empire, Entick, Hist. of the Late War, ii, 425.

<sup>3</sup> *Oeuvres de Fred. II.*, xxviii, 91. See also Moser, *Versuch*, ix, i, 296, 389.

<sup>4</sup> Stanhope, Hist. of Eng., ch. vii.

<sup>5</sup> By the treaty of Schwedt, Octo-

conquest became so clearly defined that the continuing sovereignty of the original owner became generally recognized for certain purposes, while the intruder was supposed to supersede him temporarily for certain other purposes. Thus the idea developed that although the national character of the soil and its inhabitants remained unchanged, the invader was clothed with such a quasi-sovereignty over both as authorized him to do everything necessary to bring the war to a successful conclusion, provided he neither recruited his army nor disturbed the permanent institutions of the country. During the period in which the ousted owner retains a kind "of latent title,"<sup>6</sup> as Klüber has expressed it, those of his subjects to whom he can no longer guarantee protection "pass under a temporary or qualified allegiance to the conqueror."<sup>7</sup> Or in the words of Mr. Justice Story: "The capture and possession by the British was not an absolute change of the allegiance of the captured inhabitants. They owed allegiance, indeed, to the conquerors during their occupation; but it was a temporary allegiance, which did not destroy, but only suspended their former allegiance. It did not annihilate their allegiance to the state of South Carolina and make them *de facto* aliens."<sup>8</sup> In 1808, after the beginning of the Spanish insurrection against France, Great Britain, then at war with Spain, issued a proclamation commanding that all hostilities against that country should immediately cease. Shortly thereafter, when a Spanish ship, captured on a voyage to Santander, a port still occupied by the French, was brought in for condemnation Lord Stowell remarked that "under these public declarations of the state establishing this general peace and amity, I do not know that it would be in the power of the court to condemn Spanish property, though belonging to persons resident in those parts of Spain which are at the present moment under French control, except under such circumstances as would justify the confiscation of neutral property."<sup>9</sup> During the military occupation of Catalonia by the French in the summer of 1811 Vil-

ber 6, 1713. *Droit des Gens*, III, c. xiii, § 197.

<sup>6</sup> *Europäisches Völkerr.*, § 256. See also Manning, ch. 5.

<sup>7</sup> "The general doctrine may be stated thus: firm possession by the enemy in war suspends the power and right to exercise sovereignty over the occupied places, and gives

the enemy certain rights over it, of a temporary character, which all nations recognize, and to which loyal citizens may submit." Dana's *Wheaton*, p. 421, note 162.

<sup>8</sup> *Shanks v. Dupont*, 3 *Peters*, p. 246.

<sup>9</sup> *Edwards*, 182.

lasseque, a Frenchman, was tried and convicted of the murder in that province of a Catalan by the Court of Assizes of the Pyrénées Orientales. On appeal, after the prosecution had contended that because Catalonia was occupied by French troops, and governed by French authorities, it must be considered French territory, the Court of Cassation (Arrêt du 22 Janvier, 1818), quashed the conviction on the ground that the courts of the territory had exclusive jurisdiction: "This occupation and this administration by French troops and French authorities," it was said, "had not communicated to the inhabitants of Catalonia the title of Frenchmen, nor to their territory the quality of French territory; this communication could result only from an act of union emanating from the public authority, which had never been carried out."<sup>10</sup>

§ 570. **Military authority over hostile territory as limited by Hague Conference.**—During recent years the tendency has been to escape from certain inconsistencies inherent in the law of occupation as redefined early in the last century through the adoption of the simple principle that the invader is only permitted to perform within the occupied territory such acts as are the natural incidents of hostilities,—the legal relations of the population to the invader remaining unchanged, and the rights of the sovereign surviving intact. While the great military powers cannot be said to have expressly assented to such a doctrine, unanimously supported by the smaller ones at the Conference at Brussels, they permitted the Declaration to be drawn in a form that certainly implied it.<sup>11</sup> Since then the whole subject has been regulated by Section III of The Hague Second Convention, "On Military Authority over Hostile Territory," which clearly defines the extent to which the invader may subject the inhabitants of the occupied territory and its resources to the necessities of war. In the expositions heretofore made of the laws of war as to enemy persons, and enemy property on land,<sup>12</sup> it became necessary to refer to all of the provisions contained in that section, except the following: (Art. XLII.) "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territory where such authority is

<sup>10</sup> Ortolan, *Diplomatie de la Mer, Rapports avec le Droit International*, p. 29. See also Bluntschli, *Literatur des Völkerrechts*, § 307.

<sup>12</sup> See above pp. 527, 528, 541, 542, 545, 547, 549, 550.

<sup>11</sup> Calvo, § 1877; Rolin Jacquemyns, *La Guerre actuelle dans ses*

established, and in a position to assert itself. (Art. XLIII.) The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to reëstablish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. (Art. XLIV.) Any compulsion of the population of occupied territory to take part in military operations against its own country is prohibited. (Art. XLV.) Any pressure on the population of occupied territory to take the oath of allegiance to the hostile power is prohibited. (Art. L.) No general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible. (Art. LIV.) The plant of railways coming from neutral states, whether the property of those states, or of companies, or of private persons, shall be sent back to them as soon as possible. (Art. LV.) The occupying state shall only be regarded as administrator and usufructuary of the public buildings, real property, forests, and agricultural works belonging to the hostile state, and situated in the occupied country. It must protect the capital of these properties, and administer it according to the rules of trusteeship."

§ 571. **When military occupation begins and ends. Contention of smaller states.**—Up to a certain point it is not difficult to determine when military occupation actually begins and ends in a given area of territory. According to the American Regulations (§ 85) occupation of territory (*occupatio bellica*) occurs when the regular authority of the old state has ceased, and the invading forces find themselves able to maintain order. There can be no doubt of such ability within the actual outposts of an army, and along its lines of communication so long as they are kept open, that is within the limits of the hostile army's actual as distinguished from its constructive possession. The limits of that kind of possession are always difficult to define no matter whether the question arises as to the boundaries of real property in litigation between private owners, or as to the area within which a hostile army may claim authority in an invaded country only partially subdued. The less powerful states, whose interests prompt them to resist every extension of the doctrine of constructive military possession, contend, that, as all rights over territory acquired by invasion rest upon mere force, they should appear with it, disappear with it, and cease to exist in the meantime. They claim that such pos-

session to be effective must, as in the analogous case of blockade, be maintained at all points by a sufficient force; that the rights of the invader extend over the hostile territory only so far as the inhabitants are vanquished or reduced to actual submission to him. "To extend the rights of military occupation, or the limits of conquest, by mere intention, implication, or proclamation, would be establishing a *paper conquest* infinitely more objectionable in its character than a *paper blockade*." <sup>13</sup> Or, as Wildman has stated it, "the constructive occupation of the owner is defeated by actual occupation, so far as it extends. Thus it is said by Celsus, if an enemy enter a territory by force of arms, it is in possession of so much only as it occupies. When he speaks of force, he supposes resistance on behalf of the sovereign, in defense of his possession. An army only possesses a country so far as it compels the enemy forces to retire. \* \* \* Upon these principles, the extent of hostile possession may be distinctly defined. If an army be in possession of a principal town of a province, it is not thereby in possession of the towns and forts within the same, which hold out for the enemy. Forcible possession extends so far only as there is an absence of resistance. The occupation of part by right of conquest, with intent to appropriate the whole, gives possession of the whole, if the enemy maintain military possession of no portion of the residue. Under such circumstances, military possession of a capital would be possession of a whole kingdom. But if any part hold out, so much only is possessed as is actually conquered." <sup>14</sup> Such principles are in perfect accord with Lord Coke's declaration in Calvin's case<sup>15</sup> that "certain it is, whilst King Henry VI had both England and the heart and greatest part of France under his actual legiance and obedience (for he was crowned king of France in Paris) that they that were then born in those parts of France that were under actual legiance and obedience, were no aliens, but capable of, and heritable to, lands in England. Those born in parts of France not under actual legiance and obedience, and prior to King Henry's recognition and coronation, were regarded as *antenati*, and received letters patent of denization, as in the case of Reynel." Or, as Chief Justice Taney has stated it: "By the laws and usages of nations, conquest is a valid title, while the victor maintains the exclusive possession of the conquered country." <sup>16</sup>

<sup>13</sup> Halleck, Int. Law, ii (Baker ed.) 434.

<sup>15</sup> 7 Rep. 28 a.

<sup>16</sup> Fleming et al. v. Page, 9 How.

<sup>14</sup> Int. Law, i, pp. 163-64.

615.

§ 572. Contention of the great military states. Conclusions reached at Brussels and The Hague.—On the other hand certain great military powers have for a long time contended that, unless military resistance is maintained by duly organized national troops, the invader may establish a constructive occupation through the whole of a district forming an administrative unit so soon as notice of such occupation is given by placard or otherwise. Such was the practice of the Germans in France in 1870 where the canton, of an average size of about seventy-two square miles, was adopted as the administrative unit to be affected by notice of occupation given at any spot within it. Some idea of the extent of the constructive possession thus maintained by the invaders, without the present military power to enforce their authority, may be drawn from the statement of Mr. Edwards, who says, in his "Germans in France," "I once traveled from St. Germain to Louviers, a distance of fifty miles along a road occupied theoretically by the Prussians, without seeing a Prussian soldier. From the outskirts of Rouen to Dieppe, nearly fifty miles, I met, here and there, and at one place found a post of perhaps half a dozen men. At Dieppe, Prussian proclamations on the walls and the local cannons spiked or otherwise spoiled; the police and firemen disarmed; the telegraph in every direction cut, the postal service stopped; but nowhere a Prussian or a German soldier." According to this theory occupation once established does not cease by the absence of the invading force; and thus the inhabitants remain liable to penalties for disobedience to orders when no means for enforcing them exist, and for subsequent resistance to invading bodies too weak to overcome it. While the hostile occupation ceases if the invader be expelled by the regular forces of the country, it is not extinguished by a temporary disposition which is the result of a popular movement, even when the national government has been reestablished. The most extreme form which this theory has assumed is embodied in the pretension that such a constructive occupation as will subject the inhabitants to penalties for disobedience of orders may be established even by a flying column passing through the district.<sup>17</sup> In order to set limits to such

<sup>17</sup> Cf. Gen. Von Voigts Rhetz on flying columns and temporarily successful insurrections, *Parl. Papers, Miscell.*, i, 1875, p. 65; *Bluntschli*, § 544. As to Napoleon's practice with respect to fly-

ing columns, illustrated in an order issued in 1806 to Marshal Lannes before the French army passed the Oder, see *Corresp.* xiii, 467. *Hall*, p. 501, note 1.

extravagant claims it was provided in the project of Declaration formulated at Brussels that "a territory is considered as occupied when it finds itself placed in fact under the authority of the hostile army. The occupation extends only to territories where this authority is established and in condition to be exercised." When delegates of some of the smaller powers contended that there is such a close analogy between such occupation and blockade as now understood as to compel the maintenance of an immediately effective force in order to render it valid, a view likewise maintained by England, Germany denied the assumption.<sup>18</sup> In the next year, however, the Institute of International Law in examining the project accepted the definition "that a territory is considered as occupied from such a time, and so long as the state of which it forms a part is prevented by the cessation of local resistance from publicly exercising there its sovereign authority."<sup>19</sup> Finally the definition of occupation in the amended form (Art. I), approved at Brussels, was incorporated into The Hague Second Convention (Art. XLII) without even a verbal alteration.

§ 573. **Legal relation of subdued inhabitants to occupying state. Suspended sovereignty of prior owner.**—As observed heretofore when a state is compelled to yield a portion of its territory to the superior force of an enemy, it loses for a time its claim to the perfect allegiance of the inhabitants whom it is no longer able to protect. As a necessary consequence they must give a temporary or qualified allegiance to the military occupant whose possession so far suspends the authority of the former owner as to deprive him of the power to alienate any part of his territory so long as it remains in the possession of the conqueror, or his allies.<sup>20</sup> It is even a question whether such owner can make a valid transfer of it to a neutral while his possession continues, if such transfer is made after a declaration of war, and as a means of depriving his adversary of the opportunity of acquiring it by conquest. As the general right

<sup>18</sup> Parl. Papers, Miscell., i, 1875, p. 64.

<sup>19</sup> See Rolin Jacquemyns' *Second Essai*, p. 34.

<sup>20</sup> The grantor can not make a perfect title unless he possesses at once the *jus ad rem* (the possession of) and the *jus in re* (the

right to) the thing conveyed. During military occupation these rights coexist neither in the original owner nor occupant. Grotius, *De Jure Belli ac Pacis*, II, c. vi, § 1; Puffendorf, iv, c. ix, § 8; The Foltina, 1 Dod. 450; The Fama, 5 Rob. 97.

of neutrals to purchase the property of belligerents, *flagrante bello*, is universally conceded, provided the sale is *bona fide*, it can hardly be doubted that such a transfer of title, coupled with a formal delivery of possession to the neutral grantee, would be unassailable unless the transaction is evidently *mala fide*, a conclusion to be established or rebutted by the special circumstances of each particular case.<sup>21</sup> During the suspension of the sovereignty of the former owner the inhabitants owe no such legal or moral duty to the occupant as deprives them of the right to rise in insurrection against him, provided they are prepared to brave the perils such an enterprise involves. The right of insurrection in war is supposed to rest upon the same principle as the right of revolution against an established government in time of peace; and history abounds in notable instances of its exercise, followed often by executions and confiscations, where such attempts have been unsuccessful. When during the Italian campaign of 1796 the inhabitants of Pavia rose against the French troops and made them prisoners, Napoleon, after Lannes had routed a portion of the insurgents and burned the village of Brescia, returned himself to the revolted city, shot the leaders of the insurrection, and delivered up the place to plunder, a "terrible example," we are told, that "crushed the insurrection over the whole of Lombardy."<sup>22</sup> Despite the fact that when inhabitants thus throw off the implied obligation of submission to the authority of the conqueror, he is entitled to exercise the extreme and severe rights over life and property conferred by the laws of war, involving death and confiscation, such extreme rights should be limited in their application by the laws of humanity forbidding cruel and unusual punishments. In modern warfare, while the leaders and instigators of military insurrections are usually punished by death, the main body of the common people controlled by them are more leniently dealt with.

§ 574. Legal relation of inhabitants of occupied territory to third states.—As to third states territory in the military occupation of a conquered state is, together with its inhabitants, regarded as a part of the occupying country, although such country may treat it as hostile in relation to itself. As Chief

<sup>21</sup> Heffter, § 131; Duer, *On Ins.*, i, ii, p. 451. See also Jomini, *Des pp.* 437-38; *Opinions of Attys. Guerres de la Révolution*, ch. Genl. U. S. vi, p. 638; Halleck lxxiii; Napoleon, *Mémoires*, iii, p. (Baker ed.), ii, pp. 459-60. 195; iv, p. 149; Allison, *Hist. of*

<sup>22</sup> Napier, *Hist. Peninsular War*, Europe, i, pp. 405, 468.



Justice Marshall said in a notable case: "Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark."<sup>23</sup> When, during the war of 1812, the British occupied Castine, Maine, it became as to the United States a foreign port, and so remained until its evacuation after the treaty of peace. "Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants were subject to such duties only as the British government chose to require. Such goods were in no correct sense imported into the United States. The subsequent evacuation by the enemy, and resumption of authority by the United States, did not, and could not, change the character of the previous transactions. The doctrines respecting the *jus postliminii* are wholly inapplicable to the case."<sup>24</sup> And so after the American troops occupied Tampico in November, 1846, and established a custom house there, a vessel trading thence to Philadelphia was held to be engaged in foreign as distinguished from coasting trade; and in that way liable to pay, so long as the military occupation of the United States continued, all customs duties imposed upon goods imported in foreign ships.<sup>25</sup> The doctrine that enemy character is impressed upon all persons and things connected with enemy territory has been carried so far that a vessel owned by merchants residing at the Cape of Good Hope and captured on a voyage begun from Batavia to Holland, before the conquest of the Cape by the English, was condemned by Lord Stowell because the capture took place after that event. The reason given was that the ship "having sailed as a Dutch ship, her character during the voyage could not be changed."<sup>26</sup> In the same way an English vessel was condemned during the American civil war for having attempted to violate a public blockade of the city of New Orleans in defiance of "a well established principle of prize law, as administered by the courts, both of the United States and

<sup>23</sup> *Thirty Hogsheads of Sugar v. Boyle et al.* 9 Cranch, 195.

<sup>25</sup> *Fleming et al. v. Page*, 9 How. 603.

<sup>24</sup> *United States v. Rice*, 4 Wheat. 255; *U. S. v. Hayward*, 2 Gall. 485.

<sup>26</sup> *The Danckebaar African*, 1 Rob. 107.

Great Britain, that sailing from a neutral port with intent to enter a blockaded port, and with knowledge of the existence of the blockade, subjects the vessel, and in most cases its cargo, to capture and condemnation." In answer to the contention that the blockading belligerent had ended the public blockade by occupying the city itself, it was said that "only the city was occupied, not the port; much less the district of country commercially dependent upon it, and blockaded by its blockade. Even the city had been occupied only three days. It was yet hostile; the rebel army was in the neighborhood; the occupation, limited and recent, was subject to all the vicissitudes of war." <sup>27</sup>

§ 575. When territory may possess at same moment a neutral and belligerent character.—Such a condition of things can arise only when subject states are united to a central authority whose sovereignty or overlordship is of so limited or shadowy a character that the over-sovereign may be at war with another belligerent without actually involving all of his dependencies in hostilities, or vice versa. While the Germanic Confederation still survived we were told that "the states which are under the sceptre of the head of the house of Hapsburg-Lorraine may be divided into Germanic and non-Germanic states. The Germanic states form part of the territory of the Germanic Confederation; they at the same time form part of the Austrian Empire, and their twofold national character has been the subject of international recognition. In a similar manner the Germanic states of the head of the house of Hohenzollern form part of the territory of the Germanic Confederation, and at the same time form part of the Prussian Monarchy." <sup>28</sup> When such relations existed those parts of the empire which were Austrian or Prussian were always in a double or ambiguous position when either was at war. As an illustration, reference may be made to the Austro-Sardinian war of 1848, during which an Austrian fleet sought shelter in the fortified port of Trieste under the dominion both of Austria and the Confederation. Regardless of the neutral position of the latter, the Italians declared a blockade against

<sup>27</sup> Hunter v. United States (the British steamer *Circassian*), 2 Parl. Papers, North Am., No. 2, 1874, p. 124.

<sup>28</sup> Twiss, Peace, § 39. As to the wrongful capture was subsequently awarded by a mixed commission Turkey as overlord and certain of her dependent principalities, see on British and American claims.

Trieste, not only because it had been made a refuge for the Austrian fleet, but because, as they claimed, it had been fortified and garrisoned and fire directed by its batteries against the Sardinian fleet. After consuls of the various German states had protested against such blockade the Italian admiral consented to recognize the place as belonging to the Confederation when the Austrian should be supplanted by the German flag; and subsequently, with the authority of his government, agreed to permit vessels both Austrian and foreign to go in and out provided they did not carry soldiers, arms or munitions of war or articles of contraband for naval forces,—it being declared that such vessels would not be permitted to go in or come out except by day, subject to the right of visit. Against the blockade thus maintained in principle but abandoned in substance the minister of foreign affairs of the Confederation, after denying that Trieste had been used as a base of offensive operations, presented a protest,<sup>29</sup> claiming in substance that the neutrality of the Confederation, no matter how shadowy its overlordship, impressed itself upon the territory in question regardless of the fact that it had been employed as a refuge for a worsted squadron, and as a place in which munitions of war and other supplies could be obtained. Such a contention necessarily implied, of course, the converse proposition that the belligerency of the over-sovereign would impress itself upon each portion of its subject territory regardless of the fact that its governing authorities were really neutral. Both assumptions are clearly untenable. The only reasonable and practicable rule to be observed under such circumstances has been stated by an eminent publicist as follows: “The belligerency or neutrality of territory subject to a double sovereignty must be determined for external purposes, upon the analogy of territory under military occupation, by the belligerent or neutral character of the state *de facto* exercising permanent military control within it. \* \* \* Where sovereignty is double or ambiguous a belligerent must be permitted to fix his attention upon the crude fact of the exercise of power. He must be allowed to deal his enemy blows wherever he finds him in actual military possession, unless that possession has been given him for a specific purpose, such as that of securing internal tranquillity, which does not carry with it a right to use the territory for his military

Holtzendorff's *Handbuch*, ii, § 57      <sup>29</sup> Martens (N. R. G.) xii, 497-  
(1887).      506.

objects. On the other hand, where a scintilla of sovereignty is possessed by a belligerent state over territory where it has no real control, an enemy of the state, still fixing his attention on facts, must respect the neutrality with which the territory is practically invested.”<sup>30</sup>

§ 576. **Duty of occupant to govern. Nature and extent of his authority.**—The duty of an occupant to govern the territory of which he is in military possession is correlative to his right to possess himself of it as conqueror, and as such to end all forms of preëxisting authority. The right of a belligerent to so occupy and govern is one of the incidents of war flowing directly from the laws of war as recognized by usage and as embodied in the laws of nations. From a theoretical point of view it may be said that the conqueror is armed with the right to substitute his arbitrary will for all preëxisting forms of government, legislative, executive and judicial. From the standpoint of actual practice such arbitrary will is restrained by that provision of the law of nations which compels the conqueror to continue local laws and institutions so far as military necessity will permit. All occupied districts become *ipso facto* and without proclamation, subject to martial law, the law of military necessity which is administered by the general of the army.<sup>31</sup> As the Duke of Wellington once expressed it, “martial law is neither more nor less than the will of the general who commands the army. In fact, martial law means no law at all; therefore the general who declares martial law, and commands that it shall be carried into execution, is bound to lay down distinctly the rules and regulations and limits according to which his will is to be carried out. Now, I have in another country carried out martial law; that is to say, I have governed a large proportion of a country by my own will. But then, what did I do? I declared that the country should be governed according to its own national law; and I carried into execution that my so declared will.”<sup>32</sup> A much clearer recognition of the fact that the arbitrary will of the general should be limited in its practical exercise by a recognition of local laws and institutions was made by Count Bismark Bohlen, who, on assuming the government of Alsace in 1870, declared that “le maintien des lois existantes, le rétablissement d’un ordre de choses régulier, la remise en activité de

<sup>30</sup> Hall, p. 532.

180; Field’s Int. Code, § 718; Martin v. Mott, 12 Wheat., p. 19.

<sup>31</sup> Maine, Int. Law, pp. 127,

<sup>32</sup> Hansard, 3d Series, cxv, 881.

toutes les branches de l'administration, voilà où tendront les efforts de mon gouvernement dans la limite des nécessités imposées par les opérations militaires. La religion des habitants, les institutions, et les usages du pays, la vie et la propriété des habitants jouiront d'une entière protection."<sup>33</sup> When, in 1806, Napoleon occupied the greater part of Prussia, he continued the existing administration under the general direction of a French official;<sup>34</sup> and in the same way when the Duke of Wellington invaded France he authorized the local authorities to continue the exercise of their functions, apparently without the supervision of any English superior.<sup>35</sup> On the other hand, when, in 1870, the Germans invaded France they appointed, certainly in Alsace and Lorraine, their own officials in every department of the administration, and of every rank.<sup>36</sup> The retiring sovereign of the invaded territory may withdraw with him its functionaries and even its police, as was done in Austria in 1866; or, if he leaves such officials behind him, he may forbid them to serve the invader. If, however, such functionaries consent to serve him, the occupant may continue the existing administration as a whole, subject to supervision of the military authorities or of superior civil authorities appointed by him. Such officials as thus consent to serve may be required to take an oath binding themselves to obey the orders of the invader during his occupation and not to do anything to his detriment. The occupant cannot, however, demand that local officers shall exercise their functions in his name. When, in 1870, the Germans in France attempted to violate that rule, by ordering, after the fall of the Emperor Napoleon, the courts at Nancy to administer justice in the name of the "High German Powers occupying Alsace and Lorraine," upon the ground that the exercise of their powers in the name of the French people and government was at least an implied recognition of the republic, the courts refused to obey and suspended their sittings.<sup>37</sup>

§ 577. Punishment of crimes in occupied territory.—Neither the civil nor criminal jurisdiction of the invading state is considered in international law to extend over conquered territory

<sup>33</sup> Proclam. of Aug. 30, D'Angeberg, No. 371.

<sup>34</sup> Lanfrey, *Hist. de Nap.*, i, iv, 25.

<sup>35</sup> Wellington Despatches, xi, 307.

<sup>36</sup> Calvo, § 1896; Hall, pp. 489-90, 495 and notes.

<sup>37</sup> Cf. Calvo, § 1891; Bluntschli, §§ 540, 541, 547, 551; Am. Instruct., Art. 26. For the oath taken in 1806 by the Prussian officials who

during military occupation of it. As explained heretofore in connection with the case of Villasseque<sup>38</sup> such criminal jurisdiction does not so extend until there has been some official and final act of incorporation. The criminal jurisdiction established by the invader in the occupied territory finds its source neither in the laws of the conquering or conquered state,—it is drawn entirely from the law martial as defined in the usages of nations.<sup>39</sup> The authority thus derived can be asserted either through special tribunals whose authority and procedure is defined in the military code of the conquering state, or through the ordinary courts and authorities of the occupied district. During the war between the United States and the republic of Mexico, when it was found that the rules and articles of war of the former failed to provide for many cases, civil and criminal, between its citizens and between such citizens and foreigners in Mexican territory occupied by its troops, but beyond the jurisdiction of its ordinary courts, all such cases of a criminal character arising within the limits occupied by the “main army” of General Scott were referred by him to “military commissions” as special tribunals constituted for that purpose. While in California a few such special tribunals were likewise organized for particular cases, as a general rule the punishment for all criminal offenses was left to the decision of the ordinary tribunals of the country.<sup>40</sup> In either event the martial law of the conqueror, as limited by the laws of war, is the basis of authority,<sup>41</sup> the special or civil tribunal the mere instrument through which it is exercised. By reason of certain provisions in the Constitution of the United States, military commissions organized during the civil war in states not invaded and not in a state of revolt, and in which the ordinary Federal courts were unobstructed in the

continued their functions during the French occupation, see Alison, *Hist. of Europe*, v. p. 855.

<sup>38</sup> See above, p. 587.

<sup>39</sup> “The proclamation of martial law renders every man liable to be treated as a soldier. The instant the necessity ceases, that instant the state of soldiership ought to cease, and the rights with the relations of civil life to be restored.” Lord Brougham, *Debate on the trial of the Rev. John Smith by court-martial*, *Parl. Debates*, 1824.

<sup>40</sup> Scott, *General Orders*, No. 20, Feb. 19, 1847; Marcy to Scott, Feb. 15, 1847; *Cong. Doc. No. 60*, 30th Cong., 1st sess. H. of R., p. 874; Cushing, *Opinions of Attys. General*, pp. 365 seq.; Gardner, *Inst. of Am. Int. Law*, p. 208; Halleck (*Baker ed.*), ii, p. 441.

<sup>41</sup> As to the offences and persons over which courts-martial have jurisdiction, see *Re Davison*, 22 Blatch. 475; *Re Bogart*, 2 Sawy. 402-3.

exercise of their judicial functions, were without jurisdiction to try, convict, or sentence for any criminal offense, a citizen who was neither a resident of a revolted state, a prisoner of war, nor a person in the military or naval service. For a like reason the suspension of the privilege of *habeas corpus* does not suspend the writ itself.<sup>42</sup>

§ 578. Suspension of political and continuance of municipal laws.—While political laws are as a general rule suspended during the military occupation of a conquered territory,—as heretofore explained in the chapter devoted to the laws of war as to enemy property on land,—the municipal laws of such territory, that is the laws regulating private rights, are generally continued in full force during the military occupation, except so far as they are changed or suspended by acts of the conqueror. As he possesses all the powers of a *de facto* government he can, of course, establish an entirely new civil code or make such changes in the old as he sees fit. As the conqueror has no interest or necessity requiring an abolition of the municipal laws of the country, important changes in them are seldom made. Such as are made are usually of a temporary character and end with the authority of the government making them. Unless some restriction is expressly imposed by the conqueror, as an exception to the general rule of public law recognizing the right of alienation as incident to ownership, the right of private individuals to transfer their property continues unimpaired during the military occupation in the same manner and to the same extent to which it existed prior to its beginning. A municipal or private corporation, like a natural person, has an equal right to dispose of its property during war, and all such transfers are *prima facie* as valid as if made in time of peace.<sup>43</sup> And yet despite the general rule as to the binding force of municipal laws, not expressly altered or suspended by the conqueror, the rule that the *lex loci rei sitae* governs in all things connected with title, tenure and transfer of real estate may be superseded, if the occupant sees fit to introduce a different usage or custom, even without a special decree to that effect. Such a change

<sup>42</sup> Ex parte Milligan, 4 Wall. 2-142; see also Geoffroy's Case in France, Forsyth, Cases and Opinions, 483; Phillips v. Eyre, L. R., 6 Q. B. 1.

<sup>43</sup> Kent Comm. i, p. 92; Cobraz v.

Raisin, 3 Cal. 445; Welch v. Sullivan, 8 Cal. 165; Hart v. Burnett, 15 Cal. 559; Riquelme, *Derecho Pub. Int.* lib. i, tit. i, ch. xii; Kamptz, *Literatur*, etc., § 307.

took place during the military occupation of California by the forces of the United States through the establishment of the custom of transferring real estate in that department by the simple deeds of conveyance commonly used in the United States, which seldom conformed either to the usual requirements of Mexican municipal law, or to the Mexican revenue regulations requiring such transfers to be made on stamped paper. Transfers of many millions of property there made in accordance with that usage, which continued after the restoration of peace and until the enactment of other laws by the government established after the organization of California as a state, were upheld as valid and sufficient.<sup>44</sup> "In the first place, the law requiring the use of stamped paper was a law for revenue, and, consequently, was suspended, with other political laws, *ipso facto* by the conquest, and completely abrogated by the cession. In the second place, the *lex loci rei sitae*, with respect to the forms and execution of conveyances of real property, was also suspended in its operation, by the introduction of a different usage with the government of the conquerors, and, from the nature of the case, the inhabitants of California could hardly be considered as remitted to this law by the restoration of peace."<sup>45</sup>

§ 579. **Military occupation under Constitution of the United States.**—The legal relation of the inhabitants of an occupied district to the invading state depends largely upon the character of the constitution of such state. As defined in the English constitution, conquest means one thing; as defined in the constitution and laws of the United States it means quite another. In contemplation of the former, a country subdued by British arms becomes immediately a part of the king's dominions in right of his crown, and its inhabitants, so soon as they pass under the king's protection, cease to be enemies or aliens and become subjects. In a word, foreign territory becomes a part of the British Empire and its inhabitants British subjects, both as to the conquering state and foreign nations, *ipso facto*, by the conquest itself, without any enabling or confirming legislation upon the part of the Imperial Parliament. As Lord Coke declared in Calvin's case, "they that were born in those part of France that were under actual legiance and obedience were no aliens, but capable of, and heritable to,

<sup>44</sup> Cross v. Harrison, 16 How. 164.

<sup>45</sup> Halleck (Baker ed.), ii, p. 449.



lands in England.”<sup>46</sup> In contemplation of the latter, hostile territory subdued by the armies of the United States does not pass under the dominion either of its constitution or its laws, neither do its inhabitants become citizens or subjects of the same, for the reason that neither the President as Commander-in-chief nor the military officers under his control can enlarge the boundaries of the Union without enabling legislation from Congress itself. As explained heretofore, until the status of territory so occupied and that of its inhabitants has been altered by adequate legislation, such territory does not cease to be foreign, nor do its inhabitants cease to be aliens, in the sense in which those words are used in the laws of the United States.<sup>47</sup> While such conquered territory is under the sovereignty of the United States, it is no part of the Union,<sup>48</sup> and its inhabitants have none of the rights, immunities or privileges guaranteed by law to citizens thereof. Both the territory and its inhabitants are, while in this condition, subject to martial law as limited by the usage of nations.<sup>49</sup> When territory is thus acquired by the United States by conquest its holding is a mere military occupation until by a treaty of peace the acquisition is confirmed.<sup>50</sup> While war continues it is the military duty of the President as commander-in-chief to provide for the security of persons and property, and for the administration of justice.<sup>51</sup> Such government may be carried on under an entirely new code made by the authority of the commander-in-chief, or, by the same authority, the native laws of the conquered territory may be continued in full force.<sup>52</sup> No constitutional difficulty can stand in the way of such a regime until the ceded territory is drawn within the circle of the constitutional guarantees which apply, in their entirety, to states only.<sup>53</sup>

<sup>46</sup> 7 Rep. 1, Broom's Const. Law, 2d ed., pp. 19, 48, 49, 50, 51, 60; *Elphinstone v. Bedreechund*, 1 Knapp, P. C. C. 338; *Campbell v. Hall*, 23 State Trials, 322; *Fabrigas v. Moslyn*, 1 Cowp. 165; *Callet v. Lord Keith*, 2 East, 260; *Blankard v. Galdy*, Salk. 411, 412.

<sup>47</sup> *Fleming v. Page*, 9 How. 603; *Cross v. Harrison*, 16 How. 164.

<sup>48</sup> See above, p. 593.

<sup>49</sup> *In re Kemp*, 16 Wis. 359; *Ex parte Milligan*, 4 Wall. 2; see also *Anonymous*, 9 Opin. Atty. Gen. 518.

<sup>50</sup> *American Ins. Co. v. Canter*, 1 Peters, 542.

<sup>51</sup> *The Grape Shot*, 9 Wall. 129.

<sup>52</sup> *Scott v. Billgerry*, 40 Miss. 119.

<sup>53</sup> *First Natl. Bk. of Brunswick v. Yankton*, 101 U. S. 129. See Appendix, page 793.

## CHAPTER X.

### TERMINATION OF WAR.

§ 580. **How war may be terminated.**—A war may be terminated (1) by a simple cessation of hostilities with no accompanying agreement; (2) by conquest and absorption of one belligerent by the other; (3) by a treaty of peace. While the first two methods are by no means unknown to history, war is usually terminated by a peace treaty negotiated between the belligerents, ending hostilities and fixing their relations for the future. A treaty may be of *status quo ante bellum*, *uti possidetis*, cession, or indemnity,—any or all combined,—involving the consideration of the treaty-making power and the interpretation of the terms of the instrument itself. The termination of war often presents also the question of the resumption of rights and property abandoned by the enemy upon the return of peace and not covered by the terms of the treaty, if there is one. The term *postliminy* or *postliminium* is generally employed to express the fact that the rights of an owner—suspended, not destroyed, by occupation or capture—revive when the suspending conditions cease to be operative. Every treaty of peace, unless the contrary is expressly stipulated, rests upon the principle of keeping what one has, *uti possidetis*.

§ 581. **General principles affecting treaties of peace.**—Although war may be compared in a general way to a lawsuit, there is at least one clear distinction. At law the plaintiff can recover no more than he claims at the beginning, with costs; in war the victor is entitled not only to collect his claim and expenses but also to inflict such terms as will prevent his opponent from setting up a similar claim in future. Beyond that he should not go. Even admitting that Mr. Day's statement made at the American-Spanish Conference of 1899, to the effect that conquerors impose what terms they please, contained much of truth, the victor who demands more than damages and security transcends the legitimate bounds of his opportunity.<sup>1</sup> Despite the fact that a treaty of peace is the result of armed force, it cannot be invalidated upon the ground of duress, if the negotiators themselves are at the time free agents.<sup>2</sup> After such a treaty is concluded, it cannot be

<sup>1</sup> Cic. *De Off.* i, c. ii.

<sup>2</sup> Heffter, § 180. See above, p. 385.

abrogated, however, without mutual consent. When Russia sought to take advantage of the Franco-Prussian war and violate the Treaty of Paris, she was checked by a conference of the powers, which declared it to be a principle of international law that no state can liberate itself from a treaty except by the consent of the other contracting power.<sup>3</sup> Such has been the uniform practice as illustrated by history. If the whole enemy country is annexed, there is, of course, no one to make a treaty in its behalf; and there is no necessity for such a treaty, as conquest is a valid title while the victor maintains exclusive possession.<sup>4</sup> In such a case the victor's title must ever depend upon his firm and continuous possession, military or otherwise.<sup>5</sup> The close of the American civil war was indicated by peace proclamations, varying for the different states to which they applied.<sup>6</sup> So far as litigation was concerned, Federal courts were sometimes opened before the making of such proclamations, and loyal citizens were allowed to sue others at once.<sup>7</sup> It is the province of peace treaties not only to settle disputed questions, but to open up new fields of development to the conqueror. Every peace is a new epoch.<sup>8</sup>

§ 582. **Effect of peace on pre-existing treaties.**—Important as the effect of a declaration of war on preëxisting treaties really is, the effect of a succeeding peace on such treaties is even greater. During war all treaties must perforce stand suspended except those for the regulation of war itself, as there is then no other than hostile intercourse. When peace is restored the difficult question which at once arises is this: How many of the preëxisting treaties revive with it? To remove all doubt on that subject it is not unusual in a treaty of peace to stipulate for the revival of all treaties not expressly abrogated by its terms. Should a few only be mentioned, as after the Franco-Prussian war, the doubt as to all others is thereby intensified. If the result of the war is a complete annihilation and absorption of one of the contesting states, there is, of course, an end of all treaties by reason of the non-existence of

<sup>3</sup> Maine, *Int. Law*, 220; Vattel, III, ch. 4, § 54; IV, ch. 4, § 37.

<sup>4</sup> Vattel, III, c. 13, § 20; Fleming v. Page, 9 How. 613; Halleck, 780.

<sup>5</sup> *Seemle*, Lamar v. Browne, 92 U. S. 178.

<sup>6</sup> The Protector, 12 Wall. 700; Brown v. Hiatts, 15 Wall. 177; Ad-

ger v. Alston, 15 Wall. 355; Batesville Inst. v. Kauffman, 18 Wall. 151.

<sup>7</sup> Masterson v. Howard, 18 Wall. 99.

<sup>8</sup> Bluntschli, *Mod. Kr.*, § 27 (536); Vattel, III, ch. 9, § 190; Heffter, § 181.

the opposite contracting party. Even then there may be a question of private international law as to the survival of treaties affecting private persons, in the event the extinct state was simply a trustee, as international equity can hardly permit a trust to fail for want of such a functionary. Leaving out of view instances of absolute conquest, and of treaties expressly revived or avoided, a perplexing field of doubt still remains as to the effect of war (1) on treaties to which other powers beside the belligerents are parties; (2) on treaties to which the belligerents only are parties. The following table, prepared by Lawrence,<sup>9</sup> to diminish, to some extent at least, the difficulties incident to this intricate subject, is sufficiently helpful to warrant its reproduction:

TABLE SHOWING THE EFFECT OF WAR ON TREATIES TO WHICH THE BELLIGERENTS ARE PARTIES.

I. Treaties to which other powers beside the belligerents are parties.	(A). Great International Treaties.	(a). When the war is quite unconnected with the treaty.	} Unaffected.
		(b). When the war does not arise out of the treaty, but prevents the performance of some of its stipulations by the belligerents.	} Unaffected as regards the other stipulations, and entirely unaffected with regard to neutral signatory powers.
		(c). When the war arises out of the treaty.	} Effect doubtful, depending chiefly on will of neutral signatory powers.
	(B). Ordinary Treaties to which one or more powers beside the belligerents are parties.		} Effect depends upon subject-matter. Generally suspended or abrogated with regard to belligerents; unaffected with regard to third parties.
II. Treaties to which the belligerents only are parties.		(a). Pacta Transitoria. ....	} Unaffected.
		(b). Treaties of Alliance.....	} Abrogated.
		(c). Treaties for regulating ordinary social and commercial intercourse, such as postal and commercial treaties, conventions about property, etc.	} Effect doubtful. Generally the treaty of peace deals with such matters; if not, it is best to take the stipulations as merely suspended during war.
		(d). Treaties regulating the conduct of signatory powers towards each other as belligerents or as belligerent and neutral.	} Brought into operation by war.

The effect of the War of 1812 on the Treaty of 1783 has been fully considered already.<sup>10</sup>

§ 583. Usual bases of peace: *status quo*; *uti possidetis*; amnesty. —When there is no contrary stipulation the conclusion of every peace is based on the assumption that each combatant will remain in the same position (*status quo*) as the close of war finds him, with the same possessions and rights.<sup>11</sup> The usual

<sup>9</sup> Principles Int. Law, 313.

<sup>11</sup> Bluntschli, *Mod. Kr.*, § 216

<sup>10</sup> See above, pp. 367-68, and also (715); 1 Kent Comm. 173; Heffter, Foster Century Am. Dipl. 254. § 181.

Greek formula is *ἔχοντες ἂ ἔχουσιν*,—the Latin, *uti possidetis*. All military operations cease, and everything connected therewith. Prisoners are released, punishments suspended, and friendly relations resumed.<sup>12</sup> Thus, contributions and requisitions cease, and, although Vattel holds that those previously promised are debts which may be enforced,<sup>13</sup> the modern view avoids even an uncollected levy. Prisoners' debts, however, ransom contracts, and other private obligations designed to lessen or exclude the ravages of war, and the like, are not released by conclusion of peace, for they amounted *pro tanto* to a restoration of peaceful relations when they were made. While prisoners of war are not freed *ipso facto* by peace, they must be released as soon as proper arrangements can be made therefor, including generally payment of their debts.<sup>14</sup> When after the treaty of Ghent American soldiers confined at Dartmoor, who had become restless or insubordinate at their detention, were fired on by British troops, seven being killed and sixty wounded, the British government apologized for the affair and offered compensation,<sup>15</sup> the last of which the government of the United States declined to accept. If territory is in question, the rule is *status quo ante bellum*, so far as the provisions of the treaty do not otherwise determine.<sup>16</sup> Excepting such as are unsanctioned by municipal or international law, peace works an amnesty for all acts of war, not including offenses or obligations arising before the war.<sup>17</sup> If a provision to that effect, usually embodied in treaties of peace, is omitted, the existence of the principle is implied; and also in the event there is no formal treaty at all. By treaty stipulation any offense may be excepted from the amnesty, as in the case of the peace treaty between Germany and France, 1871, excluding from its benefits French prisoners who had been condemned during their captivity for breaches of discipline regarded by their captors as ordinary crimes.<sup>18</sup>

§ 584. Cessation of hostilities.—Peace sometimes results from a mere cessation of hostilities without any accompanying agreement. Until the treaty of Kutschauk-Kainardji, 1774, such was the usual practice of the Turks, as the Koran did

<sup>12</sup> Id. §§ 217 (716), etc.

<sup>16</sup> Heffter, § 181, G. n. 2.

<sup>13</sup> Vattel, *Droit des Gens*, IV, ch. 3, § 29; Davis, *Int. Law*, 258.

<sup>17</sup> Bluntschli, §§ 211 (710); 213 (712), etc.

<sup>14</sup> Heffter, § 180 and note 6.

<sup>18</sup> Calvo, § 1303; Heffter, § 180,

<sup>15</sup> Whart., *Int. Law Dig.*, §§ 315c, G. n. 4.

not admit of peace with infidels. The British possession of Lower Burmah was based upon a similar condition, the Burmese king declining to enter into any treaty whatever. As examples of like procedures between Christian countries, reference may be made to a Franco-Spanish war which died in 1702 of inanition; and to a war between Poland and Sweden which came to an end in the same way in 1716, the peace treaty not being signed until ten years thereafter. In 1801 Paul simply ceased hostilities which Catharine had begun against Persia; and not until 1881 did France, and in 1901 Austria, renew with Mexico diplomatic relations broken off at the death of Maximilian. The Central and South American Republics offer in their revolts from Spain even more striking illustrations. Although hostilities ceased about 1825, Spain refused intercourse with some Central American states until 1840, and did not acknowledge Venezuela until 1850. It is doubtful, however, whether such a state of things can recur among civilized powers, as the world is too fast becoming a family of nations for countries to remain long out of touch with each other.

§ 585. **Conquest and its effects.**—The second mode of ending war is by conquest. As explained heretofore, modern practice, unlike the ancient, makes a distinction between military occupation and provisional administration during war (*occupatio bellica*) and complete conquest, consummated and legalized by the close of the war (*debellatio, ultima victoria*). While the oath exacted of inhabitants during a mere military occupation is necessarily of a temporary nature, it may be otherwise when conquest is intended. In the latter case all official acts are in the name of the conqueror, and from the time he declares his intention to assume sovereignty he may treat the inhabitants as subjects.<sup>19</sup> Such is the explanation often given of the oath enforced by Gustavus Adolphus in Germany, an explanation which probably applies also to the oath required by General Roberts in the Orange Free State. Although conquest, which gives *plenum dominium et utile*, may become complete by possession, it is usual to validate it by cession, as in the treaty of Frankfort in 1871 between France and Germany. Such a cession has the *ex post facto* effect of relating back to the day of actual occupation and validating all that the conqueror has done in the meantime. Until such cession is made,

<sup>19</sup> Heffter, § 186 and notes; Johnson v. McIntosh, 8 Wheaton, 588; Campbell v. Hall, 1 Cowp. 208.

the occupation is technically called *Usurpation*.<sup>20</sup> If territory marked out for conquest is alienated by the owner before occupancy is taken by the invader, the alienation stands, as mere intention to conquer confers no right whatever.<sup>21</sup> As conquest by Great Britain converts the occupied district into a dependency of the crown without an act of parliament, the sovereign can vary the rights of his new subjects in any way that does not give them more privileges than Britons as a class.<sup>22</sup> By virtue of that authority Charles II changed the government of New Netherland, when conquered from the Dutch, by letters patent to the Duke of York. On the other hand, conquests of American armies remain only military occupations until an act of Congress makes some other disposition of them. Citizenship does not necessarily follow the flag.<sup>23</sup> As a general rule it is permissible for the inhabitants to retain their old citizenship, provided they emigrate permanently from the ceded territory. If they remain, their consent to a transfer of allegiance will be presumed.<sup>24</sup> Such right of election, first recognized in 1763 in the treaty of Hubertsburg, is now guaranteed as a general rule.<sup>24</sup> As an exception to that rule may be mentioned the treaty of cession of Nice and of Savoy to France in 1860 giving to the inhabitants a time to manifest their intention to preserve their Italian nationality without a change of residence.<sup>25</sup> While the Treaty of Frankfort, 1871, provided that natives of Alsace and Lorraine desiring to remain French should emigrate, they were permitted to remain owners of their lands. On the other hand, after Count Platen had emigrated in 1866 to Vienna with his expelled sovereign, the king of Hanover, he was subsequently tried for treason as a Prussian subject, a procedure which cannot be justified. Despite the stipulation by the United States, on the acquisition of Florida, that the inhabitants should be incorporated into the Union as soon as practicable, and admitted to all rights, privileges and immunities of citizens, it was held that they were not endowed with political rights until, in accordance with American precedents, the territory should be admitted as a state. Private property and titles are to be protected, subject to the institution of commissions to investigate

<sup>20</sup> Calvo, *Droit Int.* II, 292, 300; Halleck, XXXIII, 19; Heffter, § 185; *Am. Ins. Co. v. Canter*, 1 Pet. 511.

<sup>21</sup> Calvo, *Droit Int.* II, 293.  
<sup>22</sup> *Ib.* 292, 304. See above, p. 600.

<sup>23</sup> See the *Insular Cases*, decided by U. S. Sup. Ct. in May, 1901.

<sup>24</sup> Halleck (Baker ed.) ii, 472.

<sup>25</sup> Calvo, II, 301, 303; Heffter, 182, G. n. 2.

and determine which of them are sufficiently complete to be recognized or confirmed. Such was the uniform practice followed by the United States after the acquisitions of Louisiana, Florida and California, and also by France as to the nuncupative titles in Algeria.<sup>26</sup> That intermediate alienations and other acts of governments *de facto* or by conquest are valid was clearly recognized by the Treaties of Paris and Vienna, of 1814 and 1815. The Elector of Hesse violated the rule, however, and the Congress of Vienna declined to restrain its creature even when he interfered with his own courts in order to prevent their recognition of the validity of alienations made by Napoleon and Jerome in his "absence." The wrong was redressed *pro tanto* by the eminent authorities who, in passing upon the question of the existence of debts originally due the elector but collected by the conqueror of the country, justly decided that they were by reason of such collection paid and extinguished. Although the principle involved was the same,<sup>27</sup> the elector never surrendered the lands of which he had forcibly repossessed himself. The rule of conquest requires the new possessor to assume the whole, or a portion, as the case may be, of the lawful public debt of the country or province.<sup>28</sup>

§ 586. **Public property after conquest.**—When there is no treaty, or one containing no contrary provision, public property passes by conquest itself to the conqueror. By that right Alexander, after he had acquired through the capture of Thebes the evidence of indebtedness of his Thessalian allies to Thebes, remitted the 1,000 talents due thereon. On doubtful authority it is said that the Thebans presented the validity of that act to the judgment of the Amphictyonic Council, and that that body decided adversely to them.<sup>29</sup> In reference to property of the late Confederate States it was held that a debt due to a seceded State was a lawful subject of conquest by the United States;<sup>30</sup> and that land conveyed to the Confederate States passed in like manner without any procedure of forfeiture or condemnation.<sup>31</sup> Rulings made on the same subject in Europe have recognized distinctions worthy of consideration. In France, after the American civil war, the

<sup>26</sup> Calvo, *Droit Int.*, II, 306; U. S. v. Morino, 1 Wall. 400; U. S. v. Reynes, 9 How. 127.

<sup>27</sup> *Ib.* 308, 310.

<sup>28</sup> Calvo, II, 309; Heffter, § 182.

<sup>29</sup> Quintilian, *Inst. Or.* V, 10, 111.

See authorities cited in Heffter, § 134, n. 4.

<sup>30</sup> *United States v. Smith*, 1 Hughes, 347.

<sup>31</sup> *United States v. Tract of Land*, 1 Woods, 475.



United States sued to recover the money paid by the Confederate government to builders of vessels who had been compelled, by reason of the discovery of the contract, to sell them to Prussia and other powers. The suit was dismissed under the empire, and, on appeal, under the republic, because, amongst other reasons, no United States funds could be traced into the ships. So far as the violation of neutrality was considered, it was held to be a matter only for the French government and in no event could confer rights on the injured foreign state.<sup>32</sup> In England, in 1866, the United States exhibited a bill in equity against Colin J. McRae, a Confederate agent, who was supposed to have funds of the late government in his possession or under his control, Sir Roundell Palmer appearing as solicitor for the complainant and Judah P. Benjamin for the defendant. The court, speaking through Sir W. M. James, V. C., decided that a government suppressing a rebellion could reclaim all public property originally belonging to it which had been seized by the insurgent authorities; and, by right of succession or representation, could claim all public property of the late government, however acquired. It was further held that the conquering power could force an accounting with an agent only by standing in the shoes of the insurgent government, subject to a liability to pay any balance that might appear to be due such agent, if the accounting should result in his favor. As the complainant declined to accept a decree in any form which would recognize the authority of the belligerent states, or involve any payment to their agent, and as the proof failed to show that McRae possessed anything belonging originally to the United States, the suit was dismissed with costs.<sup>33</sup>

§ 587. Effects of conquest on laws, municipal and political.—Private or municipal laws of a conquered country, says Lord Mansfield, remain in force until changed by the conqueror; political laws yield, *ipso facto*, to martial rule upon occupation taken. The American president, for instance, as commander-in-chief, can frame a government for conquered territory and administer it so long as the military retain control,—the question when such control shall cease being a constitutional and not an international one. Even when the criminal and political procedure of the conqueror is introduced, it is usual to retain

<sup>32</sup> Bigelow's *France and Confederate Navy*, 94.

<sup>33</sup> *U. S. v. McRae*, L. R. 8 Equity, 69.

the civil law of the conquered province under which all private rights shall be preserved inviolate. That rule, recognized after the British conquest of Canada from the French, and of Cape Town from the Dutch, is the general rule of international law as to cessions and conquests alike.<sup>34</sup> If a hostile state or province is entirely destroyed, and its people absorbed by the conqueror, political arrangements may be entirely remodeled, without a violation of established usage. And yet even in that extreme case policy should dictate gradual and not radical changes, no matter whether the territory in question is annexed by force or cession. When in 1809 the whole of Finland was ceded to Russia, Alexander I, after convoking the diet at Borgo, issued a manifesto in which he declared his purpose to preserve the religion, laws and liberties of the country, a pledge under which Finland long remained perhaps the freest and best governed part of the Russian Empire.

§ 588. **Private property, unaffected by change of sovereignty.**—Private property should not be affected by change of sovereigens. “The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property remain undisturbed. \* \* \* A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him.”<sup>35</sup> Conquest or cession passes the sovereignty only, and even that is limited to such of the old inhabitants as change their allegiance. If, however, a property owner prefers to depart with the old flag, he forfeits his property to the new sovereign, except so far as there may be treaty stipulations to the contrary. As the Supreme Court of the United States has expressed it, in a notable case,<sup>36</sup> “the conqueror who has obtained permanent possession of the enemy’s country has the right to forbid the departure of his new subjects or citizens from it, and to exercise his sovereign authority over them. Hence the stipulation in the capitulation and treaties of cession providing for the emigration of those inhabitants who desire to adhere to their ancient allegiance, usually fixing a limited period within which to leave the country, and frequently extending to them

<sup>34</sup> Twiss, Law of Nations, War, § 66; U. S. v. Percheman, 7 Peters, 51; Strother v. Lucas, 12 Peters, 410; Am. Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 542.

<sup>35</sup> United States v. Percheman, 7 Peters, 51, 87 (Marshall).

<sup>36</sup> United States v. Repentigny, 5 Wall. 211.

the privilege, in the meantime, of selling their property, collecting their debts, and carrying with them their effects."

§ 589. **Suppression of a rebellion.**—Should a rebellion against an established government be concluded by a treaty as in the case of states recognizing each other, there would be a confusion of ideas, and a confusion of terms. The word "rebellion" cannot be applied to a condition of things necessarily involving the recognition of a new state. For that reason a rebellion can be logically suppressed only upon the theory of conquest. After a return to original conditions, there is generally some kind of penalty inflicted upon the leaders of a rebellion, who may be punished for high treason unless the terms of their surrender forbid.<sup>37</sup> Thus, when after the close of the American civil war General Lee was threatened with arrest, General Grant successfully urged the sacredness of his parole. Mr. Jefferson Davis was, at the same time, actually arraigned on the charge of treason, but after long imprisonment the prosecution was abandoned because the *de facto* existence of the Confederate government was so pronounced and notorious as to render the theory of the charge absurd.

§ 590. **Treaty of peace.**—The third and most common method of terminating a war is by treaty of peace, which is usually preceded by an armistice and preliminary agreement made by commissioners or through the mediation of a friendly power. After M. Cambon, the French minister at Washington, had negotiated such a provisional treaty, called a protocol, as the basis of peace between Spain and the United States, a joint commission from the two powers met at Paris and settled the final or definitive treaty. The general rules applicable to the making of other treaties apply, with certain modifications, to treaties of peace, due consideration being given in each case to the treaty-making power, the form of which differs in different constitutions. Although in the United States that power is vested in the President and Senate, the annexations of Texas and Hawaii were effected by joint resolutions of a majority of each house of Congress. A treaty legally executed binds the whole nation; and when its performance requires the payment of money, it is morally obligatory upon that branch of the government whose duty it is to originate the necessary law. A refusal to perform such a duty would constitute a breach of public faith.<sup>38</sup> When private rights are

<sup>37</sup> Am. Regulations, Art. 154.

<sup>38</sup> 1 Kent Comm., 165, 167; The

sacrificed by treaty for national purposes, as by alienation, the government is bound to make compensation.<sup>39</sup> But no such obligation arises when, as in the case of the revolt of Vermont from New York, the injury proceeds not from the voluntary act of the state, but from refusal of a revolutionary government to recognize old grants.<sup>40</sup> A treaty is effective from its ratification by the treaty-making powers, not from its signature by the envoys.<sup>41</sup> If there is no one left to conclude a treaty, the silence of the defeated nation is really a tacit consent. While a captive sovereign may negotiate peace, it is not binding until ratified by the nation.<sup>42</sup> Napoleon III declined to treat at all during his captivity after Sedan.

§ 591. *Interpretation.*—When doubts arise as to the meaning of a treaty of peace, the construction of its terms is against the victor, *contra proferentem*, because as the dictator of the treaty he will be held to have expressed the full extent of his rights. The names of places and things are to be understood according to intelligent usage; and, unless otherwise expressed, the treaty relates only to the war just ended.<sup>43</sup> If restitution is provided for, it must be of the thing in the condition it was when taken,—except so far as otherwise expressly agreed, or unless the amnesty clause permits surrender in the then existing condition. Improvements added during possession may be removed, however, by the party surrendering.<sup>44</sup>

§ 592. *Indemnity and guarantees.*—It has become usual to claim indemnity from the conquered state, nominally for expenses and pensions, but often really for gain or in order to cripple the enemy. The habit of exacting money contributions from districts during invasion and from the whole country at the conclusion of peace, infrequent before the wars of the French Revolution, has, to use Calvo's expression, been erected since that time into a system. Napoleon often enforced such demands, and the allies, after his fall in 1815, imposed an indemnity on France of seven million francs, payable in installments running over five years. All precedents sink into insignificance, however, beside Germany's exaction of five billion francs (one billion dollars) of France in 1871, also pay-

Peggy, 1 Cranch, 103; Ware v. Hylton, 3 Dallas, 199, 245.

<sup>39</sup> Vattel, *Droit des Gens*, VI, ch. 2, § 12.

<sup>40</sup> 1 Kent Comm. 178.

<sup>41</sup> Halleck, *Int. Law*, 855.

<sup>42</sup> Vattel, *Droit des Gens*, VI, ch. 2, § 11.

<sup>43</sup> Vattel, *Droit des Gens*, IV, ch. 3, § 32-4. See *ante* chapter II of this part.

<sup>44</sup> Heffter, § 182.

able in five years. If France established such a method of punishment, she has certainly been the greatest sufferer from it. To the honor of the government of the United States it may be said that instead of enforcing such exactions, it actually paid Mexico and Spain for the territories taken from them in war. As a guaranty for the payment of indemnity, or fulfilment of other stipulations, territory of the conquered state, of greater or less extent, is often retained by the conqueror. Such a requirement was made of France, after the fall of Napoleon, and also after the Franco-German war of 1870-1. As an occupation of that character, although military, is not an act of war, all war measures, such as requisitions and contributions, cease entirely during its continuance.<sup>45</sup>

§ 593. Cession perfected by delivery of possession.—According to the rule observed in conveyances between individuals, delivery of possession is necessary to perfect the cession of territory between states, the signature and even ratification of a treaty not being sufficient. Until possession is taken, the agreement is only executory and the sovereignty is not changed.<sup>46</sup> Possession of Louisiana, ceded by France to Spain in 1762, was not taken until 1766; and, although retroceded in 1800, France did not take possession until 1803, and then only to transfer it in thirty days to the United States, to whom she had sold it. In each instance the old flag, officials and laws remained in the interim.<sup>47</sup> Unless otherwise provided by treaty, the transfer of the country *ipso facto* changes the allegiance of such of the inhabitants as elect to remain; but, as in the case of conquest, there is no change of the relations of such inhabitants to each other.<sup>48</sup> Even political rights remain the same, provided they are not inconsistent with the new order of things; or, in the case of previous occupation, have not been changed by the conqueror. Some modern publicists maintain that the consent of the inhabitants of the ceded territory is necessary in order to validate its transfer, after the manner of the plebiscite employed by France on the annexation or "reunion" of Savoy and Nice. Such a proceeding cannot, however, be more than a form when cession is the

<sup>45</sup> Heffter, § 184, G. n. 3.

Spanish occupation was under O'Reilly in 1769.

<sup>46</sup> The Fama, 5 Ch. Rob. 113; The Bolletta, Edwards 173.

<sup>48</sup> Am. Ins. Co. v. Canter, 1 Peters 542; U. S. v. Percheman, 7 Peters

<sup>47</sup> 2 Gayarré La., 92, 131; 3 Id. 445, 620. In fact, Ulloa's possession was but momentary and the real

87.

result of war. Not even Bluntschli's modified demand for assent of the annexed province is practicable, as the ceding government is a unit and acts in making a cession, as in everything else, as the sovereign. Cession by the defeated to the conquering state is a finality so far as the war it closes is concerned, no matter what its victims think of it. Bluntschli attempted to rest the acquisition of Alsace and Lorraine upon race conditions, a contention certainly not true as to the latter province; but Geffcken frankly admitted that it was an act of force, necessary for military reasons.<sup>49</sup>

§ 594. **Violation of treaty.**—Unless otherwise stipulated, the violation of any material provision may be treated as a breach of the whole treaty.<sup>50</sup> While the carrying on of hostilities in ignorance of the ending of the war does not constitute such a violation, their fruits must be restored, whether the capture of a ship or city has resulted therefrom.<sup>51</sup> If a ship is taken under such circumstances, the act is not criminal, and the commander of the squadron, unless a participant, is not liable. Only the immediate captor is liable *civilitèr*, and, if he is innocent, his government should reimburse him.<sup>52</sup> If a capture is made with knowledge of the treaty, but before the time fixed for cessation of hostilities at the particular place, it is null and void, provided such knowledge is positive and official. Information derived from the enemy was disregarded by the French privateer *Bellona* in 1802, and her capture of the *Swineherd* under such circumstances was sustained by the French Prize court.<sup>53</sup> When General Jackson after the battle of Fort Bowyer was notified by the British naval commander of the conclusion of peace at Ghent, he promptly declined to act on it. In that case, however, military operations did not result in any further change of conditions before authentic information reached the American general from his own government.

<sup>49</sup> Heffter, § 18 and notes. See Stoerk's "*Option und Plebiscit bei Eroberungen*," etc., 1879.

<sup>50</sup> Grotius *De Jure Belli ac Pacis*, III, c. 19, § 14; Vattel, *Droit des Gens*, ch. 4, § 47.

<sup>51</sup> Vattel, *Droit des Gens*, IV, ch. 3, § 24; Bluntschli, *Mod. Kr.*, § 210 (709); 2 Dallas 40; Hylton v.

Brown, 1 Wash. Cir. Rep. 311-12, 342, 351.

<sup>52</sup> The *Mentor*, 1 Rob. 151; Grotius, *De Jure Belli ac Pacis*, III, c. 21, §§ 5, 20; Heffter, § 183 and notes.

<sup>53</sup> Cited in 1 Kent Comm. 172, note; The *Legal Tender*, Wheaton's Dig., 302; The *Sophie*, 6 Rob. 175.

§ 595. **Postliminy as applied to states or provinces.**—The principle of postliminy (*postliminium*),—heretofore considered as to certain property recaptured from an enemy by the state to which it originally belonged,—likewise restores upon the return of peace the status of whole states and provinces and their governments which have passed for a time, during the progress of a war, under the control of an enemy. From the Roman law of postliminy, applying almost exclusively to private rights, has been drawn that principle of public law,<sup>54</sup> which provides that a state or other governmental entity, upon the removal of a foreign military force, resumes its old place, with its rights and duties substantially unimpaired, except that taxes paid or other duties discharged during the foreign occupancy cannot be reclaimed or questioned. Such political resurrection is the result of a law analogous to that which enables elastic bodies to regain their original shape upon the removal of external force,—and subject to the same exception in case of absolute crushing of the whole fibre and content. Where there has been such political reconstruction, however, even a successful revolution, or independence given by a third state, does not without more restore the original status. There is not then postliminy, but a new creature, which may assume a new form as readily as the old. When the occupation and the abandonment have been each an incident of the same war, postliminy applies, even though the occupant has acted as conqueror and for the time substituted his own sovereignty. Whether exactly the same forms of government must be restored depends upon the circumstances of each case and the constitutional powers of the restored sovereign. While past acts (*faits accomplis*) of the occupant cannot be disturbed, and civil rights, public or private, growing out of them cannot be impaired, there is no reason for their continuance. Taxes released or collected cannot be re-collected, but no future exemption will be recognized nor unfulfilled contracts regarded. Alienation of domains, income and other property by the occupant must nevertheless be respected, at least so far as they would have been lawful if made by the legitimate

<sup>54</sup> Digest 49, 15, *de captivis et postliminio reversis*; Codex .8, 51, *de postliminio reversis*; Cocceji *De Jure Postliminii*, 1683, *De Postliminio in Pace et Amnestia*, 1752.

For modern views, Grotius, III, 9; Vattel, III, 14; Phillimore III, 853; Calvo IV, 2977; Hall 416; Heffter, § 187 et seq.

sovereign.<sup>55</sup> As to lands the rule is therefore reasonably clear, but as to movable or personal property, there is more dispute. Roman law excluded all such, except munitions of war, from postliminy on the idea that capture changed the title,—everything becoming booty under a rule which does not now obtain.

<sup>55</sup> *New Orleans v. S. S. Co.*, 20 Wall. 387; *Oakes v. U. S.*, 174 U. S. 778, 792.



## PART V.

# RIGHTS AND DUTIES OF NEUTRAL STATES.

### CHAPTER I.

#### ORIGIN AND GROWTH OF THE LAW OF NEUTRALITY.

§ 596. Dim conceptions of neutrality in Greek and Roman world.—While the sweeping assertion usually made that the nations of classical antiquity possessed no words which expressed what is now understood by the English terms, *neutral* and *neutrality*, is literally and technically true, it must not be accepted as conclusive of the fact that the idea itself did not exist in any form whatever.<sup>1</sup> Recent researches into the system—highly developed in certain particulars—of international relations existing between Greek city commonwealths have revealed the fact that although the prevalence of confederations rendered perfect neutrality practically impossible between state and state, there did exist a clearly defined idea that a state standing in a friendly relation to two belligerents violated its international duty if it gave to one military aid or succor withheld from the other. Such was the contention of the Corcyraeans who, when pleading before the assembly at Athens for such an alliance as would protect them against the Corinthians, said: “You should either stop their mercenaries drawn from your country, or send succor to us also, in what manner you may be persuaded is the most expedient; but it were best of all to receive us openly and assist us.”<sup>2</sup>

Dim as the conception of neutrality, as between state and state, may have been, there is definite and satisfactory evidence

<sup>1</sup> Calvo reproduces the over-statement usually made when he says: Il n'existait anciennement dans le droit international aucune notion de l'état de neutralité. § 1011.

<sup>2</sup> . . . ἀλλ' ἢ κατέκρινον κωλύειν τοὺς ἐκ τῆς ὑμετέρας μισθοφόρους, ἢ καὶ ἡμῖν πέμπειν καθ' ὃ

τι ἂν πεισθῆτε ὡφέλειαν, μάλιστα δὲ ἀπὸ τοῦ προφανοῦς δεξιμέλους βοήθειαν.—Thuc. I. 35. Referring to Grotius's citation of this passage, Walker says: “And he quotes with approval the declaration of the Corcyraeans to the Athenians that, if they would really be neutrals, they should either forbid the Corinthi-

of the fact that the Greek law of nations provided as carefully for the neutralization during war of the person and property of a certain official known as a *πρόξενος* as the Red Cross conventions now provide for the neutralization of the medical staff, with their equipages and instruments, devoted to the care of the wounded during actual hostilities. Prof. H. Brougham Leech,<sup>3</sup> after defining the rights of ambassadors as recognized in the Greek law of nations, says that "akin to the subject which has been under discussion is the institution called *προξενία*. This system, widely adopted among Hellenic communities, was in many respects analogous to the modern system of consular agency. \* \* \* The *proxenus* was the person who, in his native city, represented the interests of another community. The word is defined by a scholiast upon Demosthenes as *ὁ προστατὴς ἐν τῇ ἐαυτοῦ πόλει ἄλλης πόλεως*. He was selected by the foreign state for the purpose of watching over its general interests, and protecting its subjects, in his own city. \* \* \* The *proxenus*, whose position has been discussed, enjoyed peculiar privileges in the case of a war between his own city and the one which he represented. Many of the inscriptions which record the bestowal of this dignity guarantee the inviolability of his person and property in time of war and peace, by land and sea.<sup>4</sup> If taken prisoner in battle, he was entitled to be released without ransom: if his city was stormed and sacked, his house was privileged to remain uninjured. On this point there is historical evidence in support of the inscriptions. Polybius relates that an Achaean admiral, making a descent on the territory of Naupaktus, took captive one Kleonikus, 'who, as he was a *proxenus* of the Achaeans, was not sold forthwith, but set free without ransom after a time.'<sup>5</sup> The fact that

ans to raise levies in Attica, or suffer the Corcyraeans to do the like." Science of Int. Law, p. 378. Such a liberal rendering, which would be very important if defensible, goes not only beyond the text of Thucydides, but beyond that of Grotius, who correctly translates him when he says: *Concyrenses apud Thucydem Arheniensium officii esse ajunt, si extra partes esse velint, aut Corinthios prohibere ne ex agro Attico militem*

conducant, aut idem sibi permittere. *De Jure Belli ac Pacis*, III, c. 17, § 3. A Greek orator had no words with which to say, if you "would really be neutrals."

<sup>3</sup> Essay on Ancient Int. Law, pp. 49, 64.

<sup>4</sup> *εἰμὲν δ' αὐτῶ ἀτέλειαν καὶ ἀσυλίαν καὶ κατὰ γῆν καὶ κατὰ θάλασσαν.* (Corpus Inscriptionum. 1052.)

<sup>5</sup> *ὅς διὰ τό πρόξενος ὑπάρχειν τῶν Ἀχαιῶν, παρ' αὐτὰ μὲν οὐκ*

Professor Leech has thus convinced us, quite unconsciously, that such a thing as a neutralized person during war was known to Greek diplomacy, while employing the proof of it in connection with another subject, renders what he says only the more convincing. There is nothing, however, going to show that the Romans had any clearly defined idea even of a neutralized person during war. The terms *neutralis*, *neutralitas*, barbarisms used by certain modern writers, are not to be found in any classical author. The Latin language contained no substantive whatever corresponding to *neutrality*. The nearest approach ever made by the Roman historians and civilians in their efforts to describe those we now call neutrals was embodied in such inadequate expressions as *amici*, *medii*, *pacati*, *socii*.<sup>6</sup>

§ 597. **Neutrality incompatible with theory of Medieval Empire.**—The idea of neutrality as now understood is the outcome of the creation of a family of nations composed of coequal and sovereign states whose only common superior is that body of rules which Grotius was the first to place upon the throne made vacant by the collapse of the Medieval Empire as an international power.<sup>7</sup> So long as that strange creation, resting upon the theory of a vast Christian monarchy whose sway was absolutely universal, endured, there was no place for the idea of a state standing as an impartial spectator in wars in which every member of the confederation was directly interested, no matter whether they were waged by one member of the association against the other, or by the corporate person of the entire church militant against Saracens and

ἐπράθη, μετὰ δὲ τινα χρόνον ἀφειθη χωρὶς λύτρων.—Polyb. V.

The Athenians put to death a certain Antipater, who had slain their proxenus during an uprising. (Tit. Ἀθήν. V.)

<sup>6</sup> Grotius, regarding neutrals as "middle men," termed them *medii in bello*. *De Jure Belli ac Pacis*, III, 17, *De his qui in bello mediū sunt*. As to those who are not parties to a war, and yet supply aid to the combatants, see III, 1, § 5. Bynkershoek, expressing the idea negatively, used the term *non hostes*. *Non hostes appello, qui*

*neutrarum partium sunt, nec ex foedere his illisve quicquam debent; si quid debeant, federati sunt, non simpliciter amici.* *Quaest. Jur. Pub.* I. c. 9, *De statu belli inter non hostes*. As to Vattel's use of the terms *neutre* and *neutralité*, see *Droit des Gens* (III, ch. vii), published in 1758. In the next year Hübner, a Danish civilian, published at The Hague his *De la Saisie des Bâtimees neutres*. From that time the words, neutral and neutrality, became technical terms in international law.

<sup>7</sup> See above, p. 78.

Infidels. According to medieval ideas no Christian could stand neutral in the struggle of orthodoxy against heresy, a struggle which intensified the application of the scriptural precept that, "he that is not with us is against us." While a crusader, under exceptional circumstances, might make a truce with the Saracen, no peace could be made with the Infidel, against whom all wars carried on by Christians were, according to Conrad Brunus, just, provided they were undertaken to recover dominions that might be made useful to all Christendom.<sup>8</sup> Under the aegis of that principle Chivalry marshaled its hosts, embracing such religious orders of knight-hood as the Teutonic Knights and Knights of the Sword—offsprings of the Crusades—whose territorial acquisitions were so considerable.<sup>9</sup> The same antagonism to the principle of neutrality likewise inspired that school of lay thinkers which, at the close of the Middle Ages, revived the study of the science of politics. Machiavelli, as its mouthpiece, advised his ideal prince never to stand neutral in wars between his neighbors, because it is always more advantageous in the end to enlist on one side or the other. When there is danger to be feared from the conqueror, whoever he may be, it is wise to take up arms on one side or the other, because, if you do not, "you are certain to become the prey of the victor, to the satisfaction and delight of the vanquished." If neither party is powerful enough to put you in fear, "it is all the more prudent for you to take a side, for you will then be ruining one with the help of the other, who, were he wise, would endeavor to save him. If he whom you help conquers, he remains in your power, and with your aid he cannot but conquer."<sup>10</sup> Machiavelli's teachings found favor with his contemporaries,—the Borgias, while hesitating as to their part in the Franco-Spanish struggle, gave leave to both parties to enlist levies at Rome.<sup>11</sup>

§ 598. **Absence of rule as to neutral duty in sixteenth century.**—Throughout the sixteenth century there was such an absence from the common law of nations of any recognized rule denying to a state the right to commit, or to permit its

<sup>8</sup> See above, p. 56. As to Ayala's contrary view, see note 8.

<sup>9</sup> Freeman, *Historical Geography*, pp. 512, seq.; Schmauss, *Corpus Juris Gent. Academ.*, II, p. 2162; Walker, *Science of Int. Law*, p. 375.

<sup>10</sup> *The Prince*, ch. xxi. See trans. by N. H. T., published by Kegan, Paul & Co.

<sup>11</sup> Guicciardini, *The Hist. of Italy*, iii, p. 223. Godard's trans.

subjects to commit, acts of open hostility against other states with which it was nominally at peace, that neither usage nor moral opinion was outraged if a neutral state permitted an enemy or its ally to enlist levies within its territories, or even if it should lend him money or ships of war, or should supply him, directly or through its subjects, with munitions of war. If any recognized rule had then existed forbidding such unneutral acts there would have been no occasion for the series of treaties entered into during that and the preceding epoch expressly stipulating for neutrality in such a way as to prevent the contracting parties from assisting the enemies of the other, either publicly with subsidies or auxiliary forces, or privately by indirect means. The state thus binding itself to be neutral generally undertook at the same time to prevent its subjects from doing like acts. Fair examples of such stipulations, couched sometimes in general, and sometimes in very specific terms, may be found in treaties entered into, in 1502, between Henry VII. and Maximilian, King of the Romans; and, in 1505, between Henry VII. and the Elector of Saxony. In the first it was agreed “quod nullus dictorum principum movebit aut faciet etc. guerram etc. nec dabit auxilium, consilium, vel favorem, publice vel occulte, ut hujusmodi guerra moveatur vel excitetur quovismodo.” In the second it was covenanted that neither of the contracting parties, “patrias, dominia, etc. alterius a suis subditis invadi aut expugnari permittet, sed expresse et cum effectu prohibebit et impediet,” and neither of them “alicui alteri patrias, dominia etc. alterius invadenti etc. consilium, auxilium, favorem, subsidium, naves, pecunias, gentes armorum, victualia aut aliam assistentiam quancunque publice vel occulte dabit, aut praestari consentiet, sed palam et expresse prohibebit et impediet.”<sup>12</sup>

§ 599. Growth of the principle of neutrality in seventeenth century. Grotius.—That the right to resist and resent the performance of acts of war within its lands or waters was vested, in theory at least, in a sovereign state, at the beginning of the seventeenth century, is manifest from the proclamation issued by James I. in 1604 directing that “all officers and subjects by sea and land shall rescue and succour all such merchants and others as shall fall within danger of such as wait

<sup>12</sup> Quoted by Hall, *Int. Law*, p. 599, citing Dumont's *Corps Universel Diplomatique*.

the coasts." And yet the non-existence of any well defined rule covering the entire subject is manifest from the short and unsatisfactory chapter ("*De his qui in bello medi sunt*"), in which Grotius went no farther than to say that "it is the duty of those that are not engaged in war, to sit still and do nothing that may strengthen him that prosecutes an ill cause, or hinder the motions of him that hath justice on his side; and, in a dubious case, to behave themselves alike to both parties, as in suffering them to pass through their country to supply them with provisions, and not to relieve the besieged."<sup>13</sup> He had previously admitted, however, that "it is not inconsistent with an alliance that those who are attacked by one of the parties to it shall be defended by the other, peace being maintained in other respects."<sup>14</sup>

The vague and incoherent doctrine of neutrality thus put forth by the "father of the law of nations," at the end of the first quarter of the seventeenth century, was of a piece with the practice prevailing about that time, from which it clearly appears that such doctrine as did then exist had not advanced beyond the stage of theory. "In 1627, the English captured a French ship in Dutch waters; in 1631, the Spaniards attacked the Dutch in a Danish port; in 1639, the Dutch were in turn the aggressors, and attacked the Spanish fleet in English waters; again in 1666, they captured English vessels in the Elbe, and in spite of the remonstrances of Hamburg and of several other German states did not restore them; in 1665, an English fleet endeavored to seize the Dutch East India squadron in the harbour of Bergen, but were beaten off with the help of the forts; finally, in 1693, the French attempted to cut some Dutch ships out of Lisbon, and on being prevented by the guns of the place from carrying them off, burnt them in the river."<sup>15</sup> And yet the learned author from whose pages that extract is taken concludes that "by the latter half of the seventeenth century it was no longer necessary to stipulate for neutrality in precise language. The neutrality article dwindled into a promise of mutual friendship. But it would be a mistake to infer from this that international practice conformed to the more stringent provisions of former treaties."<sup>16</sup>

<sup>13</sup> *De Jure Belli ac Pacis*, III, c. xvii.

<sup>14</sup> *Ibid.*, II, c. xvi.

<sup>15</sup> Hall, *Int. Law*, pp. 604-5.

<sup>16</sup> *Ibid.*, p. 600. "The Peace of the Pyrenees (1659) has merely the general words, 'Les Roys, etc., eviteront de bonne foy tant qu'il

§ 600. Theory of neutrality as defined by publicists of eighteenth century. Bynkershoek.—On the threshold of the eighteenth century we are met by one of the most important of the early publicists, Bynkershoek, whose *De Dominio Maris*, which appeared in 1702, was followed in 1721 by his *De Foro Legatorum*, and in 1737 by his *Questiones Juris Publici*. In the latter he says: "I call those non-enemies (*non hostes*) who are of neither party in a war, and who owe nothing by treaty to one side or to the other. If they are under any such obligation they are not mere friends, but allies. \* \* \* Their duty is to use all care not to meddle in the war. \* \* \* If I am neutral, I cannot advantage one party, lest I injure the other. \* \* \* The enemies of our friends may be looked at in two lights, either as our friends or as the enemies of our friends. If they are regarded as our friends, we are right in helping them with our counsel, our resources, our arms, and everything which is of avail in war. But in so far as they are the enemies of our friends, we are barred from such conduct, because by it we should give a preference to one party over the other, inconsistent with that equality in friendship which is above all things to be studied. It is more essential to remain in amity with both than to favor the hostilities of one at the cost of a tacit renunciation of the friendship of the other." Again he says: "What if I have promised help to an ally, and he goes to war with my friend? I think I ought to stand by my promise, and that I can do so properly." If, however, the war has been undertaken unjustly on the part of the ally the neutral may abstain; and after it has begun no new engagements must in any event be entered into. As to levies in a neutral state, apart from treaty, Bynkershoek says: "I think that the purchase of soldiers among a friendly people is as lawful as munitions of war."<sup>17</sup>

**Wolf.**—From Wolf, whose *Jus Gentium* appeared in 1749, we learn that those are called neutrals "who adhere to the side of neither belligerent, and consequently do not mix themselves up in the war."<sup>18</sup> As such neutrals are in a state of amity

leur sera possible le dommage l'un de l'autre.' Dumont, vi, ii, 265. Like language is found in the Treaty of Breda, between England and France, in 1667 (Dumont, vii, i, 41); in the Peace of Lisbon, between Spain and Portugal, in 1668 (Dumont, vii, i, 73); in the Treaty

of Nymeguen, in 1678 (Dumont, vii, i, 357); and the Peace of Ryswick, in 1697 (Dumont, vii, ii, 389)." Note 1 on p. 600.

<sup>17</sup> *Quaest. Jur. Pub.*, I, cc. ix; xxii.

<sup>18</sup> *Jus Gentium*, § 672.

with both parties and owe to each whatever is due in time of general peace, belligerents have the right of unimpeded access to their territory, and of purchasing there such things as they may require. That right is modified, however, by the condition that it shall be exercised only for a *causa justa*, but as war is a *causa justa* the passage of troops is therefore to be permitted.

**Vattel.**—Vattel, whose *Droit des Gens* appeared in 1758, tells us that “as long as a neutral nation wishes securely to enjoy the advantages of her neutrality, she must in all things show a *strict impartiality towards the belligerent powers*: for, should she favor one of the parties to the prejudice of the other, she cannot complain of being treated by him as an adherent and confederate of his enemy. Her neutrality would be a fraudulent neutrality, of which no nation will consent to be the dupe. \* \* \* Let us therefore examine in what consists that impartiality which a neutral nation ought to observe. It solely relates to war, and includes two articles: 1. To give no assistance when there is no obligation to give it,—nor voluntarily to furnish troops, arms, ammunition, or anything of direct use in war. I do not say, ‘to give assistance equally,’ but ‘to give no assistance,’ for it would be absurd that a state should at one and the same time assist two nations at war with each other; and, besides, it would be impossible to do it with equality. The same things, the like number of troops, the like quantity of arms, of stores, etc., furnished in different circumstances, are no longer equivalent succours. 2. In whatever does not relate to war, a neutral and impartial nation must not refuse to one of the parties, on account of his present quarrel, what she grants to the other. This does not deprive her of the liberty to make the advantage of the state still serve as her rule of conduct in her negotiations, her friendly connections and her commerce. \* \* \* When a war breaks out between two nations, all other states that are not bound by treaties are free to remain neuter; and, if either of the belligerent powers attempted to force them to a junction with him, he would do them an injury, inasmuch as he would be guilty of an infringement on their independency in a very essential point. To themselves alone it belongs to determine whether any reason exists to induce them to join in the contest; and there are two points which claim their consideration: 1. The justice of the cause. If that be evident, injustice is not to be countenanced: on the contrary, it is generous



and praiseworthy to succour oppressed innocence, when we possess the ability. If the case be dubious, the other nations may suspend their judgment, and not engage in a foreign quarrel. 2. When convinced which party has justice on his side, they have still to consider whether it be for the advantage of the state to concern themselves in this affair, and to embark in the war.”<sup>19</sup>

A little later on Vattel qualifies his general statement of the duties imposed by neutrality by saying that without a violation of his duty a neutral may make a loan of money at interest to one of two belligerents, while refusing a like loan to the other, provided the transaction between the states is of a purely business character. “If the sovereign, or his subjects, lend money to my enemy on that footing, and refuse it to me because they have not the same confidence in me, this is no breach of neutrality. They lodge their property where they think it safest. \* \* \* But if the loan were evidently granted for the purpose of enabling an enemy to attack me, this would be concurring in the war against me.”<sup>20</sup>

**G. F. de Martens.**—Thirty years later<sup>21</sup> Martens, a successor of Vattel, who followed closely in his footsteps, maintained that a state in order to preserve entire neutrality must (1) abstain from all participation in military operations, and (2) bear itself with absolute impartiality in all that can be useful or necessary to the belligerent powers, granting or refusing to the one what it grants or refuses to the other, or continuing the same conduct in respect of each which it observed in time of peace.<sup>22</sup> “Strictly speaking,” he says, “a belligerent power has a right to treat as his enemies all the powers who lend military assistance to the enemy, from whatever motive or in consequence of whatever treaty. However, policy has induced the powers of Europe to depart from this vigorous principle. They now admit (1) that not only a sovereign who furnishes but a body of troops in virtue of a simple treaty of subsidy does not thereby become the enemy of the power against which those troops act, and that the troops alone can be

<sup>19</sup> *Droit des Gens*, III, c. vii, §§ 104, 106.

<sup>20</sup> *Droit des Gens*, III, c. vii, § 110.

<sup>21</sup> The *Précis du Droit des Gens Moderne de l'Europe* was published at Göttingen in 1788, and translated by the author into German

in 1796. In 1795 it was translated into English by W. Cobbett, Philadelphia. A fifth edition, in French, with notes by Pinheiro-Ferreira and Vergé, appeared in 1855.

<sup>22</sup> Cf. Bk. viii. ch. vi, “Of Neutrality.”

treated hostilely; but (2) that an auxiliary power, who contents himself by sending to the defence of his ally no more than the number of troops, etc., stipulated for in the general treaty of defensive alliance made before the war without taking any direct part in it, ought not to be looked upon as the enemy of the power against which his troops make war, and that the treaties concluded with the power are not broken. This is more especially the case when the aid of an auxiliary is the consequence of a treaty of general defensive alliance concluded before the beginning of the war.”<sup>23</sup> Walker, therefore, concludes that, “in accordance with these principles, a sovereign may maintain an unbroken neutrality while lending assistance in the struggle to one or the other belligerent; provided that such assistance (1) be granted under a treaty made before the rupture, (2) do not exceed the stipulated amount, (3) do not involve the whole or nearly the whole strength of the auxiliary power, or (4) be not the main cause of the continuation of the war.”<sup>24</sup> In harmony with that conclusion is Hall’s statement<sup>25</sup> that, under the practice of the eighteenth century, “it was clearly open to a state, without abandoning its position of neutrality, to supply troops to a belligerent under a treaty between the two powers, either for mutual help, or for succour to be given by one only to the other in the event of a war which might be in contemplation by an intending belligerent at the very moment of concluding the treaty. Agreements of this kind were often made, and were sometimes guarded against by express stipulations.”

§ 601. Sweden’s protest against succour furnished by Denmark to Russia in 1788.—It appears that not until 1788, upon the outbreak of war between Russia and Sweden, was the right of a neutral state to give succour to a belligerent under a pre-existing treaty called seriously into question. Prior to that time it was deemed necessary to prevent the exercise of that right by express contract, as in the treaties concluded between Great Britain and Denmark in 1780; and in that concluded between the United States and Prussia in 1785, wherein it was agreed that “neither one nor the other of the two states would let for hire, or lend, or give any part of its naval or military forces to the enemy of the other to help it or to enable it to act offensively or defensively against the belligerent.”

<sup>23</sup> Bk. viii, ch. v, sec. 9, “Of the rights of a belligerent power with respect to the allies of the enemy.”

<sup>24</sup> Science of Int. Law, p. 382.

<sup>25</sup> Int. Law, pp. 608-9.

erent party" to the treaty.<sup>27</sup> It is not, therefore, strange that when Russia called upon Denmark for an auxiliary contingent of troops and vessels stipulated for in treaties of 1768, 1769 and 1781 that the Danes should have felt in honor bound to supply them.<sup>28</sup> In doing so, Count Bernstorff said that "His Danish Majesty has ordered the undersigned to declare, that although he complies with the treaty between the Courts of Petersburg and Copenhagen, in furnishing the former with the number of ships and troops stipulated by several treaties, and particularly that of 1781, he yet considers himself in perfect amity and peace with His Swedish Majesty; which friendship shall not be interrupted, although the Swedish arms should prove victorious, either in repulsing, defeating or taking prisoners the Danish troops now in the Swedish territories, acting as Russian auxiliaries, under Russian flags. Nor does he conceive that His Swedish Majesty has the least ground to complain, so long as the Danish ships and troops now acting against Sweden do not exceed the number stipulated by treaty; and it is his earnest desire that all friendly and commercial intercourse between the two nations, and the good understanding between the Courts of Stockholm and Copenhagen, remain inviolably as heretofore." In her counter-declaration Sweden said, through her minister at Copenhagen, that "the declaratory note delivered by the Count Bernstorff to the undersigned, in which his Danish Majesty conceives that his Swedish Majesty cannot have any ground of complaint, as long as the Danish ships and troops merely act as auxiliaries to Russia, is a doctrine which His Swedish Majesty cannot altogether reconcile with the law of nations and rights of sovereigns, and against which His Majesty has ordered the undersigned to protest."<sup>29</sup> By reason of her military weakness, Sweden, after making that protest, deemed it politic to preserve her general peaceful relations with Denmark, by limiting hostilities to the auxiliary forces. Even that cause of offence was removed, however, by the withdrawal of such forces, with the consent of Russia, when Great Britain, Prussia and Holland intervened in behalf of the Swedes with the demand that the Danes should maintain an unlimited and per-

<sup>27</sup> Elliot, *American Diplomatic Code*, i, 347; Chalmers, *Collection of Treaties*, i, 97.

<sup>28</sup> Martens, *Causes Célèbres*, iii, p. 506.

<sup>29</sup> Annual Register (1788), vol. XXX, pp. 292-3. Quoted by Phillimore, iii, p. 206, 207.

fect neutrality.<sup>30</sup> Although general opinion seems to have been against his contention, Count Bernstorff firmly maintained to the last that the grant of auxiliary forces, under existing treaties, was in nowise inconsistent even with such a strict neutrality as the three powers had exacted.<sup>31</sup>

§ 602. Conflict between Great Britain and Spain in 1804.—The same question again arose when on the rupture between Napoleon and Great Britain in 1803 Spain was called upon for the military and naval contingent due under the offensive and defensive alliance of San Ildefonso entered into between France and Spain three years before. The attempt made by Spain to placate Great Britain through the substitution of a money payment in lieu of the promised forces was met, at first, by an indication from the latter power that she would not regard a subsidy as a *casus belli*, so long as the former neither furnished more than the stipulated amount of aid nor permitted the entrance of French troops into Spanish territory. That conditional acquiescence upon the part of Great Britain was abandoned, however, when Napoleon gained “an useful tributary for a burdensome ally” through Spain’s contribution to France of 6,000,000 livres per month. The failure upon the part of Spain to give a satisfactory explanation of the preparation of armaments at Ferrol and of other suspicious movements within her territory finally provoked the issuance of orders to British commanders for the detention of all ships laden with treasure for Spain and of all Spanish vessels carrying military or naval stores, and for the prevention of the sailing of Spanish men-of-war to and from Ferrol. When in October, 1804, Spanish frigates were attacked and captured under such orders, the strong ties of friendship uniting the two countries were not strong enough to prevent their drifting into war.<sup>32</sup> In the face of such opposition the right of A to give military assistance to B while the latter is at war with C gradually came to be considered essentially an unneutral act, which cannot be explained away by the fact that A was under a pre-existing contract to commit such an illegality.<sup>33</sup> Thus

<sup>30</sup> See ultimatum of the Court of Sweden, Oct. 5, 1788; letter of the three Ministers Plenipotentiary of Great Britain, Prussia and Holland to Count Bernstorff, July 6, 1789.

<sup>31</sup> Declaration of Count Bern-

storff, July 9, 1789. *Causes Célèbres*, III, pp. 514, 524.

<sup>32</sup> Papers relating to the Discussion with Spain in 1802, 1803 and 1804, pp. 81, 189, 247-262, 300, 380.

<sup>33</sup> F. E. Smith’s *Int. Law*, p. 132.

was finally established the principle now generally admitted that it is incumbent upon neutrals *non se interponere bello*.

§ 603. **Struggle for the freedom of neutral commerce.**—According to the *Consolato del Mare* the customs of the sea dominant in the western Mediterranean during the Middle Ages decreed the condemnation of enemy goods found under the neutral flag on the high seas, and the release of neutral goods found on a captured belligerent vessel,<sup>34</sup> in obedience to the precept—“confiscate the goods of your enemy; respect the property of your friend.” That the later and more artificial doctrine which has invested a neutral vessel with the power to protect enemy goods had no existence in early maritime usage is evident from the declaration of Louis XI., who, in writing to the King of Sicily, said that it is a “*usus in hoc occidentali mari indelebiter observatus, res hostium et bona, etiamsi infra amicorum aut confoederatorum triremes seu naves positae sint, nisi obstiterit securitas specialiter super hoc concessa, impune et licite jure bellorum capi posse.*”<sup>35</sup> The French Ordinances of 1538, 1543 and 1584 even went so far as to confiscate not only the hostile goods, but the ship in which they were embarked,<sup>36</sup>—a harsh rule to whose principle Grotius, despite the efforts of the French courts not to enforce it to its full extent, gave his sanction when he said “*neque amicorum naves in praedam veniunt ob res hostiles, nisi ex consensu id factum sit dominorum navis.*”<sup>37</sup> The first serious effort to establish the rights of neutral commerce came from the north, from the merchants of the Hanse Towns, whose trading leagues extended throughout northern Europe;<sup>38</sup> and from the sturdy and heroic burghers of Holland after they had triumphed in their glorious struggle for independence. These people of the sea, who were carriers rather than producers of merchandise, became, in response to the touch of self-interest, the champions of the principle that such a freedom should be given to neutral commerce as would enable the neutral trader to keep up intercourse with any customer in time of war as in time of peace. The Dutch were the earliest people to stipulate for the freedom of enemy cargo in

<sup>34</sup> In either event there was an equitable settlement of the question of freight. *Consolato del Mare*, c. 273. For a translation of the text of the *Consolato*, see Ortolan, *Dip. de la Mer*, ii, 68.

<sup>35</sup> Quoted by Heffter, § 163.

<sup>36</sup> Valin, *Ord. de la Marine*, III, tit. ix, art. 7.

<sup>37</sup> *De Jure Belli ac Pacis*, III, c. vi, § vi note.

<sup>38</sup> See above, p. 40.

neutral ships in a treaty concluded in 1650<sup>39</sup> between Spain and the United Provinces in which it was agreed that the goods of the enemies of either party should be free from capture when on board the ships of the other party, the latter being neutral; and during the fifty years that followed that event they were able to have that privilege either granted or confirmed in eleven treaties entered into with Great Britain, France, Sweden and Portugal.<sup>40</sup> And yet despite such efforts upon the part of the Dutch the new principle of free ships, free goods made but little real progress down to the end of the seventeenth century. The treaties made by France in 1646<sup>41</sup> with the United Provinces, and in 1655 with the Hanse Towns,<sup>42</sup> pointing in the same direction, had been given by the former an extreme construction against the right; while Great Britain, except when she had agreed to the contrary in an express convention,<sup>43</sup> asserted her right, under the rules of the *Consolato*, to confiscate enemy goods in neutral bottoms, a right confirmed by her in several treaties.<sup>44</sup> Not until near the middle of the eighteenth century did France resolve to espouse the new Dutch principle by departing from the harsh rule established by the règlement of 1704, which intensified the hardships of the older practice by declaring liable to confiscation the raw or manufactured produce of hostile soil, when the property of a neutral, except when it was in the course of transportation direct from the enemy country to the port of the neutral state to which its owner belonged. Not until 1744 did France concede that neutral vessels carrying enemy goods were free from confiscation; and not until 1778 was the freedom of the goods themselves conceded by the règlement of that year.<sup>45</sup> While Spain occasionally recognized the freedom of enemy goods by treaty, she did not adopt the

<sup>39</sup> Dumont, vi, i, 571.

<sup>42</sup> Dumont, vi, ii, 103.

<sup>40</sup> Portugal, 1661 (Dumont, vi, ii, 369); France, 1661 (ib. 346); France, 1662 (ib. 415); Great Britain, 1667 (ib. vii, 1, 49); Sweden, 1667 (ib. 38); Great Britain, 1674 (ib. 283); Sweden, 1675 (ib. 317); France, 1678 (ib. 359); Sweden, 1679 (ib. 440); Great Britain, 1689 (ib. ii, 236); France, 1697 (ib. 389)

<sup>43</sup> Such conventions were made with Holland in 1667 and 1674; and with France in 1677, 1713 and 1786. Cf. Martens (R) II, 693; Jenkinson, Discourse, pp. 67-9.

<sup>44</sup> With Sweden and Denmark in 1654 and 1661; and with Denmark in 1670, Dumont, vi, ii, 80, 92, 387, 346; ib. vii, i, 128.

<sup>41</sup> Dumont, vi, i, 342; Manning, 317.

<sup>45</sup> Valin, *Ord. de la Marine*, iii, tit. ix, art. 7; Pistoye and Duverdy, i, 344, 360.

new policy of France in its fullness until 1780, when her private rules for the first time exempted both enemy goods in neutral vessels, as well as the vessels themselves, from confiscation.<sup>46</sup> From this new policy Great Britain, jealous of her belligerent rights as a great sea power, stood firmly aloof. She pledged herself in treaties with only a few states not to follow the old practice of seizing neutral goods, and neutral ships, too, subject to release upon the payment of freight. Such special treaty arrangements she regarded simply as exceptions to the old rule and not as recognitions of its abrogation. As Pitt well expressed it: "I must observe that the honorable gentleman has fallen into the same error which constitutes the great fallacy in the reasoning of the advocates of the northern powers; namely, that every exception from the general law by a particular treaty proves the law to be as it is stated in that treaty; whereas the very circumstance of making an exception by treaty proves what the general law of nations would be if no such treaty were made to modify or alter it."<sup>47</sup>

§ 604. **Rule of war of 1756.**—After the European states had established colonies in newly discovered lands each claimed as the legitimate reward of its efforts the right to exclude foreign ships from the trade with such colonies, just as states still deny to strangers the right to engage in the coasting trade from one port to the other of the home country. When in 1756 the French, under the pressure of Great Britain's superiority at sea, opened the trade between the mother-country and its colonies to the Dutch, excluding all other neutrals, the question arose whether an enemy of the state thus opening its close trade had the right to deny to a favored neutral or to all neutrals the enjoyment of the advantages thus accruing to them. While the Dutch and other northern neutrals, eager to reap advantage out of the crippled naval condition of France, were eager to maintain such an enlargement of their rights, Great Britain, whose interests were the other way, finally declared, through Lord Mulgrave, "that a neutral power had no right to a commerce with the colonies of an enemy in time of war which it had not in time of peace, and that every extension of it in the former state, beyond the limit of the latter, was due to the concession of Great Britain, not to the right of the neutral power."<sup>48</sup> By

<sup>46</sup> Martens (R), iv, 270.

<sup>47</sup> Speeches, iii, 227-8.

<sup>48</sup> In a dispatch to Mr. Madison, Aug. 20, 1805, Mr. Monroe states

virtue of her maritime supremacy Great Britain was able to uphold that view under which Dutch ships, with their cargoes, were captured and condemned as a part of the commercial navy of France, upon the ground that they had adopted the commerce and character of the enemy. The property involved was considered, *pro hac vice*, as enemy property, in obedience to that principle which decrees that where a neutral is engaged in a trade, confined so exclusively to the subjects of any country, in peace and war, and so interdicted to all others that it cannot be carried on in the name of a foreigner, it must be considered so entirely national as to follow the hostile situation of the country.<sup>49</sup> This "Rule of War of 1756," originally founded on that principle, after lying dormant during the American Revolution, was given a wider extension at the commencement of the war against France in 1793 in order to meet conditions arising out of the opening to neutrals by that country of her coasting as well as her colonial trade. As a counter-blast to that permission Great Britain issued in November, 1793, and in January, 1794,<sup>50</sup> instructions to her naval commanders which not only denied to neutrals the right to carry French goods between the mother-country and her colonies, and to engage in her coasting trade, but also exposed them to penalties for conveying neutral goods from their own ports to those of a belligerent colony, or from any one port to another belonging to the belligerent country. The reasons for these extreme measures, rendered still more severe by what was known as the doctrine of continuous voyage, although ably expounded by Lord Stowell in his great judgments,<sup>51</sup> were as earnestly combated by the statesmen and jurists of

that the British position was thus declared by Lord Mulgrave. See also 3 Am. St. Papers, 105; (For. Rel.), 118; and President Jefferson's Special Message, Jan'y 17, 1806. Under the rule as laid down by the British Courts, "neutrals are not permitted to engage in a trade with the colonies of a belligerent during war which is not permitted to foreigners in time of peace." Manning, Bk. v, ch. v; The Juliana, 4 Rob. Admr., 328. For the views of Gessner and Bluntschli, who repudiated the rule, see *Le Droit des Neutres*, pp. 266, 275;

*Le Droit International Codifié*, §§ 799, 800.

<sup>49</sup> The Pincessa, 2 Rob. Admr., 52; the Anna Catharina, 4 Ibid., 118; The Rendsborg, Ibid., 121; The Vrow Anna Catharina, 5 Ibid., 150; 2 Wheat. Appendix, 26; Dana's Wheaton, p. 666.

<sup>50</sup> The Orders in Council of Nov. 6, 1793, and Jan'y 8, 1794, were followed by the Order of Jan. 25, 1798, finally merged in the retaliatory Orders in Council of 1806-7

<sup>51</sup> See The Emmanuel, 2 Rob. Admr., p. 199.



the United States. Madison declared "that the principle is of modern date; that it is maintained, as is believed, by no other nation but Great Britain, and that it was assumed by her under the auspices of a maritime ascendancy which rendered such a principle subservient to her particular interest;"<sup>52</sup> and to that Jefferson added: "Under this new law of the ocean, our trade to the Mediterranean has been swept away by seizures and condemnations, and that in other seas has been threatened with the same fate."<sup>53</sup>

§ 605. **First Armed Neutrality League of 1780.**—The natural outcome of England's effort to enforce the ancient rule as to belligerent rights in the face of the attempt of the northern powers to establish the freedom of neutral commerce was the union of all the hostile elements in an armed confederacy against her. As France was aiding the revolted colonies in the American Revolution then pending, England, in order to prevent munitions of war from reaching them, was forced to assert her naval power to the utmost against enemies and neutrals alike, just at the time when Catherine II. was up-building the commerce of Russia, and the other neutral states of the Baltic were learning to look to that growing empire for advice and moral support. It is not, therefore, strange that the French Ambassador Vergennes should have been behind the first move made in 1778 when Sweden and Denmark approached the Empress with formal proposals for the organization of a combined fleet for the protection of the neutral trade of the north against all attack.<sup>54</sup> The outcome was the presentation by Catherine, early in 1780, to the three belligerent courts of London, Versailles and Madrid of a Declaration<sup>55</sup> setting forth in five articles the propositions as to neutrality which she proposed to adopt and defend. These articles, which became the basis of the First Armed Neutrality, embodied four principles which may be briefly stated as follows: First, freedom of the coasting trade of states at war; second, that the neutral flag should cover all goods not contraband; third, that contraband should be limited to essentially warlike stores; and, fourth, that a blockade to be effective

<sup>52</sup> Mr. Madison, Sec. of State, to Mr. Monroe, April 12, 1805, 3 Am. St. Papers (For. Rel.), 101.

<sup>53</sup> Message of October 27, 1807; 3 Am. St. Papers (For. Rel.), 5.

<sup>54</sup> Cf. Diaries and Correspondence of the Earl of Malmesbury, i, p. 219.

<sup>55</sup> Martens (R), ii, pp. 74, 75.

must be one dangerous to pass.<sup>56</sup> The Empress **did** “not hesitate to declare that to maintain these principles and protect the honor of her flag and the security of the trade and navigation of her subjects she had prepared the greatest part of her maritime forces;” that she would continue a strict neutrality “so long as she was not provoked and forced to break the bounds of moderation and perfect impartiality;” that in such an extremity her fleet had “orders to go wherever honor, interest and need might require.”<sup>57</sup> In the presence of such a menace Great Britain, struggling as she was with her revolted colonies, and with her ancient enemies, France and Spain, replied with firmness and dignity that, as to the general law, she had acted “conformably to the clearest principles generally acknowledged as the law of nations, being the only law between powers where no treaties subsist. \* \* \* That precise orders had been given respecting the flag and commerce of Russia, according to the laws of nations and the tenor of our treaty of commerce.”<sup>58</sup> The replies of the courts of Versailles and Madrid were made in April, 1780,<sup>59</sup> and, before that year ended, Denmark and Sweden had united with Russia in forming the league known as the First Armed Neutrality. In the next year it was joined by France, Spain, Holland, Prussia, Austria and the United States; in 1782 by Portugal, and in 1783 by the two Sicilies. No settlement of this controversy, thus championed on the one hand by Great Britain and on the other by Russia, had been reached when

<sup>56</sup> (1) “Que les vaisseaux neutres puissent naviguer librement de port en port et sur les côtes des nations en guerre.

(2) “Que les effects appartenans aux sujets des dites Puissances en guerre, soient libres sur les vaisseaux neutres à l’exception des marchandises de contrabande.

(3) “Que pour déterminer ce qui caractérise un port bloqué, on n’accorde cette dénomination qu’ à celui, où il y a par la disposition de la Puissance, qui l’attaque avec des vaisseaux arrêtés et suffisamment proches, un danger évident d’entrer.

(4) “Que les vaisseaux neutres ne peuvent être arrêtés que sur

justes causes et faits évidens; qu’ils soient jugés sans retard; que la procédure soit toujours uniforme, prompte et légale, et que chaque fois, outre les dédommagemens, qu’on accorde à ceux qui ont fait des pertes sans avoir été en faute, il soit rendu une satisfaction complète pour l’insulte fait au pavillon.” Convention between Russia and Denmark, July 9, 1780. Martens (R) ii, 103-107; Walker, 304-5.

<sup>57</sup> For Declaration of the Empress, see 2 Azuni, p. 373.

<sup>58</sup> Annual Register for 1780, (115).

<sup>59</sup> Martens (R), iv, pp. 346-348, 348-350.

the treaties of peace, concluded at Versailles in 1783 between Great Britain, France and Spain, revived and confirmed the treaties of Utrecht, establishing between such contracting powers the principle of free ships, free goods,<sup>60</sup>—a principle which, under the lead of France, rapidly advanced down to the time when the movement in favor of neutral rights was checked by the outbreak of the wars of the French Revolution.

§ 606. **Second Armed Neutrality League of 1800.**—As early as 1653 the question was first mooted whether neutral merchant vessels are bound to suffer a visit while sailing under convoy of ships of war of their own nation. In that year Queen Christina of Sweden issued, during the war between England and the United Provinces, a Declaration in which, after reciting that the goods of her subjects were plundered by privateers, she gave orders to her ships of war convoying such vessels as desired protection “in all possible ways to decline that they or any of those that belong to them be searched.”<sup>61</sup> Not, however, until the American War of Independence was the right seriously urged, the Dutch government ordering in 1780 “that a certain number of men-of-war should be ready for the future to convoy naval stores to the ports of France,” and that the commander of the convoying force should resist the visit and search of the vessels so laden.<sup>62</sup> Great Britain, nevertheless, maintained her right in that case, and in another arising in the next year with Sweden, who, upon an appeal to Russia, drew from that power a declaration that it considered the principle of the immunity of convoyed vessels as embraced in the principles of the Armed Neutralities. Undaunted by that declaration, and by the affirmance of the immunity in the six treaties made before the end of the century between the Baltic powers, and in one between Holland and the United States,<sup>63</sup> England in 1798 brought in for adjudication a Swedish convoy, which was condemned by the

<sup>60</sup> The two maxims were again associated when the confirmation was again reiterated in the commercial treaty of 1786 between France and Great Britain. As there was no armed conflict with the power last named, the First Armed Neutrality can only be regarded as a concert of action for the for-

mal announcement of certain clearly defined principles.

<sup>61</sup> Thurloe's State Papers, i, 424.

<sup>62</sup> Stanhope, Hist. of England, vii, 44; Martens, *Nouvelles Causes Célèbres*, i, 165.

<sup>63</sup> Martens (R), III, 437, 475, 571; iv, 43, 212, 238, 328; Hall, pp. 747, seq.

British prize-court on the ground of resistance.<sup>64</sup> In December, 1799, a conflict occurred between an English squadron and a Danish convoy in the straits of Gibraltar, when the Danish commander, acting under instructions, fired upon the English search party.<sup>65</sup> While that affair was still unsettled, the British and Danish navies came again into collision in the British Channel in July, 1800, when the captain of the Danish frigate, "Freya," conveying six merchantmen, was, after refusal at the cannon's mouth to permit the search of his charge, brought in with his convoy to the Downs.<sup>66</sup> The attitude thus assumed by England as to the rights of neutral convoy was the direct and moving cause which impelled Denmark, Sweden, Prussia and Russia to unite in the Second Armed Neutrality League of December, 1800. In order to understand the entire purport of the new agreement it must be remembered that in 1793 the British government had issued orders to its commanders directing that all neutral ships sailing for any port "declared" by the British to be blockaded should be liable to condemnation.<sup>67</sup> To meet such conditions the programme upon which the Second League was based, after repeating the four principles embodied in the First, simply added to them two further rules,—the one recognizing the protection for neutral convoy demanded by Denmark and Sweden, the other declaring the necessity for actual direct notice by the blockading squadron as a preliminary to the capture of a blockade-runner.<sup>68</sup> The prelude to the armed con-

<sup>64</sup> The *Maria*, 1 Rob. Admr., 340.

<sup>65</sup> Martens, *Supplément*, II, 347, 350. Correspondence between Mr. Merry and Count Bernstoff, April 10 and 19, 1800.

<sup>66</sup> As to the lively controversy that ensued, see Martens, *Supplément*, II, 353, seq.; *Memoirs and Correspondence of the Marquess Wellesley*, II, 116. For the convention embodying a temporary settlement of the question, see Martens (R), vii, 426. Walker, 311-12.

<sup>67</sup> For the views of the government of the United States as to this order preventing neutral corn ships from entering unblockaded ports, see Mr. Jefferson, Sec. of

State, to Mr. Pinckney, May 7, 1793. MSS. Inst. Ministers.

<sup>68</sup> The five articles agreed upon by the four powers in conventions between Russia and Sweden, Russia and Denmark and Russia and Prussia (Dec., 1800) are as follows: (1) "Que tout vaisseau peut naviguer librement de port en port, et sur les côtes des nations en guerre.

(2) "Que les effets appartenans aux sujets des dites puissances en guerre soient libres sur les vaisseaux neutres, à l'exception des marchandises de contrebande.

(3) "Que pour déterminer ce qui caractérise un port bloqué, on n'accorde cette dénomination qu' à

flict which soon followed was a war of embargoes into which the emperor, Paul, who had succeeded Catherine, entered with special zeal by reason of the conduct of Great Britain in retaining the island of Malta in violation of what he claimed to be his rights as the Grand Master of the Knights of St. John.<sup>69</sup> As a response to that fresh threat against her commercial supremacy England dispatched her fleet to the north under Parker and Nelson, forced the passage of the Sound and, on April 2, 1801, while the Russians were still ice-bound, crushed the naval power of the Danes in the bloody battle of Copenhagen.<sup>70</sup> That triumph, soon followed by the murder of Paul, opened the way for the settlement of differences embodied in the maritime convention<sup>71</sup> signed at St. Petersburg in June between the government of George III. and the new emperor, Alexander. Under the terms of that compromise Great Britain,—after vindicating against the Armed Neutralities the right to search merchantmen under convoy as exercised by men-of-war, and establishing the liability to seizure by a hostile captor of goods actually the property of the subject of a belligerent laden under the neutral flag,—agreed, while confirming the definition of contraband contained in her last treaty of commerce with Russia, expressly to

celui, où il y a, par la disposition de la puissance qui l'attaque avec des vaisseaux arrêtés et suffisamment proches, un danger évident d'entrer et que tout bâtiment naviguant vers un port bloqué ne pourra être regardé d'avoir contrevenu à la présente convention, que lorsqu'après avoir été averti par le commandant du blocus de l'état du port, il tâchera d'y pénétrer en employment la force ou la ruse.

(4) "Que les vaisseaux neutres ne peuvent être arrêtés que sur de justes causes et faits évidents, qu'ils soient jugés sans retard, que la procédure soit toujours uniforme, prompte et légale, et que chaque fois, outre les dédommagemens qu'on accorde à ceux qui ont fait des pertes, sans avoir été en contrevention, il soit rendu une satisfaction complète pour l'in-

sulte faite au pavillon de leurs Majestés.

(5) "Que la déclaration de l'officier, commandant le vaisseau ou les vaisseaux de la Marine Royale ou Impériale, qui accompagneront le convoi d'un ou de plusieurs bâtimens marchands, que son convoi n'a à bord aucune marchandise de contrebande, doit suffire pour qu'il n'y ait lieu à aucune visite sur son bord ni à celui des bâtimens de son convoi." Martens, *Suppléments*, II, 393, 402, 409.

<sup>69</sup> Paul not only laid an embargo on all British property within his dominions, but ordered one British vessel to be burned because another had escaped. Martens (R), vii, 155.

<sup>70</sup> Mahan's *Nelson*, ch. xiv.

<sup>71</sup> Martens, *Supplément*, II, p. 476.

adopt the three principles by virtue of which the League maintained that neutrals have the right to navigate freely between the ports and on the coasts of nations at war, that blockade to be binding must be effective, and that belligerents in their dealings with neutrals must administer speedy and uniform justice. In the following October additional explanatory articles were adopted limiting the general permission given to neutral trade by the declaration that in no event was the direct conveyance by a neutral carrier of belligerent merchandise and produce between the belligerent and the mother country to be permitted. On that basis Denmark acceded to the arrangement in October, 1801, and Sweden in March, 1802.<sup>72</sup> Although neutral commerce had yet to struggle with British Orders and French Edicts during the wars of the French Revolution,—whose exigencies forced the signatories of the Armed Neutralities to trample as belligerents upon principles they had championed as neutrals, and England and France to vie with each other in the commission of illegalities and severities which each justified as measures of retaliation for acts committed by the other,—the fact remains that the Leagues of 1780 and 1800, by their efforts to establish the rule of free ships, free goods, without the corollary of enemy ships, enemy goods, paved the way for the triumph of that principle in the time to come.

§ 607. **Neutral territorial rights vindicated by United States. Proclamation of April 22, 1793.**—During the latter part of the eighteenth century,—while publicists like Galiani, Lampredi and Azuni<sup>73</sup> were giving scientific form to the growing conceptions of the rights and duties of neutrals considered as a definite part of the international code, and while the Baltic powers were insisting upon the practical enforcement of such rights and duties at the cannon's mouth,—the young republic beyond the sea was suddenly called upon to restate with precision and force the very imperfect rules by which the law of nations then attempted to protect the sanctity of

<sup>72</sup> Martens (R), vii, 260-281.

<sup>73</sup> Galiani's *Dei doveri dei Principi Neutrali verso i Principi Guerreggianti e di questo verso i Principi Neutrali* was published at Naples in 1782; Lampredi's *Del Commercio dei Popoli Neutrali in tempo di Guerra*, at Florence in

1788; and a second edition of Azuni's *Sistema Universale dei Principi del Diritto Marittimo dell'Europa*, the second volume of which considers the relative rights and duties of belligerents and neutrals, at Trieste in 1796-97.

neutral territory. The loose practice of the seventeenth century heretofore referred to,<sup>74</sup> under which acts of war were so often committed with impunity upon neutral lands and waters,—after being improved during the latter part of the eighteenth in a series of treaties binding the contracting parties not to permit hostilities between belligerents within a marine league of their coasts, and not to attack within a like distance of neutral shores,<sup>75</sup>—relapsed during the wars of the French Revolution into a condition worse than the first. In 1793 even the government of Great Britain refused to restore a French frigate captured in the port of Genoa by two English men-of-war;<sup>76</sup> and in 1806 Murat, when he came into violent collision with Danish forces while pursuing a corps of Prussians under Blücher across the Danish frontier, informed the Danish commander that French troops would follow their enemies wherever they found them,<sup>77</sup>—a rule to which Napoleon and his marshals ruthlessly adhered.<sup>78</sup> In the presence of such flagrant breaches of neutral right and duty in the Old World, Washington, as the embodiment of the spirit of legality in the New, said to Congress in his fourth annual address of 1792: “I particularly recommend to your consideration the means of preventing those aggressions by our citizens on the territory of other nations, and other infraction of the law of nations, which, furnishing just subject of complaint, might endanger our peace with them.”<sup>79</sup> On April 20, 1793, Jefferson, then Secretary of State, wrote to Pinckney: “You may on every occasion give assurances, which cannot go beyond the real desires of this country, to preserve a fair neutrality in the present war, on condition that the rights of neutral nations are respected in us as they have been settled in modern times either by the express declarations of the powers of Europe, or their adoption of them on particular occasions.”<sup>80</sup> Two days later President Washington issued his famous neutrality proclamation in which,—after stating that “it appears that a state of war exists between Austria, Prussia, Sardinia, Great Britain and the United Netherlands of

<sup>74</sup> See above, p. 622.

<sup>75</sup> Martens (R) II, 704; III, 16, 45, 57, 118; iv, 21; vi, 380; vii, 148.

<sup>76</sup> Heffter (Geffcken), § 147, note.

<sup>77</sup> Mr. Garlike to Viscount Howick, Nov. 11, 1806, Papers respecting Austria, Denmark, etc., 1808, pp. 483-5. Walker, p. 430.

<sup>78</sup> Napoleon could quote Frederick's declaration “that there are no neutrals when there is war.”

<sup>79</sup> Messages and Papers of the Presidents, vol. i, p. 128.

<sup>80</sup> MSS. Inst., Ministers.

the one part and France on the other, and the duty and interest of the United States require that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent powers,"—he declared "that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations by committing, aiding or abetting hostilities against any of said powers, or by carrying to them those articles which are deemed contraband by the modern usages of war, will not receive the protection of the United States against such punishment or forfeiture; and, further, that I have given instructions to those officers to whom it belongs to cause prosecutions to be instituted against all persons who shall, within the cognizance of the courts of the United States, violate the laws of nations with respect to the powers at war, or any of them."<sup>81</sup>

§ 608. **Illegal acts of the French minister Genet. Executive orders of June 5th and August 4th, 1793.**—Two weeks before the issuance of the proclamation in question M. Genet, accredited as minister plenipotentiary of France, arrived at Charleston intent upon involving this country in war with England by making its territory the base of belligerent operations. As a justification of his acts he appealed to the Treaty of Commerce, of 1778, made by the United States with France in order to secure her aid in the struggle for independence, the seventeenth article of which provided that public ships or privateers of France could take their prizes into American ports without restriction as to time or cause. While the legality of the captures thus made could not be inquired into, the United States were bound to close their ports against prizes made from the French by nations at war with France, except as ports of refuge in stress of weather, and in such case to require their departure at the earliest practicable moment. By the twenty-second article of the same treaty privateers of a nation at war with France were to be prohibited, in ports of the United States, from fitting themselves and from selling their prizes or procuring stores beyond what should be necessary to take them to the nearest port of their own country.<sup>82</sup> Sustained by such treaty provisions and by a public sentiment, grateful to France for her timely aid and sympathetic with her democratic institutions, M. Genet, instead of proceeding

<sup>81</sup> Messages and Papers of the Presidents, vol. i, pp. 156-7.

<sup>82</sup> Treaties and Conventions, 1889, p. 296.



directly to the capital, undertook at Charleston to offer commissions to citizens of the United States to cruise in the service of France against Great Britain, to fit out privateers, to set up French consular prize-courts, so that prizes brought in could be condemned in American ports, and otherwise to employ the territory of this country for belligerent purposes. The embarrassments of such a situation were greatly increased by the fact that neither in the mother-country nor in the infant republic had any statutes ever been passed to aid either the executive or the courts in enforcing the legal obligations of neutral duty.<sup>83</sup> Washington and his cabinet were thus forced to rely upon executive orders and the common law as supplemented by the law of nations. When on May 2 the British Minister<sup>84</sup> complained to Jefferson of the capture on April 25 in Delaware Bay of the British ship *Grange*, brought into Philadelphia by the French frigate *Ambuscade*, the American cabinet, after declaring that such capture was a clear violation of the sovereignty of the United States and of the laws of nations, ordered her restoration.<sup>85</sup> A few days later the British representative complained of the fitting out at Charleston under French commissions of two privateers to cruise against British commerce; of the condemnation of British prizes by a prize-court set up by the French Consul at that port, and of the sale of a large quantity of arms and military accoutrements to a French agent at New York. After due consideration the President held that the equipping and commissioning of vessels in American ports to cruise against any belligerent was reprehensible and would be prevented, and that the setting up of the French consular prize-court was not only unwarranted by the law of nations or by the treaty relations of the United States with France, but was a mark of special disrespect because all judicial functions must be exercised in this country by its courts only.<sup>86</sup> As to the third ground of complaint, involving a distinction between commercial dealings with belligerents in materials of war and the fitting out of vessels, enlisting of men and commissioning of officers here for hostile operations, a different answer was given. Mr. Jefferson, in his notable letter of May 15, 1793, after condemning

<sup>83</sup> Am. State Papers, i, p. 44.

<sup>84</sup> Mr. G. Hammond to Mr. Jefferson, May 2, 1793. Appendix to the case of Great Britain, v, pp. 238-239.

<sup>85</sup> Mr. Jefferson to Mr. Ternant, May 3, 1793; Randolph, Correspondence of Jefferson, iii, p. 234.

<sup>86</sup> Mr. Jefferson to Mr. Hammond, May 15, 1793; *Ibid.*, iii, p. 234.

the latter, wrote to Mr. Hammond that "our citizens have been always free to make, vend and export arms. It is the constant occupation and livelihood of some of them. To suppress their calling, the only means perhaps of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal derangement of their occupations."<sup>87</sup> Such was the prelude to Mr. Genet's arrival at Philadelphia and reception by the President on May 17th. On June 5 a further reply was made to Mr. Hammond, finally disposing of the question involved in fitting out of privateers at Charleston, in a letter from Jefferson declaring "that the granting of military commissions within the United States by any other authority than their own is an infringement on their sovereignty, and particularly so when granted to their own citizens to lead them to acts contrary to the duties they owe their own country; that the departure of vessels thus illegally equipped from the ports of the United States will be but an acknowledgment of respect analogous to the breach of it, while it is necessary on their part, as an evidence of their faithful neutrality."<sup>88</sup> While Mr. Hammond was thus obtaining from Jefferson executive definitions of neutral duty favorable to England, M. Genet demanded reparation for the capture by the British of French property under the American neutral merchant flag. To that complaint Jefferson could only answer that "I believe it cannot be doubted but that by the general law of nations the goods of a friend found in the vessel of an enemy are free, and the goods of an enemy found in the vessel of a friend are lawful prize. Upon this principle, I presume, the British armed vessels have taken the property of French citizens found in our vessels, in the cases above mentioned, and I confess I should be at a loss on what principle to reclaim it."<sup>89</sup> In the midst of such difficulties the American

<sup>87</sup> Mr. Jefferson, Sec. of State, to Minister of Great Britain, May 15, 1793; 3 Jefferson's Works, 558. See 1 Am. St. Papers (For. Rel.), 69, 147. A like note was addressed on the same day to the Minister of France, 3 Jefferson's Works, 560.

<sup>88</sup> Mr. Jefferson, Sec. of State, to the Minister of Great Britain,

June 5, 1793, Correspondence of Thomas Jefferson, iii, p. 243. The decision was at the same time communicated to the Minister of France, 1 Am. St. Papers (For. Rel.), 150.

<sup>89</sup> Mr. Jefferson to M. Genet, July 24, 1793. 1 Am. St. Papers (For. Rel.), 166.

cabinet resolved that the despatch of June 5th should be followed by a circular directed on August 4th to the collectors of customs throughout the United States for the guidance of the revenue officers in their efforts to prevent the arming and equipping of vessels by belligerents in our ports;<sup>90</sup> and on August 7th Jefferson wrote M. Genet that the President considered this government bound to restore all prizes which had been captured by privateers fitted out in the United States, and brought into port after June 5th, or make compensation therefor;<sup>91</sup> and that the President would, therefore, expect the minister of France to deliver up all prizes taken by such vessels after that date. Before that point was reached, however, Washington had resolved to demand the recall of Genet,<sup>92</sup> who was superseded by Mr. Fauchet, instructed to disavow the acts of his predecessor, to disarm the privateers fitted out in the United States and to remove such consuls as had acted in violation of the proclamation, circular and despatches of the President.<sup>93</sup>

§ 609. **Trial of Gideon Henfield, July, 1793.**—While the executive power was thus doing its utmost to uphold the neutrality of the United States its courts were making ineffectual efforts in the same direction. The case of the *William*, captured May 3, 1793, off Cape Henry by the *Citoyen Genet*, in which the District Court of Pennsylvania declared its inability to decree restitution of the vessel,<sup>94</sup> was the prelude to the trial in the Circuit Court of Philadelphia of Gideon Henfield, which began on July 22. The two cases were in fact but different phases of the same transaction, as Henfield, a Massachusetts sailor, was indicted at common law for serving on board the *Citoyen Genet* in violation of the treaties of the United States. It appeared that the defendant had shipped on the French

<sup>90</sup> For the cabinet resolution of August 3, 1793, see 10 Washington's Writings, by Sparks, 546. It appears also as an appendage to Hamilton's Treasury circular of Aug. 4. See 1 Am. St. Papers (For. Rel.), 140.

<sup>91</sup> 1 Wait's St. Papers, 167; 1 Am. St. Papers (For. Rel.), 136.

<sup>92</sup> Sparks, *Life and Writings of General Washington*, x, p. 547.

<sup>93</sup> On Feb. 24, 1794, the new minister addressed a letter to Mr.

Randolph, Sec. of State, "communicating the order of the Executive Provisory Council of the French Republic to demand the arrest of M. Genet and all the other agents who may have participated in his faults and sentiments." See Mr. Randolph to Mr. Fauchet, Feb. 27, 1794 (MSS. Notes For. Leg.), declining to make the arrest.

<sup>94</sup> Mr. Hammond to Mr. Randolph, June 18, 1794, *Case of Great Britain*, Appendix V, pp. 248, 279.

privateer at Charleston on the understanding that he should be given the position of prize-master on board the first prize captured, which turned out to be the *William*. In that capacity he arrived at Philadelphia. The administration took an active interest in the prosecution of Henfield, whose defence was as warmly espoused by M. Genet, who claimed that he had not committed any indictable offence because it appeared that he had enlisted before the proclamation and in ignorance of the law. Although the court charged, upon such evidence, that, as the United States was in a condition of neutrality as to the contest between Great Britain and France, the acts of hostility committed by Henfield constituted a crime, the jury, after prolonged consideration, returned a verdict of not guilty<sup>95</sup>—a result hailed as a triumph by M. Genet and his followers, casting, as it did, upon the administration “the obloquy of having attempted a measure which the laws would not justify.”<sup>96</sup>

§ 610. **American Foreign Enlistment Acts of 1794 and 1818.**—Upon the opening of Congress in December, 1793, Washington, after communicating the proclamation, dispatches and circulars under which he had ineffectually attempted to enforce all of our neutral duties, appealed to that body for such legislation as was necessary to supply the deficiency. The response was the first American Foreign Enlistment Act of June 5, 1794,<sup>97</sup> generally called at the time the Neutrality Act, which, as it was enacted in the first instance for only two years, was continued for a like term by the Act of March 2, 1797, and made perpetual by the Act of April 24, 1800. Despite the fact that an act was also passed, June 14th, 1797, to prevent citizens from privateering against nations in amity with the United States, Portugal was compelled, in 1816,<sup>98</sup> to suggest additions to our neutrality laws of a preventive character by reason of special damage she had suffered in that regard. In response to that suggestion was passed the temporary Act of March 3, 1817, incorporated before its expiration in the Act of April 20, 1818, which, after repealing all other acts upon the subject, consolidated their contents in a definite code, so designed as to prevent or punish every infraction of neutral duty which could be committed by the issuance

<sup>95</sup> Wharton, *State Trials of the U. S.*, pp. 49-89.

<sup>97</sup> U. S. Laws, i, 381.

<sup>98</sup> M. J. Correa de Serra to Mr.

<sup>96</sup> Marshall's *Life of Washington*, Monroe, Dec. 20, 1816. ii, p. 273. .

of foreign commissions or by the enlistment of land or sea forces within the territorial limits of the United States. The first conviction which occurred under the act of June 5th, 1794, was in the case against John Etienne Guinet and John Baptiste le Maitre, indicted in the Circuit Court at Philadelphia,<sup>1</sup> May 11, 1795, for a misdemeanor in fitting out and arming a vessel called *Les Jumeaux* in that port, to be employed in the service of the Republic of France against Great Britain, both powers being at peace with the United States. After Justice Patterson had charged the jury that "converting a ship from her original destination, with intent to commit hostilities, or, in other words, converting a merchant ship into a vessel of war, must be deemed an original outfit; for the act would, otherwise, become nugatory and inoperative. It is the conversion from the peaceful use to the warlike purpose that constitutes the offence,"—a verdict of guilty was rendered against Guinet; the only party apprehended. The subsequent history of the neutrality laws of the United States,—put to a severe test in their application to the conditions arising out of the successive insurrectionary movements in the American possessions of Spain and Portugal, and to the prevention of attempts to organize military expeditions against the Sandwich Islands, Cuba, Mexico and Nicaragua,—must be drawn from the judicial decisions<sup>2</sup> and the state papers in which it is recorded. No higher tribute to the character of such laws, as standards for imitation, could be desired than that contained in Canning's speech delivered in 1823, in which he said: "If I wished for a guide in a system of neutrality I should take that laid down by America in the days of the presidency of Washington and the secretaryship of Jefferson. In 1793 complaints were made to the American Government that French ships were allowed to fit out and arm in American ports for

<sup>1</sup> U. S. v. Guinet, Wharton's State Trials of the U. S., 93-101. See also U. S. v. Peters, 3 Dallas, 121.

<sup>2</sup> For the judicial history of the subject see *The Betsey*, Bee, 67; *The Brothers*, *Ibid.*, 76; *The Nancy*, *Ibid.*, 73; *The Betsey Cathcart*, *Ibid.*, 292; *The Sloop Betsey*, 3 Dallas, 6; *The Magdalena* (Talbot v. Jansen), *Ibid.*, 133; *The Alfred*, *Ibid.*, 307; *The Phoebe Ann*, *Ibid.*,

319; *The Exchange*, 7 Cranch, 116; *Santissima Trinidad*, 1 Brockenbrough (Marshall's Circuit decisions) 470; *The Alerta*, 9 Cranch, 359; *The Invincible*, 1 Wheat., 238; *The Estrella*, 4 Wheat., 298; *La Amislad de Rues*, 5 Wheat., 385; *La Conception*, 6 Wheat., 235; *Bello Corrunes*, *Ibid.*, 152; *Santissima Trinidad*, 7 Wheat., 283; *Gran Para*, *Ibid.*, 471; *Arrogante Barce-lones*, *Ibid.*, 496; *Nereyda*, 8

the purpose of attacking British vessels, in direct opposition to the laws of neutrality. Immediately upon this representation the American Government held that such a fitting out was contrary to the laws of neutrality, and orders were issued prohibiting the arming of any French vessels in American ports. At New York a French vessel fitting out was seized, delivered over to the tribunals and condemned. Upon that occasion the American Government held that such fitting out of French ships in American ports for the purpose of cruising against English vessels was incompatible with the sovereignty of the United States, and tended to interrupt the peace and good understanding which subsisted between that country and Great Britain."<sup>3</sup>

§ 611. **British Foreign Enlistment Acts of 1819 and 1870.**—Canning had been an advocate of the Foreign Enlistment Act carried through parliament, in the face of strong opposition, in 1819,<sup>4</sup>—a reproduction, as all the world knew, of the American acts of 1794 and 1818, viewed in the light of their diplomatic and judicial history. While statutes had been passed prior to that time prohibiting enlistments in England in the service of recognized foreign governments, the Act of 1819 must be regarded as the first in aid of British neutrality considered as a complete system. Although drawn, in other particulars, almost in the terms of the American act of 1818, it differed seriously from it in the omission of its tenth and eleventh sections, in which were embodied the preventive powers under which security could be demanded of the owners or consignees of armed vessels about to sail from the United States, owned in whole or in part by citizens thereof, that the same shall not be employed by them in hostilities against any state with which the United States is at peace, and revenue officers authorized to detain any vessel, manifestly built for warlike purposes, whose cargo shall consist chiefly of munitions of war, when the circumstances render it probable that she is intended to be used in hostilities against any state with which the United States is at peace. During the Civil War in the United States the complaints made against the British government for its failure to perform its neutral duty by the *Wheat*, 108; *The Fanny*, 9 *Wheat*, 658; *U. S. v. Quincy*, 6 *Peters*, 445; *Kenneth v. Chambers*, 14 *Howard*, 38. See also Title (lxvii), "Neutrality," in Revised Statutes of the U. S.

<sup>3</sup> Canning's Speeches, v, pp. 50, 51.

<sup>4</sup> Alison, *Hist. of Europe*, i, pp. 401, seq.; ii, p. 53.

prevention of the *building* and *selling* in its ports of vessels designed for use against a friendly power revealed the fact that the Foreign Enlistment Act of 1819 was fatally defective in that respect. As Chief Baron Pollock said in the case of the *Alexandra*: "Building ships is not prohibited, even building ships for war is not prohibited, provided they be not 'equipped, furnished, fitted out or armed' in our ports with either of the intents stated in the seventh section. \* \* \* I told the jury, in substance, that the sale of a ship was, in my judgment, perfectly lawful, even of a ship so constructed as to be convertible into a ship of war; that the sale of arms and ammunition and every kind of warlike implement was not forbidden by any law, either international or municipal, and that I thought that a ship capable of being used for war might be made and sold, as well as sold (if made) provided she did not leave a port of this country either armed or equipped, or furnished or fitted out within the meaning of the statute; that is to say, with intent or in order to cruise or commit hostilities against a state or power with whom Her Majesty was not at war."<sup>5</sup> Under a statute thus construed it was perfectly possible for an unarmed vessel to be built or purchased in a neutral port and then dispatched to some place far beyond the neutral jurisdiction, there to meet arms and men sent from some other neutral port with the express purpose of completing her equipment as an engine of war. In such a case the difficulty was to ascertain the criminal intent with which the elements were prepared prior to the final combination revealing such intent. With that defect in the act of 1819 clearly in view, a Royal Commission was appointed in 1867 for the purpose of recommending such changes in its provisions as would give it increased efficiency and bring its provisions into full conformity with British international obligations as then understood. The result was the Foreign Enlistment Act of 1870,<sup>6</sup> which deals specifically and in detail with such violations of neutral duty on the part of British subjects as are involved in illegal enlistments, in the preparation of hostile expeditions, in the augmentation of warlike forces and with the offence of illegal ship-building within Her Majesty's dominions. When the offence last named is charged the onus

<sup>5</sup> Judgment in the Court of Exchequer, Jan. 11, 1864. Appendix to the case of Great Britain at Geneva, iii, p. 60.

<sup>6</sup> Stat. 33 and 34 Vict., c. 90. See Report of the Neutrality Law Commission appointed Jan. 30, 1867.

of proving an innocent intent is cast upon the ship-builder by Section 9, which provides that "when any ship is built by order of or on behalf of any foreign state when at war with a friendly state, or is delivered to or to the order of such foreign state, or to any person who, to the knowledge of the person building, is an agent of such foreign state, or is paid for by such state or such agent, and is employed in the military or naval service of such foreign state, such ship shall, until the contrary is proved, be deemed to have been built with a view to being so employed, and *the burden shall lie on the builder of such ship of proving that he did not know that the ship was intended* to be so employed in the military or naval service of such foreign state." By Sec. 14 the Court of Admiralty is empowered to deal with all questions arising out of *illegal prize* of every kind whatsoever when he who brings it in has knowledge that the same was captured as a prize of war either within British territorial jurisdiction, or by a vessel built, equipped, commissioned, despatched or having had her warlike force augmented contrary to the provisions of the law in question.

§ 612. **Law of neutrality as between state and state.**—The growth of the law of neutrality, whose several stages of development have now been briefly outlined, has resulted in the definition of two vitally important principles which should never be confused with each other. At the outset international law contemplated no other relations than those of peace and war. Upon the breaking out of the latter every state not an ally was supposed to be an enemy. The next step was taken when a state, unwilling to participate in hostilities to the full extent, assumed a position of partial neutrality in which it could permit the enemy of its ally to levy troops within its dominions, or supply such an enemy with money, ships of war or munitions of war without a violation of its duties to the state with which it was nominally at peace. Gradually the special stipulations contained in innumerable treaties to the effect that the contracting parties would not thus assist the enemies of the other, either publicly with auxiliary forces or subsidies, or privately by indirect means, grew into a general rule which required neutrals not merely to extend impartial treatment to the opposing belligerents, but to abstain entirely from any assistance whatever to either party to the contest. As Bluntschli has expressed it: *Les états neutres sont ceux qui ne sont pas parties belligérantes*



et qui ne prennent part aux opérations militaires, ni en faveur de l'un des belligérantes, ni au détriment de l'autre.<sup>7</sup> Before the end was reached, however, that principle, which compelled a neutral state simply to refrain from helping either of two belligerents, was supplemented by another requiring it to take care to a reasonable extent that neither shall be injured by acts over which it is supposed to exercise control. Thus were finally developed these canons of international law which now define the reciprocal duties of a neutral towards belligerent states, and of a belligerent towards neutral states. As such duties are due from each to the other in its corporate capacity as a sovereign, the breach of any one of them constitutes an international wrong which can be righted only through the application of an international remedy,—a subject to which the two following chapters will be specially devoted.

§ 613. Law of neutrality as between states and individuals. —Long before the doctrine defined in the preceding section was firmly established, traders, who undertook during the Middle Ages to build up certain rights in favor of neutral commerce as against the claim of belligerent states to restrain and limit it, were often brought under the direct action of law administered by such states in their own tribunals. The claim of such belligerents was that they had the right summarily to inflict in their own prize-courts penalties for the infraction of rules they were permitted to enforce, without a prior appeal to the neutral sovereigns to which the wrong-doers belonged. Such sovereignties were thus forced either to accept responsibility for all acts committed by their subjects beyond the limits of their territorial jurisdiction, or to submit to their punishment in the courts of the belligerents by whom their persons and properties were seized. The exercise of the right last named was finally acquiesced in because, as Lord Brougham<sup>8</sup> has expressed it, "no power can exercise such an effective control over the actions of each of its subjects as to prevent them from yielding to the temptations of gain at a distance from its territory. No power can, therefore, be effectually responsible for the conduct of all its subjects on the high seas; and it has been found more convenient to entrust the party injured by such aggressions with the power of

<sup>7</sup> *Le Droit International Codifié*, § 742,      <sup>8</sup> Works, viii, 386 (Ed. 1857).

checking them. This arrangement seems beneficial to all parties, for it answers the chief end of the law of nations,—checking injustice without the necessity of war.” Neutral sovereigns, while thus conceding to foreign tribunals the right to adjudge whether or no one or more of their subjects have infringed the privileges of the belligerent state, have reserved the right of interference only when such state exceeds the bounds set by the law of nations. The enforcement, on that principle, of the law of neutrality as between belligerent states and neutral individuals will be examined in detail in the following chapters devoted to the consideration of “Legitimate neutral commerce;” to “Contraband;” to “Neutral services, lawful and unlawful;” to “Blockade” and to the “Right of visit and capture.” No other branch of international law is so precise and definite because its rules have been elaborated by trained jurists, acting to some extent under the direction of their own governments, and at the same time under the jealous scrutiny of foreign states ready to demand reparation for any act committed or decree rendered beyond the limits of their recognized authority.

## CHAPTER II.

### DUTIES OF NEUTRAL TOWARDS BELLIGERENT STATES.

§ 614. **General scope of neutral duties defined.**—In the preceding chapter the conclusion was reached that the principle compelling a neutral state simply to refrain from helping either of two belligerents was finally supplemented by another requiring it to take care, to a reasonable extent, that neither shall be injured by acts over which it is supposed to exercise control. Neutrality (*medius in bello*), a condition in which any state has a perfect right to remain,<sup>1</sup> consists in the continuance of all the rights of peace, with friendly impartiality towards both contestants.<sup>2</sup> It is in effect a state of friendship maintained by a nation at peace towards two or more nations at war,—a continuation of the state of peace, with certain limitations and responsibilities growing out of the fact of dealing with two or more states belligerent as to each other.<sup>3</sup> How modern the doctrine, in its fully developed form, really is appears from the preceding outline of its growth which concluded with emphasizing the fact that, not until the time of Washington and Jefferson, was that part of the doctrine requiring a neutral actively to prohibit within its limits acts injurious to a belligerent fully and frankly recognized. Not until that point was reached was the general scope of neutrality, as a condition involving both rights and responsibilities, clearly defined. Not until then was there a clear comprehension of the fact that a neutral is in duty bound to vindicate his neutrality; that he is armed with certain powers and privileges to be exercised primarily in his own interest, secondarily in that of the family of nations considered as a whole. As Lord Bowen well expressed it in a pamphlet published in 1868 on the Alabama claims: “The rights violated are those of the neutral only. May not the neutral do what he pleases with his own? If this were excellent learning it would be indifferent sense. In spite of local jurisconsults, America will still be of the opinion that she was very closely concerned with the uninterrupted equipment in English ports

<sup>1</sup> Bourrienne, ch. vi; <sup>2</sup> Azuni, I,   <sup>2</sup> Heffter, § 144 and notes.

<sup>3</sup> 2 Azuni, ch. I, art. III.

of cruisers like the *Alabama*.”<sup>4</sup> When the government of the United States informed M. Genet<sup>5</sup> and others that it considered itself “as bound \* \* \* in conformity to the laws of neutrality, to effectuate the restoration of, or to make compensation for, prizes which shall have been made of any of the parties at war with France subsequent to the 5th day of June last by privateers fitted out of our ports”; \* \* \* that “besides taking efficacious measures to prevent the future fitting out of privateers in the ports of the United States, they will not give asylum therein to any which shall have been at any time so fitted out, and will cause restitution of all such prizes as shall hereafter be brought within their ports by any of the said privateers”; \* \* \* “that if the United States have a right to refuse permission to arm vessels and raise men within their ports and territories, they are bound by the laws of neutrality to exercise that right, and to prohibit such armaments and enlistments,”—the outlines were drawn of that chapter in international law as to neutral responsibility whose progress towards completion was so materially advanced by the treaty of Washington of 1871 and the Geneva Arbitration of that year.

§ 615. **Standards of neutral duty prior to 1871.**—That the two states, which deemed it wise to submit the gravest question of neutral responsibility that ever arose to an arbitral tribunal, felt compelled to agree beforehand upon the rules by which such responsibility was to be measured in that case is certainly persuasive of the fact that no generally recognized standard had then been established by the consensus of nations. Prior to the wars of the French Revolution it cannot be said that anything more existed than a growing sense of state responsibility in regard to neutrality which was prompting law-loving nations to demand that a scrupulous respect for their sovereign rights should be the return made by belligerents for the observance of an absolute impartiality between them. Geographical position prompted the United States to lead that advance.<sup>6</sup> As Hall has expressed it: “The policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obliga-

<sup>4</sup> See *Law Quarterly Review* for July, 1894, p. 214. Jefferson, iii, p. 270. See also *Am. State Papers*, i, 116, 136.

<sup>5</sup> Mr. Jefferson to M. Genet, Aug. 7, 1793. Correspondence of Thomas <sup>6</sup> 2 Azuni, II, ch. I, art. V.

tions then incumbent upon neutrals. But it represented by far the most advanced existing opinions as to what those obligations were; and in some points it even went further than authoritative international custom has up to the present time advanced. In the main, however, it is identical with the standard of conduct which is now adopted by the community of nations.”<sup>7</sup> In order to enable the executive government of the United States to enforce its ideals the Foreign Enlistment Acts<sup>8</sup> were passed, whose application to the fitting out, arming and equipping of belligerent ships in neutral waters gave rise to a long line of judicial decisions whose central idea is that the character of the acts involved in such fitting out, arming and equipping depends upon the intent with which they are performed,—the *animus belligerandi* being guilty, the *animus vendendi* being innocent. After carefully reviewing such decisions Dana concludes: (1) “As to the preparing of vessels within our jurisdiction for subsequent hostile operations, the test we have applied has not been the extent and character of the preparations, but the intent with which the particular acts are done. If any person does any act, or attempts to do any act, towards such preparation, with the intent that the vessel shall be employed in hostile operations, he is guilty, without reference to the completion of the preparations; \* \* \* (2) An American merchant may build and fully arm a vessel, and supply her with stores, and offer her for sale in our own market. \* \* \* He may, without violating our law, send out such a vessel, so equipped, under the flag and papers of his own country with no more force of crew than is suitable for navigation, with no right to resist search or seizure, and to take the chances of capture as contraband merchandise, of blockade, and of a market in a belligerent port. In such case, the extent and character of the equipments is as immaterial as in the other class of cases. *The intent is all.*”<sup>9</sup> On the other hand the British Foreign Enlistment Act of 1819, drawn on the American model, escaped judicial interpretation until proceedings for forfeiture were taken under it in the case of the *Alexandra*, designated by the American minister as a vessel in course of construction at Liverpool for the Confederate Government. As heretofore explained the English judges held in that case, in harmony with the American judges, that the act was directed not against the

<sup>7</sup> Int. Law, p. 616.

<sup>9</sup> Dana's Wheaton, pp. 562-63.

<sup>8</sup> See above, p. 644.

*animus vendendi* but against the *animus belligerandi*. The result of such interpretation was that unless a ship suitable for war went away from a neutral port so equipped as to commence hostilities the moment she crossed the line dividing the territorial waters from the high seas, she was merely an article of contraband trade, and as such subject to its vicissitudes. Conscious that a statute so construed did not enable the government to discharge, with due diligence, the full measure of neutral duty then imposed by international law parliament enacted the Foreign Enlistment Act of 1870.<sup>10</sup>

**Codes of France, Italy, the Netherlands, Austria, Spain, Portugal and Denmark.**—Great Britain and the United States have, by the terms of their Foreign Enlistment Acts, gone farther than the other nations who have limited their prohibitions to vessels fitted solely for fighting purposes. France leaves the punishments of those who violate such prohibitions to certain general provisions of her Penal Code<sup>11</sup> to which special attention is called upon the outbreak of hostilities, as in the proclamation of neutrality issued in 1861, on the outbreak of the American Civil War, referring to such articles, and prohibiting all French subjects from “assisting in any way the equipment or armament of a vessel of war or privateer of either of the two parties.”<sup>12</sup> In 1864 Italy, prompted by the Danish war, adopted a like rule; and in 1866 the government of the Netherlands for the first time “undertook to see that the equipment of vessels intended for the belligerent parties should not take place in the ports of the Netherlands.” The codes of Spain, Austria, Denmark and Portugal also contain prohibitions against the procuring of arms, munitions of war, or vessels for the service of a foreign power,—terms which could be so extended no doubt as to restrain the construction of any vessel intended for belligerent use.<sup>13</sup>

§ 616. **The Three Rules of the Treaty of Washington, 1871.**—Such were the antecedents of the Treaty of Washington<sup>14</sup> whose sixth article provides that, “in deciding the matters submitted to the arbitrators, they shall be governed by the

<sup>10</sup> See above, p. 646.

<sup>11</sup> Code Pénal, arts. 84 and 85.

<sup>12</sup> Under that proclamation six vessels then in the course of construction for the Confederate States in French ports were arrested.

<sup>13</sup> See Neut. Laws Commissioners' Rep., Appendix, iv; *Rev. de Droit Int.*, vi, 502; Hall, *Int. Law*, p. 638.

<sup>14</sup> *Treaties and Conventions*, 1889, p. 478.

following three rules, which are agreed upon by the High Contracting Parties as rules to be taken as applicable to the case, and by such principles of international law not inconsistent therewith as the Arbitrators shall determine to have been applicable to the case.

## RULES.

### A NEUTRAL GOVERNMENT IS BOUND—

First, to use *due diligence* to prevent the fitting out, arming, or equipping within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction to warlike use.

Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly, to exercise *due diligence* in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

Her Britannic Majesty has commanded her High Commissioners and Plenipotentiaries to declare that Her Majesty's government cannot assent to the foregoing rules as a statement of principles of international law which were in force at the time when the claims mentioned in Article I. arose; but that Her Majesty's government, in order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provisions for the future, agrees that, in deciding the questions between the two countries arising out of these claims, the arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules. And the High Contracting Parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime powers, and to invite them to accede to them."<sup>15</sup>

<sup>15</sup> As to the relation of these law see Calvo's article in *Rev. de Droit Int.*, 1874, p. 529.

As construed by the counsel of the United States.—As article VII. of the treaty provided that the tribunal should first determine as to each vessel separately, whether Great Britain had, by any act or omission, failed to fulfill any of the duties defined in the three rules, or recognized by the principles of international law not inconsistent therewith, and certify the fact as to each vessel,—the question of questions presented for solution, upon the very threshold of the controversy, was that involved in the construction of the phrase, “due diligence,” contained in the first and third of the rules. As to the precise scope and meaning of that phrase,—certainly intended to indicate in some form the degree of care that can be justly demanded by a belligerent from a neutral government in matters concerning the enforcement of neutral duty,—the advocates of the contesting states differed widely. The counsel for the United States,—after claiming, “1. That it is the duty of a neutral to preserve strict and impartial neutrality as to both belligerents during hostilities.

2. That this obligation is independent of municipal law.

3. That a neutral is bound to enforce its municipal laws and its executive proclamation; and that a belligerent has the right to ask it to do so,—undertook to define certain conditions under which “due diligence” can always be exacted of a neutral power.<sup>16</sup> Thus the statement was made, “9. That when a neutral fails to use all the means in its power to prevent a breach of the neutrality of its soil or waters, in any of the foregoing respects, the neutral should make compensation for the injury resulting therefrom.

10. That this obligation is not discharged or arrested by the change of the offending vessel into a public man-of-war.

11. That this obligation is not discharged by a fraudulent

<sup>16</sup> “4. That a neutral is bound to use due diligence to prevent the fitting out, arming or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace. 5. That a neutral is bound to use like diligence to prevent the construction of such a vessel. 6. That a neutral is bound to use like diligence to prevent the departure from its jurisdiction of any vessel

intended to cruise or carry on war against any power with which it is at peace; such vessel having been specially adapted, in whole or in part, within its jurisdiction, to warlike use. 7. That a neutral may not permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other. 8. That a neutral is bound to use due diligence in its ports and waters to prevent either belligerent from obtaining there a renewal



attempt of the offending vessel to evade the provisions of a local municipal law.

12. That the offence will not be deposited so as to release the liability of the neutral even by the entry of the offending vessel in a port of the belligerent, and there becoming a man-of-war, if any part of the original fraud continues to hang about the vessel.”<sup>17</sup> The essence of the American contention was that the “due diligence” required by the rules in question was a diligence “commensurate with the emergency, or with the magnitude of the results of negligence.” In applying that language to the construction and sale of a warship by a neutral builder it was said that “while the subjects or citizens of either country have been left by law free to manufacture or sell muskets or gunpowder, or to export them at their own risk, even if known to be for the use of a belligerent, the legislatures, the executives, and the judiciaries of both Great Britain and the United States have joined the civilized world in saying that a vessel of war, *intended for the use of a belligerent*, is not an article in which the individual subject or citizen of a neutral state may deal, subject to the liability to capture as contraband by the other belligerent. Such a vessel has been and is regarded as organized war.”

**As construed by the counsel of Great Britain.**—The counsel for Great Britain,—after excepting certain cases from the operation of the rule of “due diligence,” and declaring that “public ships of war in the service of a belligerent, entering the ports or waters of a neutral are, by the practice of nations, exempt from the jurisdiction of a neutral power,—” declared that “9. Due diligence on the part of a sovereign government signifies that measure of care which the government is under an international obligation to use for a given purpose. This measure, where it has not been defined by international usage or agreement, is to be deduced from the nature of the obligation itself, and from those considerations of justice, equity, and general expediency on which the law of nations is founded.

10. The measure of care which a government is bound to use in order to prevent within its jurisdiction certain classes of acts, from which harm might accrue to foreign states or their citizens, must always (unless specifically determined by usage or agreement) be dependent, more or less, on the sur-

or augmentation of military supplies, or arms for belligerent vessels, or the recruiting of men.”

<sup>17</sup> Papers relating to the Treaty of Washington, I, pp. 87-88.

rounding circumstances, and cannot be defined with precision in the form of a general rule. It would commonly, however, be unreasonable and impracticable to require that it should exceed that which the governments of civilized states are accustomed to employ in matters concerning their own security or that of their own citizens. That even this measure of obligation has not been recognized in practice might be clearly shown by reference to the laws in force in the principal countries of Europe and America. It would be enough, indeed, to refer to the history of some of these countries during recent periods, for proof that great and enlightened states have not deemed themselves bound to exert the same vigilance and employ the same means of repression, when enterprises prepared within their own territories endangered the safety of neighboring states, as they would probably have exerted and employed had their own security been similarly imperilled.

11. In every country where the executive is subject to the laws, foreign states have a right to expect—(a) That the laws be such as in the exercise of ordinary foresight might reasonably be deemed adequate for the repression of all acts which the government is under an international obligation to repress; (b) That, so far as may be necessary for this purpose, the laws be enforced and the legal powers of the government exercised." In applying these general principles to the case of an armed ship it was said that "the case of a vessel which is despatched from a neutral port to or for the use of a belligerent, after having been prepared within the neutral territory for warlike use, is one which may be regarded from different points of view, and may fall within the operation of different principles. The ship herself may be regarded merely as an implement or engine of war, sold or manufactured to order within neutral territory, and afterwards transported therefrom, and the whole transaction as falling within the scope of the principles applicable to the sale, manufacture, shipment, and transportation of articles contraband of war; or, on the other hand, the preparation and dispatch of the ship may be viewed as being really and in effect the preparation and commencement of a hostile expedition. The circumstances of each case can alone determine from which of these two points of view it may most fitly be regarded, and to which class the transaction ought to be assigned."<sup>18</sup>

<sup>18</sup> Case of Great Britain, Part III, pp. 23-25. Papers relating to the Treaty of Washington, I, p. 239.

As construed by the arbitral court.—The United States demanded judgment, on the submission made under the rules, against Great Britain for damages resulting from the acts of the Alabama and her tender, the Tuscaloosa; from the acts of the Florida and her tenders, Clarence, Tacony and Archer; from the acts of the Shenandoah, Sumpter, Nashville, Retribution, Georgia, Tallahassee and Chickamauga. The court, by a unanimous vote in the case of the Alabama, by a vote of four to one in the case of the Florida, and by a vote of three to two in the case of Shenandoah fixed the responsibility for such acts on Great Britain, except as to such acts of the Shenandoah as were committed prior to her departure from Melbourne on Feb. 18th, 1865. It was further decreed “that such tenders or auxiliary vessels, being properly regarded as accessories, must necessarily follow the lot of their principals, and be submitted to the same decision which applies to them respectively.” Great Britain was acquitted of all responsibility for the acts of the Sumpter, Retribution, Georgia, Nashville, Tallahassee, and Chickamauga. As the claim for indirect losses presented by the United States was rejected, the responsibility of Great Britain was limited to such direct losses as had resulted from the destruction of vessels and their cargoes by the cruisers in question, and to national expenditures incurred in their pursuit. The essence of the decree, so far as the definition of principles is concerned, is as follows: \* \* \* “the ‘due diligence’ referred to in the first and third of the said rules ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part. \* \* \* the effects of a violation of neutrality committed by means of the construction, equipment, and armament of a vessel are not done away with by any commission which the government of the belligerent power, benefited by the violation of neutrality, may afterwards have granted to that vessel; and the ultimate step, by which the offence is completed, cannot be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence. \* \* \* the privilege of extritoriality 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 courtesy and mutual deference between nations, and therefore can

never be appealed to for the protection of acts done in violation of neutrality.”<sup>19</sup>

Criticisms of arbitral definition of “due diligence.”—Strange, indeed, it would have been if this first tentative effort to solve the mighty problem involved in neutral responsibility had resulted in a judge-made rule at once so clear, comprehensive, precise and adaptable to every possible condition as to eliminate all future controversy upon the subject. Nothing more could have been reasonably expected than a substantial advance in the direction of a rule,—to be hereafter perfected through the further reflection of publicists and growing experience of nations,—whose application to new conditions must ever be attended with certain difficulties which human wisdom has so far been unable to remove from the domain of jurisprudence. Against the definition given by the arbitrators to the phrase, “due diligence,” the severest criticism has naturally been directed. One English publicist of great acumen, after condemning the construction given to “due diligence” by the counsel for both of the contesting states, concludes that the court itself made a fatal mistake in accepting and embodying in their award “the principle of a changing standard.” “In the second of their recitals they laid down the proposition that ‘due diligence’ ought to be exercised by neutral states ‘in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfill the obligations of neutrality on their part.’ This is the least happy of all the attempts to discover a standard of neutral obligation. It imposes different degrees of responsibility upon different neutrals in the same war, and even upon the same neutral in respect of different belligerents in the same war, and thus destroys that impartiality which is the essence of neutral duty.”<sup>20</sup> On the other hand, another English publicist of the highest reputation, declares that “with this award it is, under the peculiar conditions of the reference, well nigh impossible to quarrel. Opinions may well differ as to the value of certain of the legal propositions advanced by the majority of the arbitrators, but under no reasonable interpretation of language could Great Britain hope to secure acquittal from a tribunal sitting under and guided by the Three Rules of

<sup>19</sup> See the “Decision and Award” printed in Moore’s International Arbitrations as a part of an excel-

lent statement of the case as a whole; vol. 1, pp. 495-682.

<sup>20</sup> Lawrence, Principles of Int. Law, pp. 538-539.

the Treaty of Washington. The British Government did not, it must be confessed, show 'due'—that is, a reasonably sufficient—diligence in the fulfilment of its neutral duty. Whether 'due diligence' be or be not the diligence contended for by the American Counsel and demanded by the majority of the Geneva Tribunal, due diligence must be alert, prompt and fearless. The British Government, however well meaning, was in no true sense alert in the protection of its neutrality. The British Foreign Enlistment Act was in terms reasonably adequate for its purpose, but the British officials were not duly alert in the detection of attempted fraudulent evasions of the law. The British authorities evinced a marked disposition to believe the best of all men, to wait for, rather than to seek out, evidence, and to trust to the initiative of the United States Minister and his active subordinates. In a word, they displayed a fatal lack of appreciation of the preventive duty of a government."<sup>21</sup> Into that declaration is condensed the essence of the whole matter, because it admits that, according to the new conception of neutrality which has developed since the end of the eighteenth century, Great Britain had not exercised that degree of diligence as to the arming and equipping of belligerent ships in neutral waters which the quickened sense of neutral duty now demands. The arbitral tribunal, while fully and frankly recognizing the existence of a new and stricter rule, failed to give to it that logical, and generally satisfactory definition which must precede its incorporation into the law of nations.<sup>22</sup>

**Intent as the test of guilt.**—The difficulty attending the construction of such a rule, in its application to the arming and equipping of belligerent ships in neutral waters, arises out of the fact that the dividing line between acts which the neutral government is bound to restrain, and those which its subjects are permitted to engage in at their peril "may often be scarcely

<sup>21</sup> Walker, *Science of Int. Law*, pp. 493-494.

<sup>22</sup> Instructive discussions of the several questions involved in the arbitration and award may be found in Rolin Jaquemyns' article (severity criticising the arbitral definition of "due diligence") in the *Rev. de Droit Int.*, 1874, p. 567; in Pradier-Fodéré, *La Ques-*

*tion de l'Alabama et le Droit des Gens*; in Rivier, *L'Affaire de l'Alabama et le Tribunal Arbitral de Genève*; in Kamarowski *Le Tribunal International*, 214; in Rouard de Card, *Les Destinées de l'Arbitrage International*, 75; in Fiore, *Nouveau Droit Int. Public*, I. 130, 135; III, 464; in Neumann, *Droit des Gens Moderne*, 139.

traceable.”<sup>23</sup> The difficulty in each particular case is to determine whether the vessel, considered in reference to the circumstances under which it is equipped and sold, constitutes an “expedition,” whose departure the neutral government is bound to prevent; or merely an article of contraband, liable to capture and confiscation by the belligerent against whom she is to be used, without any responsibility whatever upon the part of the neutral state from whose waters it departs. On the one hand, the Supreme Court of the United States, speaking through Story, J., in the case of the *Santissima Trinidad*,<sup>24</sup> said that “there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit; and which only exposes the persons engaged to the penalty of confiscation.” On the other, the same court, speaking through Marshall, C. J., in the case of the *Gran Para*,<sup>25</sup> decreed the next day the restitution of captured property brought within the jurisdiction of the United States, on the ground that the vessel by which it was brought “was purchased, and that she sailed out of the port of Baltimore, armed and manned as a vessel of war, for the purpose of being employed as a cruiser against a nation with whom the United States were at peace. \* \* \* The vessel was constructed for war, and not for commerce. There was no cargo on board but what was adapted to the purposes of war. The crew was too numerous for a merchantman, and was sufficient for a privateer. These circumstances demonstrate *the intent* with which the *Irresistible* sailed out of the port of Baltimore.” As explained heretofore the line of American cases in question rests upon the cardinal principle that in the event of a fitting out, and arming of a vessel in neutral waters the intent of the parties engaged in the enterprise is all in all.<sup>26</sup>

**The character of the ship as the test.**—Because of the difficulty of applying intent as the crucial test of guilt, Hall has suggested that it be superseded by another making the character of the ship the criterion of illegality. That great publicist was, however, too acute not to perceive the worthlessness of his own suggestion. While he claims that “experts are perfectly able to distinguish vessels built primarily for warlike

<sup>23</sup> Dana's *Wheaton*, p. 563, note.

<sup>25</sup> *Ibid.*, 486.

<sup>24</sup> 7 *Wheat.*, 341.

<sup>26</sup> See above, p. 653.

use," he at the same time admits that "it is otherwise with many vessels primarily fitted for commerce. \* \* \* Mail steamers of large size are fitted by their strength and build to receive, without much special adaptation, one or two guns of sufficient calibre to render the ships carrying them dangerous cruisers against merchantmen. These vessels, though of distinct character in their more marked forms, melt insensibly into other types, and it would be impossible to lay down a rule under which they could be prevented from being sold to a belligerent and transformed into constituent parts of an expedition immediately outside neutral waters without paralyzing the whole ship-building and ship-selling trade of the neutral country."<sup>27</sup> The perfect facility with which certain "mail steamers of large size" were quickly adapted to hostile purposes during the recent Spanish-American war demonstrates beyond question, if demonstration is necessary, that no expert could possibly determine "almost from the laying of the keel the difference between the two classes of ships." The fact that such vessels, fitted primarily for commerce, may be suddenly converted into ideal commerce destroyers should remove the suggestion of the character of the ship, as a sole and exclusive test, from serious consideration. Unless "the whole ship-building and ship-selling trade of the neutral country" is to be paralyzed the question whether or not a particular vessel constitutes an "expedition," or is merely an article of contraband, must ever depend upon the intent of the parties by whom she is fitted out and equipped. The only practical question is as to the best method of removing the difficulties attending the proof of such intent. A most intelligent move in that direction was made by the framers of the British Foreign Enlistment Act of 1870, which, in dealing with the offence of illegal ship-building, provides (Sec. 8) that any person who, within British dominions and without license (1) builds, agrees to build or causes to be built, (2) issues or delivers a commission to, (3) equips, or (4) despatches, or causes or allows to be despatched, any ship with intent or knowledge or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any state with which Great Britain is at peace, is declared thereby to offend against her laws.<sup>28</sup> And

<sup>27</sup> Int. Law, p. 640.

British dominions, builds, causes

<sup>28</sup> The way is then pointed out to be built or equips a vessel for a in which a person who, within belligerent power, *in pursuance of*

if (Sec. 9) "any ship is built by order or on behalf of any foreign state when at war with a friendly state \* \* \* or is paid for by such foreign state or such agent, and is employed in the military or naval service of such foreign state, such ship shall, until the contrary is proved, be deemed to have been built with a view to being so employed, and *the burden shall lie on the builder of such ship of proving that he did not know that the ship was intended to be so employed* in the military or naval service of such foreign state." Could the new rule as to neutral duty be so formulated, through international concert, as to require each state to cast the onus of proof, according to the British Act of 1870, upon those engaged in suspected traffic, it is more than likely that the greater part of the existing difficulties as to the proof of guilty intent would soon disappear.

**Practical value of arbitral decree.**—No matter to what extent the jurists<sup>29</sup> who construed the three rules in the arbitral court at Geneva may have failed in the effort to provide a canon so complete as to command immediate and general acceptance, as a final expression of the new and stricter conception of neutral duty, the fact remains that what they did accomplish, while moving in the right direction, is of the highest practical value. In the first place, the result of the decree rendered emphasized the truth, as it had never been emphasized before, that the municipal laws of a sovereign state are not the measure of its international obligations so far as neutral duties are concerned. The only standard by which such obligations can be measured is an international one. In the particular case before the court a conventional standard had been agreed upon beforehand by which the adequacy of the municipal law of Great Britain was tested and found wanting. By that great object-lesson the world has been convinced that a standard of general application must soon be set up through such an international concert as will give to it the moral power to bind any minority that may attempt to resist it. When such a standard is once clearly defined no neutral can escape responsibility by pleading that it has satisfied all the requirements of its own law. On the other hand, no belligerent can

*a contract made before the outbreak of war, may avoid the penalties of illegal shipbuilding.*

<sup>29</sup> The court was composed of Mr. Charles Francis Adams (Unit-

ed States), Sir Alexander J. E. Cockburn (Great Britain), Count Sclopis (Italy), M. Stämpfli (Switzerland), and Viscount d'Itajubá (Brazil).



complain if a neutral does not comply fully with its own law, provided it performs all that it is required to do by the common law of nations. Even in the absence of such a generally recognized standard the authorities of every well governed state have been aroused by the Geneva award to a livelier sense of neutral responsibility which they are preparing to discharge. In the second place, while the award did not deny that a commission emanating from a recognized government protected a vessel bearing it from all subsequent proceedings against her by a neutral whose neutrality she had violated, it did declare that "the effects of a violation of neutrality committed by means of the construction, equipment, and armament of a vessel, are not done away with by any commission which the government of the belligerent power, benefited by the violation of neutrality, may have afterwards granted to that vessel." In the third place, the award has put all neutral states on notice that while a ship of war may still be built and armed for a belligerent, and delivered to him outside neutral territory ready to receive a fighting crew; or may be delivered to him within such territory, and issue therefrom as belligerent property, provided it is neither commissioned nor so manned as to be able to commit immediate hostilities, and provided there is no good reason to believe that an intention exists to make a fraudulent use of such territory in the particulars indicated,—every belligerent injured by the issuance of such a vessel, under such circumstances, will expect the neutral state to prove its innocence under the common law of nations. The only real difficulty which still remains is that involved in the making of proof as to guilty intention.

§ 617. **Declarations of neutrality.**—As neutrality is presumed unless a state declares otherwise, there is no legal necessity for a formal manifesto or proclamation announcing the fact to the world. And yet as it has been the custom for such declarations to be made, since the new conception of neutral duty began to develop, they stand forth as important and reliable expositions of its history. The First Armed Neutrality League of 1780 grew out of a declaration of neutral rights<sup>30</sup> issued in that year by Russia to which Sweden and Denmark immediately adhered. Then followed the famous proclamation issued by Washington in 1793,<sup>31</sup> said to have had a greater influence in molding international law than any

<sup>30</sup> Martens (R.) ii, p. 74.

<sup>31</sup> See above, p. 638.

single document of the last hundred years. Among the important declarations made since that time should be noted the Neutrality Ordinance of Austria of 1803;<sup>32</sup> the neutrality proclamations of Great Britain and France at the outbreak of the American Civil War in 1861; and that issued by Great Britain in 1870.<sup>33</sup>

§ 618. Neither armed assistance nor other aid to be granted under preexisting treaty.—As explained heretofore the idea that a neutral state could supply military assistance to an ally under a treaty made before the war, without a breach of neutrality, ceased to influence practice after the end of the eighteenth century.<sup>34</sup> And yet despite the fact that during the nineteenth century no nation while professing to be neutral has actually given such assistance, the right to give it has been maintained down to our own time by writers of high reputation. In 1797 the Supreme Court of Pennsylvania assumed the right to be unquestioned when it said that, “if two nations are at war, a neutral power shall not do any act in favor of the commercial or military operations of one of them; or, in other words, it shall not, by treaty, afford a succor, or grant a privilege, *which was not stipulated for* previously to the commencement of hostilities.”<sup>35</sup> In 1836 Wheaton stated that “the neutral may be bound by treaty, previous to the war, to furnish one of the belligerent parties with limited succor in money, troops, ships, or munitions of war, or to open his ports to the armed vessels of his ally, with their prizes. The fulfilment of such an obligation does not necessarily forfeit his neutral character, nor render him the enemy of the other belligerent nation, because it does not render him the general associate of its enemy.”<sup>36</sup> Manning, whose work appeared in 1839, while admitting that the custom is “directly at variance with the true basis of neutrality” says, “it has now been established by the habitual and concurrent practice of states, and is at the present day an undisputed principle of the European law of nations,”<sup>37</sup> a doctrine reasserted in a work so very

<sup>32</sup> Martens (R.) viii, III.

<sup>33</sup> See Bigelow's *France and the Confederate Navy*, p. 20, note; Wharton, *Int. Law Dig.*, § 402; Hansard, 3d series, vol. ccciii, 1098.

<sup>34</sup> See above p. 626 seq.

<sup>35</sup> *Vasse v. Ball*, 2 Dallas, p. 275.

<sup>36</sup> Dana's *Wheaton*, p. 517. See also Kent (*Comm. I*, lect. vi), who

says that “neutral duty does not extend so far as to prohibit the fulfilment of antecedent engagements, which may be kept consistently, with exact neutrality, unless they go so far as to require the neutral nation to become an associate in war.”

<sup>37</sup> *Comm. Law of Nations*, p. 225.

recent as that of M. Bluntschli.<sup>38</sup> The answer to such assumptions is that, no matter how high the standing of the publicists in question may be, they all rely upon no later precedent than that growing out of the demand made by Russia on the outbreak of war with Sweden in 1788, for certain ships and troops stipulated for in a treaty made in 1781,—a precedent which, when correctly interpreted, really marks the end of the old system.<sup>39</sup> The protest of Sweden against “a doctrine which his Swedish Majesty cannot reconcile with the law of nations and rights of sovereigns” was the first strong expression of that new-born sense of neutral duty that compelled even Washington to falter when called upon to carry out the embarrassing provisions contained in the treaty of 1778 whose non-fulfilment occasioned for a time a rupture with France. The result, however, of the negotiations that followed was the convention of 1800, from which the objectionable stipulations of the treaty of 1778 were omitted. From that time it may be said that the right of a neutral to give succor under a preëxisting treaty ceased to be recognized by the common law of nations. Since then it has not been upheld by continuous usage; and it cannot be successfully maintained that an agreement, contrary to existing usage, although made prior to a war, can in any way affect the character of unneutral acts with reference to a non-consenting third party having the right to rely upon such usage.<sup>40</sup>

§ 619. **No levying of soldiers in neutral territory.**—During the seventeenth century it was deemed no violation of neutrality for a state to give permission to recruit to its neighbors engaged in war. Often the right of recruiting was stipulated for in treaties like that entered into in 1656 between Great Britain and Sweden providing that it should be “lawful for either of the contracting parties to raise soldiers and seamen by beat of drum within the kingdoms, countries and cities of the other, and to hire men of war and ships of burden.”<sup>41</sup> Although Bynkershoek says, “I think that the purchase of soldiers among a friendly people is as lawful as the purchase of munitions of war,”<sup>42</sup> certainly during the eighteenth century there was a great deal of doubt on the subject. Despite the fact that his country was a favorite recruiting-ground

<sup>38</sup> Völkerr, § 759.

Calvo, § 2322; Hall, pp. 618-619.

<sup>39</sup> See above, p. 627.

<sup>41</sup> Dumont, vi, ii, III, and vi, ii,

<sup>40</sup> Such is the view of Phillimore, iii, § cxxviii; Heffter, § 117;

125.

more, iii, § cxxviii; Heffter, § 117;

<sup>42</sup> *Quaest. Jur. Pub.*, I, c. xxii.

Vattel says: "The Switzers, as we have already observed, grant levies of troops to whom they please; and no power has hitherto thought fit to quarrel with them on that account. It must, however, be owned, that, if those levies were considerable, and constituted the principal strength of my enemy, while, without any substantial reason being alleged, I were absolutely refused all levies whatever,—I should have just cause to consider that nation as leagued with my enemy; and, in this case, the care of my own safety would authorize me to treat her as such." Just before he had said that "when it is the custom of a nation, for the purpose of employing and training her subjects, to permit levies of troops in favor of a particular power to whom she thinks proper to intrust them,—the enemy of that power cannot look upon such permissions as acts of hostility, unless they are given with a view to the invasion of his territories, or the support of an odious and evidently unjust cause."<sup>43</sup> After the rising tide of public opinion as to neutral duty had settled the fact that the right of a belligerent to levy troops in other states was extinct, and that a neutral state permitting such a levy was guilty of a breach of neutrality, Switzerland continued the practice under treaties called capitulations. The troops thus furnished were simply mercenaries engaged for a stated period in foreign service, for stipulated pay and allowances, and absolutely subject to the power employing them. The result of a mutiny that resulted in the death of several hundred Swiss soldiers belonging to regiments, composed entirely of Swiss, hired to the Neapolitan government under a capitulation that ended in June, 1859, added to complications arising in the same year out of the employment of Swiss troops in other foreign states, especially in Italy, prompted Great Britain and other powers to induce the Confederation to pass a law destroying the entire system by making it a penal offense for foreigners to enroll Swiss citizens, and forbidding such citizens to enroll themselves as soldiers to a foreign state, without the permission of the governments of their respective cantons.<sup>44</sup> The practice thus extinguished was not only in conflict with existing ideas of neutral duty but inconsistent with the peculiar status of Switzerland as a neutralized power. It is not to be understood,

<sup>43</sup> *Droit des Gens*, III, § 110.

vol. ii, pp. 636-642; Manning, *Law*

<sup>44</sup> Halleck (Baker ed.), II, 8, note 1; Bury, *La Neutralité de la Suisse*, in the *Rev. de Droit Int.*,

of Nations, Bk. V, Ch. I; Dana's *Wheaton*, p. 356, note 145.

however, that a neutral state is obliged to exercise such care as to prevent a man here and there from crossing its frontier to take service with a belligerent. Such incidents fall under the *de minimis non curat lex* maxim of international law.<sup>45</sup> It is only expected that precautions will be taken to prevent anything like the migration in considerable bodies, or in a continuous stream, of neutral citizens to swell the ranks of either combatant. All such movements can be easily detected, and should be promptly suppressed. Express prohibitions against them are often embodied in neutrality proclamations.

§ 620. **No passing of belligerent troops through neutral territory.**—The right of passage through neutral territory was gradually extinguished by the same sentiment that forbade recruiting. Grotius was simply describing the practice of the seventeenth century when he said that the right of passage not only existed but could be taken by force when denied unjustly.<sup>46</sup> In the eighteenth century the right had become so limited that Vattel says, “an innocent passage is due to all nations with whom a state is at peace; and this duty extends to troops as well as to individuals. But it rests with the sovereign of the country to judge whether the passage be innocent; and it is very difficult for that of an army to be entirely so.

\* \* \* He who desires to march his troops through a neutral country, must apply for the sovereign’s permission. To enter his territory without his consent, is a violation of his rights of sovereignty and supreme dominion.<sup>47</sup> He admits, however, that there is an exception in the case of extreme necessity. “When, therefore, an army find themselves exposed to imminent destruction, or unable to return to their own country, unless they pass through neutral territories, they have a right to pass in spite of the sovereign, and to force their way, sword in hand.” To that he adds: “If the neutral state grants or refuses a passage to one of the parties at war, she ought, in like manner, to grant or refuse it to the other, unless a change of circumstances affords her substantial reasons for acting otherwise.” A refusal without such reasons was supposed to constitute “a departure from the line of strict neutrality.”<sup>48</sup> The idea that a neutral state could thus grant a passage

<sup>45</sup> Calvo, § 2321; Heffter, § 145. 126. Pando (§ cxc) maintains

<sup>46</sup> *De Jure Belli ac Pacis*, II, ii, 13, and III, xvii, 2. with Vattel that a belligerent may force a passage against the will of

<sup>47</sup> *Droit des Gens*, III, § 119. a neutral in case of extreme neces-

<sup>48</sup> *Droit des Gens*, III, §§ 122, sity.

through its territory to a belligerent army, without a violation of its neutrality, certainly in the event it was granted impartially to both belligerents, was upheld by leading publicists down to the earlier part of the present century.<sup>49</sup> It has not been exercised, however, since 1815, when the allies forced the Federal Council of Switzerland to grant permission for the passage of troops across its territory on their way to invade the southeastern portion of France.<sup>50</sup> The opinion of recent publicists<sup>51</sup> that the right no longer exists has been fully vindicated by recent practice. In 1870 the government of Switzerland refused to permit bodies of Alsations enlisted for the French army to cross her frontiers, although they were traveling without arms or uniforms.<sup>52</sup> In the same year Belgium thwarted an attempt of the Germans to send their wounded home over her railways, even when the privilege was asked in the name of humanity. The application was made because after the battle of Sedan the victorious army found it difficult to remove to Germany over the routes then open the masses of wounded by which it was encumbered. It was refused because, if the Germans had been permitted thus to relieve the congestion of the lines of communication with their own country, their ability would have been increased to reinforce and support their armies then invading France.<sup>53</sup> Although France's earnest protest was sustained by Belgium, after consultation with Great Britain, her representative at the Brussels Conference assented to the Article 55 of the Military Code then drawn up, providing that "the neutral state may authorize the transport across its territory of the wounded and sick belonging to the belligerent armies, provided that the trains which convey them do not carry either the personnel or the *material* of war."<sup>54</sup> In 1877 when the troops of Diaz, after defeating and routing their adversaries on Mexican soil, pursued them into Texas, where they again attacked and dispersed them, the government of Mexico was told that "while it is deemed hardly probable that this unjustifiable invasion of

<sup>49</sup> Martens, *Précis*, § 310; Klüber, § 284; Kent, lect. vi; Manning, p. 245; Dana's *Wheaton*, § 427.

<sup>50</sup> Heffter, § 147; Bluntschli, § 770; Calvo, § 2345; Negrin, p. 173; Hall, p. 624.

<sup>51</sup> As to the special circumstances under which the permission was extorted see Martens

(N. R.) II, p. 170; Dana's *Wheaton*, § 419.

<sup>52</sup> Bluntschli, § 770.

<sup>53</sup> Cf. Rolin Jaequemyns in the *Rev. de Droit Int.*, vol. ii, pp. 708, 709 (*La Guerre Actuelle*).

<sup>54</sup> British State Papers, *Miscell.*, No. 1 (1875), p. 324.

American soil was made in obedience to any specific orders from the Mexican capital, it is, nevertheless, a grave violation of international law, which cannot for a moment be overlooked. You are instructed to call the attention of the officers of the *de facto* government with whom you are holding unofficial intercourse to this case, and to say that the government of the United States will confidently expect a prompt disavowal of the act, with reparation for its consequences, and the punishment of its perpetrators.”<sup>55</sup> In the year in which the United States was thus emphasizing the new conception of neutral duty a step backward was apparently taken by the making of a convention between the Russian and Roumanian governments, just before the beginning of hostilities between Russia and Turkey, in which permission was given to the former to pass its troops through Roumania while on the march to the Danube for the purpose of invading European Turkey. The Russian commanders who were responsible for the good order of their troops, and who were to pay for all supplies taken from the country, were to have the use of all railways, roads, and telegraphs, provided they neither passed through the Roumanian capital, nor interfered with the internal affairs of the state. Under that agreement at least half a million Russian troops are said to have passed during the war across the Danube into Bulgaria.<sup>56</sup> In this transaction may be found a typical illustration of the principles involved in a condition of double sovereignty, a condition in which it is possible for a state to possess at the same moment a belligerent and a neutral character.<sup>57</sup> As Turkey was the nominal suzerain of Roumania its territory was technically a part of the Turkish Empire. Therefore the entry of Russian troops into such territory was, in theory at least, an invasion of Turkey. In fact, the subjection of the self-governing state of Roumania to Turkey was so slight that it was practically an independent power. As such it assumed to sever its connection with its nominal over-lord, first by giving free passage to the troops of Russia through its territory; and then by joining that country in the war with its entire army.

§ 621. Internment of belligerent soldiers in neutral territory.—The prohibition which denies to a neutral the right to

<sup>55</sup> Mr. Evarts, Sec. of State, to Mr. Foster, June 21, 1877. MSS. 497; Lawrence, Principles, pp. 526-528.  
Inst., Mex., For. Rel., 1877.

<sup>57</sup> See above, pp. 594-96.

<sup>56</sup> Fyffe, Modern Europe, iii, p.

lend his territory to either belligerent for the purposes of war does not deprive him of the right to extend hospitality and asylum to a beaten army or to individual fugitives seeking refuge from a pursuing enemy. Modern practice, which ignores Bynkershoek's contention that flying troops may be followed into a neutral state,<sup>58</sup> imposes upon such a state the duty of receiving them under such conditions as will deprive them of the power to start again from its soil in order to renew hostilities. To secure that end, and at the same time to satisfy the claims of humanity, belligerent troops are disarmed so soon as they cross the neutral frontier<sup>59</sup> and detained in honorable confinement until the end of the war. While thus detained they are said to be interned,—a condition which they must not resist, and the expense of which their government is in honor bound to bear. When in 1871 the wreck of Bourbaki's army, consisting of eighty-five thousand starving French troops, sought permission, in the last days of the Franco-Prussian War, to cross the Swiss frontier, it was given by a special convention made between their commander, General Clinckant, and the Swiss General Herzog,<sup>60</sup> providing for their immediate disarmament. At the conclusion of peace they were permitted to return to France under an agreement providing for the payment by that country of a stipulated sum to defray the cost of their maintenance by the Swiss during their detention.<sup>61</sup> The Hague Conference substantially confirmed the preëxisting practice by declaring that a neutral state that receives into its territory troops belonging to a belligerent army shall intern them, so far as possible, at a distance from the theatre of war. It can guard them in camps and even in fortresses or other places appropriated to that purpose. It may leave officers at liberty on their giving their parole not to quit the neutral territory without permission. Unless there shall be some other special convention made, the neutral state shall supply those thus interned with the food, clothing and relief required by humanity, and upon the return of peace remuneration shall be made by the state

<sup>58</sup> *Quæst. Jur. Pub.*, I, 8.

<sup>59</sup> The neutral who fails to perform that duty justifies the other belligerent in attacking such refugees within such territory, which can no longer be regarded as neutral. Heffter, § 149; Klüber, § 208;

Ortolan, *Dip. de la Mer*, iii, ch. viii; Hautefeuille, *Des Nations Neutres*, vi, ch. ii; Halleck (Baker ed.), ii, p. 152.

<sup>60</sup> Martens (N. R. G.), xix, 639.

<sup>61</sup> Calvo, § 2336; Fyffe, *Modern Europe*, iii, 462.



interested for the expenses incurred during the internment.<sup>62</sup>

§ 622. Neither gifts nor loans of money to be made by neutral to belligerent states.—Neither reason nor authority can be opposed to the statement that it is a grave breach of duty for a neutral state to give or lend money to a belligerent one. When Kent says that “even a loan of money to one of the belligerent parties is considered to be a violation of neutrality,” he emphasizes the fact that he is referring to public loans by citing Pickering’s instructions of March 2, 1798, to Messrs. Pinckney, Marshall, and Gerry as to a proposed loan from the political representatives of a neutral state to a belligerent one.<sup>63</sup> Under such instructions the American envoys declined to consider the application of the Directory for a loan of thirty-two millions of Dutch florins to France, then at war with England.<sup>64</sup> A neutral power has no right to guarantee a loan issued by its belligerent friend.

§ 623. Neutral individuals may lend money to belligerent states.—Usage has entirely discredited those publicists who have attempted to give an unreasonable and impracticable extension to the foregoing rule by denying, directly or by implication, to individuals composing a neutral community the exercise of a right withheld for obvious reasons from the state as such. Bluntschli<sup>65</sup> claims in direct terms not only that a state must abstain from the making of loans for war purposes, but that the rule is equally applicable to loans negotiated by private individuals. Phillimore, after criticising Vattel, opposes both classes of loans as “a manifest frittering away of the important duties of the neutral,”<sup>66</sup> a conclusion to which Halleck<sup>67</sup> definitely subscribes. Calvo,<sup>68</sup> while admitting that all loans made during war are illicit, holds that as the neutral

<sup>62</sup> Second Hague Convention, sec. iv. “On the detention of belligerents and the care of the wounded in neutral countries.” Arts. LVII and LVIII.

<sup>63</sup> Comm. I, p. 116, note (b). Wharton (Int. Law Dig., § 390) says “the loan proposed in this case was to be from the political representatives of a neutral state to a belligerent.” Hall (p. 620, note 1) overlooked that fact when he wrote: “Kent merely says that ‘a loan of money to one of the belligerent parties is considered to be

a violation of neutrality,’ but it does not appear whether this language is intended to include private as well as public loans.”

<sup>64</sup> The loan was asked, in addition to fifty thousand pounds sterling, as a “*douceur*” to the Directory.

<sup>65</sup> Volkerr, § 768.

<sup>66</sup> Int. Law, iii, § CLII. Vattel, III, § 110.

<sup>67</sup> Int. Law (Baker ed.), ii, p. 163.

<sup>68</sup> *Droit Int.*, § 2331.

state cannot control the acts of individuals in certain commercial transactions it cannot be held responsible for their consequences. Phillimore and Halleck rest their contention mainly upon the dictum of Lord Chief Justice Best, who expressed the opinion in *De Wurtz v. Hendrick*<sup>69</sup> that it is "contrary to the law of nations for persons residing in this country, to enter into engagements to raise money, by way of loan, for the purpose of supporting subjects of a foreign state in arms against a government in alliance with our own." The statement then follows that a like case had recently been decided "in which the Lord Chancellor entertained the same opinion as myself, and in which he is stated to have said, that English courts of justice will not take notice of, or afford any assistance to persons who set about raising loans for subjects of the king of Spain, to enable them to prosecute a war against that sovereign; or, at all events, that such loans could not be raised without the license of the crown." The rule thus laid down by the English courts declaring it to be illegal for individuals to raise money by way of loan to assist subjects of a foreign state, so as to enable them to prosecute a war against their own government, while the latter is in amity with that of the lenders, has been expressly affirmed by the Supreme Court of the United States.<sup>70</sup> And yet the fact that money is an article of commerce, whose transmission can be so manipulated by private individuals as to baffle all attempts upon the part of governments to control it, has made necessary the rule exempting them from the neutral duty of interference when the transaction is merely a commercial one, providing for the *bona fide* payment of reasonable interest. Vattel, clearly perceiving the real difficulty, even in his day, drew the distinction between a case in which money is loaned in the ordinary course of business "for the sake of gaining an interest upon it," and a case in which a loan is made with a definitely hostile purpose. As he has expressed it, "if the loan were evidently granted for the purpose of enabling an enemy to attack me this would be concurring in the war against me."<sup>71</sup> And so when Canning, in 1823, called upon the British law officers (including Copley, afterwards Lord Lyndhurst) for advice as to the legality of loans and subscriptions "for the use of one of two belligerent states by individual subjects of

<sup>69</sup> 9 Moore's Common Pleas Reports, ix, p. 587.

<sup>70</sup> *Kennett v. Chambers*, 14 Howard, p. 38.

<sup>71</sup> *Droit des Gens*, III, § 110.

a nation professing and maintaining a strict neutrality between them," the reply was made that, while voluntary subscriptions of the kind in question were inconsistent with neutrality, "loans, if entered into merely with commercial views, we think, according to the opinions of writers on the law of nations, and the practice that has prevailed, that they would not be an infringement of neutrality."<sup>72</sup> In accordance with that unquestionably sound view Mr. Webster declared in 1842 that "as to advances and loans made by individuals to the government of Texas or its citizens, the Mexican government hardly needs to be informed that there is nothing unlawful in this, so long as Texas is at peace with the United States, and that these are things which no government undertakes to restrain."<sup>73</sup> Upon that basis the bourses of the world are open to the traffic in money as merchandise. During the Franco-Prussian war the French Morgan Loan and a part of the German Confederation Loan were issued in England;<sup>74</sup> and during the American Civil War the loan of the Confederate States was taken without interference in London, Frankfort, Paris and Amsterdam.<sup>75</sup> Such bonds, secured by cotton, ranked higher for a time than those of the United States.

§ 624. Neither arms nor instruments of war can be furnished by a neutral to belligerent state. An exception.—The same reason that denies to a neutral state the right to supply a belligerent with money and military contingents, denies to it the right to supply arms, ships and other instruments and materials of war. No matter whether the transfer is gratuitous or for a consideration, a neutral state has no right to engage, under ordinary conditions, in transactions with the agents of belligerent powers which must result in arming their principals with the means of injuring a friend. And yet an exception is made to that wholesome and necessary rule in favor of the right of a neutral government to continue the ordinary sales of old arms and stores from its arsenals, even though it knows that agents of belligerent powers will avail themselves of the opportunity to buy. The Congress of the United States having, by the act of 1868, directed the Secretary of War to dispose of

<sup>72</sup> See the two opinions of the British law officers printed in Halleck (Baker ed.), ii, pp. 164-165.

<sup>73</sup> Mr. Webster to Mr. Thompson, Ex. Doc., 27th Congress, 1841-1842.

<sup>74</sup> Wharton, Int. Law Dig., § 390.

<sup>75</sup> The remonstrances of Mr. Adams, the American minister, against the acts of private bankers and buyers were disregarded by the British Govt. Cf. Adams's Life of C. F. Adams, p. 346.

such arms and stores as were unsuitable for use, sales of them began before the commencement of the war between France and Germany. Perels<sup>76</sup> says that the government of the United States sold in October, 1870, at public auction 500,000 muskets, 163 carbines, 35,000 revolvers, 40,000 sabers, 20,000 horse trappings, and 50 batteries with ammunition; and that the export from New York to France from September to the middle of December of that year included 378,000 muskets, 45,000,000 *patronen*, 55 cannon, and 2,000 pistols, which were paid for through a French consul. When early in 1872 complaints were made to the Senate that certain "sales of ordnance stores" had been made by the government, during the preceding fiscal year, to parties who were agents of the French government, and that the same had been used in the war then pending with Germany, a committee was appointed to investigate the subject. That committee said in its report that "Congress having, by the act of 1868, directed the Secretary of War to dispose of these arms and stores, and the government being engaged in such sales prior to the war between France and Germany, had a right to continue the same during the war, and might, in the city of Washington, have sold and delivered any amount of such stores to Frederick William or Louis Napoleon in person, without violating the obligations of neutrality, providing such sales were made in good faith, not for the purpose of influencing the strife, but in the execution of the lawful purpose of the government to sell its surplus arms and stores."<sup>77</sup> While it cannot be denied that the government of the United States was clearly within its legal rights, it is certain that under such circumstances the neutral state should do all in its power to remove any just cause of complaint. In 1825 Sweden, in order to reduce its navy, offered six frigates for sale to Spain; and after she had refused to buy, three of them were sold to an English commercial firm, who were afterwards suspected of acting in the matter as agents of Mexico, then in revolt against the mother country. When the vessels were about to be handed over to the recognized agent of Mexico in England Sweden, after an earnest remonstrance from Spain, rescinded the contract at considerable pecuniary loss to herself, although the ships had been sold in ignorance of their ultimate destination.<sup>78</sup> In the same spirit the British government, when it

<sup>76</sup> *Int. Seerecht*, 251.

<sup>78</sup> Martens, *Causes Célèbres*, v,

<sup>77</sup> Wharton, *Int. Law Dig.*, § 391. 229.

found out that an old and unserviceable gunboat, called the *Victor*, sold to a private firm, had been resold to agents of the Confederate government, gave orders that no more ships of the royal navy should be disposed of until after the end of the civil war then pending.<sup>79</sup>

§ 625. **Neutral individuals may supply instruments and materials of war to belligerent state.**—The same mercantile considerations which permit loans of money by neutral individuals to belligerent states, permit such individuals to supply, at their peril, instruments and materials of war. President Pierce correctly interpreted the law of nations when he said: “In pursuance of this policy, the laws of the United States do not forbid their citizens to sell to either of the belligerent powers articles contraband of war, or take munitions of war or soldiers on board their private ships for transportation, and although in so doing the individual citizen exposes his property or person to some of the hazards of war, his acts do not involve any breach of national neutrality, nor of themselves implicate the government. Thus, during the progress of the present war in Europe, our citizens have, without national responsibility therefor, sold gunpowder and arms to all buyers, regardless of the destination of those articles.”<sup>80</sup>

**Sale of Warships.**—As heretofore explained an American merchant may build and fully arm a vessel, supply her with stores, and offer her for sale in our own market; or he may, without a violation of law, send out a vessel so equipped, under the flag and papers of his own country, with no more crew than is necessary for navigation, and then take the chances of capture as contraband merchandise, of blockade, and of a market in belligerent port,—provided he performs such acts without the guilty intent involved in an arrangement or understanding with a belligerent that she shall be employed in hostilities when sold.<sup>81</sup> In other words, such a vessel, regarded as a mere implement of war, may be sold or manufactured to order within neutral territory, and afterwards transported therefrom, under such circumstances as will place the entire transaction within the scope of the principles applicable to the sale, manufacture, shipment, and transportation of articles contraband of war. A different result will follow, however, if

<sup>79</sup> British State Papers, North Adopted by Sir W. Harcourt, in Am., No. 2 (1873), pp. 104-105. Historicus, 132.

<sup>80</sup> Second Annual Message, 1854. <sup>81</sup> See above, pp. 661-62.

the preparation and dispatch of such a ship is coupled with such an intent as will convert them into the commencement of a hostile expedition.

§ 626. **Neutral territory not to be used as base of operations for warlike expeditions, military or naval.**—A neutral state cannot permit its territory to be used as a base of operations in the technical sense, from which a force, military or naval “draws its resources and reinforcements, that from which it sets forth on an offensive expedition, and in which it finds refuge at need.”<sup>82</sup> As such expeditions have their inceptions, as a general rule, in secret acts, not involving force, whose real significance cannot be understood until their completion at a subsequent time, and in some place remote from the neutral territory, it is difficult to define the degree of diligence which the neutral must employ under such circumstances. The starting point of any effort to ascertain what kind of incipient acts a neutral is expected to prevent must begin, however, with an understanding of what a warlike expedition really is. The leading case usually cited to illustrate its simplest form is that of the *Twee Gebroeders*<sup>83</sup> in which Lord Stowell released several Dutch merchantmen,—captured in 1800 just outside the limits of neutral jurisdiction by boats sent out by an English ship lying in neutral Prussian waters,—on the ground that no fruit could be reaped from proximate acts of war originating in neutral territory. More complicated conditions were involved in what is known as the *Terceira* affair, which grew out of the civil war originating in Portugal in 1828 between the partisans of the youthful *Donna Maria* and those of her uncle, *Don Miguel*. When a body of troops in the service of the former, which had taken shelter in England, endeavored to organize an expedition there in favor of their mistress, the British government warned them that it would not permit the execution of such a design. After declaring that their only object was to send unarmed Portuguese and Brazilian subjects in merchant vessels to Brazil, the refugees embarked at Plymouth in 1829 about seven hundred men under Count *Saldanha* in four unarmed vessels for *Terceira*, one of the Azores that had remained faithful to *Donna Maria*’s cause. While off *Port Praya* in *Terceira*, to which place the necessary arms had been shipped as merchandise for its use, this expedition, unarmed, but under military command, was intercepted by

<sup>82</sup> Jomini, *Précis de l’Art de la Guerre Ire partie*, ch. iii, art. 18.

<sup>83</sup> 3 C. Rob. Admr., p. 162.

the British ship *Ranger*, dispatched to prevent a landing at the real destination. When the Portuguese commander, who was told that he might go where he would outside of the Azores, refused to yield to anything but force, his vessels were conducted within a few miles of the English Channel, from which they proceeded to Brest.<sup>84</sup> The fact that the British government made a mistake in arresting this expedition in Portuguese waters and on the high seas, where it really had no jurisdiction, instead of preventing its departure from the English waters, where its right to deal with it was complete, does not impair the value of the incident as an assertion of the principle that a warlike expedition fitted out within neutral territory is illegal, even when its individual members are unarmed, provided they are organized as soldiers and placed under military command. That a hostile expedition does not exist, in contemplation of international law, without such organization and leadership, was maintained by the government of the United States at the outbreak of the Franco-Prussian war, when large numbers of Germans and Frenchmen resident here returned in order to discharge their military obligations to their respective countries. When the attention of Secretary Fish was called to the embarkation at New York of nearly twelve hundred Frenchmen in two French ships, laden with a cargo of rifles and ammunition, he held that the vessels could not be regarded as a warlike expedition against Germany, because the arms and ammunition were subjects of legitimate commerce, and the unarmed and unofficered Frenchmen on board without any kind of organized military discipline.<sup>85</sup> That view Hall declared to be undoubtedly correct as "it was impossible for the men and arms to be so combined on shipboard, or soon after their arrival in France, as to be capable of offensive use. It would have been a different matter if the men had previously received such military training as would have rendered them fit for closely proximate employment."<sup>86</sup> From these precedents the conclusion may be drawn that a warlike expedition, as that term is now understood, is one which is organized with a view to proximate acts of war, and which goes forth, under military or naval command, with a present purpose of engaging in hostilities. It

<sup>84</sup> Annual Register for 1829, vol. 738-781, and xxiv, 126-214; Phillimore, iii, §§ CLIX, CLX, Bulwer's Life of Lord Palmerston, i, 301-2.

<sup>85</sup> Mr. Thornton to Lord Granville, Aug. 26, 1870; State Papers, 1871, lxxi, 128.

<sup>86</sup> Int. Law, p. 631.

is not necessary, however, that the members of such an expedition should take with them the arms they expect to use; they need not be in a position to begin fighting the moment they cross the neutral frontier. A mere preparation or plan to violate neutral territory does not constitute an expedition without overt acts. "If the means provided were procured to be used on the occurrence of a future contingent event, no liability is incurred under the statute. If, also, the intention is that the means provided shall only be used at a time and under circumstances when they could be used without a violation of law, no criminality attaches to the act."<sup>87</sup> Augmentations of warlike forces, military or naval, within neutral territory are as clear a violation of such territory as original equipments.

§ 627. Warlike expeditions organized outside of neutral territory from elements issuing separately from it.—It is not generally understood, perhaps, that Captain Semmes of the Alabama, who was the guiding and directing force in the fitting out of the expeditions whose destructive work resulted in the claims "generically known as the Alabama Claims," was one of the most astute and accomplished lawyers of his time.<sup>88</sup> As his notable work shows he was perfectly familiar with the infirmities of the British Foreign Enlistment Act of 1819 with whose prohibitions he was called upon to deal. He tells us that "the Alabama had been built in perfect good faith by the Lairds. When she was contracted for, no question had been raised as to the right of a neutral to build, and sell to a belligerent such a ship. \* \* \* Notwithstanding this practice of good faith, on our part, and our entire innocence of any breach of the laws of nations, or of the British Foreign Enlistment Act, Lord John Russell had been intimidated to such an extent, that the ship came within an ace of being detained. But for the little ruse which was practiced, of going on a trial-trip, with a party of ladies, and the customs officers, mentioned by Mr. Laird, on board, and not returning, but sending our guests back in a tug, there is no doubt that the Alabama would have been tied up, as the Oreto or Florida had been, in court. She must have been finally released, it is true, but the delay itself would have been of serious detriment

<sup>87</sup> U. S. v. Lumsden, 1 Bond, 5, War he practiced for many years  
construing sec. 6 of the neutral- at Mobile, where the author often  
ity act of 1818 (Rev. Stat., § 5286). took part with him in the trial of

<sup>88</sup> After the close of the Civil causes, civil and criminal.



to us.”<sup>89</sup> Captain Semmes clearly understood that the framers of the British Foreign Enlistment Act of 1819 had not possessed sufficient foresight to provide for the prevention of warlike expeditions organized outside of neutral territory by the combination of elements issuing separately from it. As an English publicist has recently stated the matter: “Who may know the intent of a crafty and secret mind? A thousand tricks and devices may be employed to disarm suspicion. An unarmed vessel may be dispatched from a neutral port, arms and men from another, and the intent with which these elements were prepared and gathered together may only become apparent on their combination at some spot far beyond the bounds of the neutral jurisdiction. May the neutral monarch suffer his laws thus to be rendered futile? If otherwise, when do well-grounded suspicions amount to reasonable ground for active action, and circumstantial details constitute legal proof?”<sup>90</sup> In the case as made before the arbitral tribunal at Geneva it appeared that the *Alabama*, wholly unarmed, left Liverpool in July, 1862, and afterwards received her guns and ammunition at Terceira, partly from a vessel which cleared two weeks later from Liverpool for Nassau, and partly from another vessel which cleared from London for Demarara. The *Georgia*, built near Glasgow, after clearing from that port in March, 1863, under the name of the *Japan*, on a pretended voyage to China, received her arms and ammunition off the French coast from the steamer *Alar*, which had sailed from Newhaven in Sussex. Upon that state of facts the United States claimed that those two vessels were, in contemplation of law, “armed within British jurisdiction.” The great unsettled question which the Geneva tribunal has left for future solution is that involving the duty of a neutral state to vindicate its neutrality by preventing the departure from its jurisdiction of the elements out of whose combination, outside of its limits, an hostile expedition may be formed. “When do well-grounded suspicions amount to reasonable ground for active action, and circumstantial details constitute legal proof?” No more satisfactory answer has so far been made than that of Dana, who says that “the intent covers all cases, and furnishes the test. It must be immaterial where the combination is to take place, whether here or elsewhere, if the acts done in our territory—whether acts of building, fitting, arm-

<sup>89</sup> *Service Afloat*, pp. 401-2.

<sup>90</sup> Walker, *Science of Int. Law*, p. 500.

ing, or of procuring materials for these acts—be done as part of a plan by which a vessel is to be sent out with intent that she shall be employed to cruise.”<sup>91</sup>

§ 628. Neutral states should prevent acceptance of letters of marque by their citizens.—It is evident that the states who signed the Declaration of Paris, abolishing privateering, cannot offer privateering commissions in the form of letters of marque to neutral seamen. The fact is that the right to offer such letters to such seamen has, for more than a century, been forbidden by the common law of nations, and neutral governments have accepted the correlative duty of prohibiting the acceptance of such commissions by their citizens.<sup>92</sup> A disposition has sometimes been shown to regard as pirates persons taking letters of marque from one of two belligerents, their own state being at peace with the other. When France was at war with Mexico in 1839 Admiral Baudin, commanding the fleet of the former, gave notice that every privateer sailing under the Mexican flag, of which the captain and two-thirds of the crew were not Mexican subjects by birth, would be regarded as piratical and treated as such; and during the war between Mexico and the United States, which began in 1846, the government of the latter declared that it could not “recognize the lawful existence of Mexican privateers in the Mediterranean. \* \* \* These corsairs take to the seas, under color of commissions issued in blank and filled up in a Spanish port by some inferior agent, from whom they have purchased the privilege to plunder American vessels. \* \* \* Our vessels of war in the Mediterranean will be ordered to seize and send home for trial as pirates, under the treaty of 1795 and the act of March 3, 1847, all Spanish subjects who have accepted and acted under such Mexican commissions.”<sup>93</sup> In obedience to that growing public sentiment, before which the older usage has practically disappeared, the United States, the most important of the powers that failed to sign the Declaration of Paris, has manifested its disposition in no uncertain way to treat as piracy the capture of vessels belonging to one belligerent by neutral privateers in the service of the other. By the Acts of June 14, 1797, and of April 24, 1816, citizens of the

<sup>91</sup> Dana's Wheaton, Note 215, p. 563.

<sup>92</sup> Report of Neutrality Law Commissioners, 1868, Appendix, iv.

<sup>93</sup> Mr. Buchanan, Sec. of State,

to Mr. Saunders, June 13, 1847. MSS. Inst., Spain. See also Ortolan, *Dip. de la Mer*, II, ch. xi, and Annexe H.

United States were forbidden to take part in the equipment or manning of privateers to act against nations at peace with it; and in treaties made with France, the Netherlands, Sweden, Prussia, Great Britain, Spain, Central America, Brazil, Chile, Venezuela, Peru, Bolivia, Ecuador, Guatemala and San Salvador, those powers were asked to declare that they would consider as piracy the acceptance of letters of marque by the subjects of a state from one foreign country against the other.<sup>94</sup> While some of those treaties have been abrogated enough survive to rebut the presumption that there is any purpose to depart from the general line of policy they were intended to embody.

§ 629. **Power of neutral state to prevent infractions of its neutrality.**—Whenever a belligerent attempts to violate the reasonable regulations made by a neutral for the protection of its neutrality, or the general rules provided by the law of nations for that purpose, such neutral may resort to remedies, diplomatic, administrative or judicial. If there is no urgent reason for immediate action remonstrance should be made through the ordinary diplomatic channel so that the offending state may have the opportunity spontaneously to offer adequate redress. There is no reason, however, for such a preliminary when it is necessary for the neutral to prevent the completion of a wrong, or to inflict exemplary punishment upon the wrongdoer, by the prompt and summary application of its administrative machinery. If a belligerent ship undertakes to make a capture in a neutral port the local authorities may employ all necessary force to thwart the attempt, regardless of any consequent damage they may inflict upon the aggressor, who can only blame himself for such a result. Publicists of the highest reputation have rightfully maintained that when it becomes necessary for a state to vindicate its neutrality it may pursue the peccant ship into the open sea and arrest it there just as it would have the right to do in the event of an infraction of its municipal laws.<sup>95</sup> Lawrence's

<sup>94</sup> Martens (R), ii, 597; *Ibid.*, iii, § 342; Woolsey, *Int. Law*; § 58; 447; *Ibid.*, 576; *Ibid.*, iv, 45; *Ibid.*, v, 678; (N.R.) vi, 836; *Ibid.*, ix, 24, 447; *Ibid.*, xiii, 564, vi, 122; (N. R. G.) iv, 317; *Ibid.*, xiv, 318; *Ibid.*, xv, 77. Wharton, *Int. Law Dig.*, § 385; Hall, pp. 273-4.

<sup>95</sup> Bluntschli, *Droit Int. Codifié*, Wheaton, p. 42.

earnest contention<sup>96</sup> that such a right cannot be justified on principle is very much weakened by the fact that the eighth of the articles adopted at Paris, in March, 1894, by the Institut de Droit International, on the subject of territorial waters, declares that the territorial state may continue on the high seas a pursuit commenced in its waters,—the right so to follow and capture to cease in the event the flying vessel gains a port of its own country or of a third power.<sup>97</sup> No matter whether property captured in violation of neutrality remains from the first in neutral waters where it has been illegally taken, or is brought back to them some time after the capture, the neutral sovereign must assume the duty of undoing the wrongful act of the belligerent. “In a case in which a captured vessel be brought, or voluntarily comes, *infra presidia*, the neutral nation extends its examination so far as to ascertain whether a trespass has been committed on its own neutrality by the vessel which has made the capture.”<sup>98</sup> Such jurisdiction extends even to a case in which a capturing vessel, after having received its original warlike equipment or a subsequent augmentation of its warlike force within neutral territorial waters, returns with a prize to the port whose neutrality it has violated. The leading case in the line in which that doctrine has been maintained is that of the *Santissima Trinidad*,<sup>99</sup> in which Judge Story declared that while captures made during the same cruise are infected with the character of torts, and must be restored to the original owner when the property is brought within our jurisdiction, an augmentation of force, or illegal outfit, does not affect any capture made after the original cruise, for which such augmentation or outfit was made, is terminated. Despite the fact that restoration in all such cases may be made by administrative act, it is generally

<sup>96</sup> Principles of Int. Law, p. 555.

<sup>97</sup> *Annuaire de l'Institut de Droit International*, 1894-95, p. 330.

<sup>98</sup> The *Estrella*, 4 Wheaton, p. 309. See also The *Betsey* Cathcart, Bee. 282; *Talbot v. Janson*, 3 Dallas, 157; *La Amistad de Rues*, 5 Wheaton, 385; *Ortolan, Dip. de la Mer*, ii, 298; *Phillimore*, iii, §§ clvii-viii, cccxxvii; *Pando*, III, sect. vii, § 192. According to Calvo (§ 2843) the right of the neutral sovereign is limited to cases of capture within his jurisdiction.

<sup>99</sup> 7 Wheaton, 285. If the captured property is carried into the jurisdiction of the belligerent whose subjects are the wrongdoers, courts of such belligerents must do justice to the neutral state when application is made to them. *Twee Gebroeders*, 3 C. Rob., Admr., 162; *La Nostra Señora del Carmel contre la Vénus de Médecis*; *Pistoze et Duverdy, Traité des prises Maritimes*, i, 106; *Ortolan*, ii, 298; *Hall*, pp. 645-6.

advisable to hand over such controversies to the neutral prize court for authoritative adjudication.

§ 630. **Reparation by neutral state for failure to perform its obligations as such.**—When the rights of a neutral sovereign were so lightly regarded that either belligerent dared to defy them and set them aside whenever he possessed the necessary physical force, it was held that the other belligerent had no claim upon the neutral for redress, as the latter was not a free agent under such circumstances. Not until the stricter conception of neutral duty had so far developed as to suggest the necessity for arming the neutral state with certain large powers and privileges was the corollary established that the possession of them compelled the neutral so to assert them as to vindicate its neutrality. When that point was reached it was not difficult to formulate the rule under which a neutral state is now required to make reparation to a belligerent who has been seriously and specifically injured by its failure to perform its neutral obligations. The fact that such a rule is a part of modern international law has not been an open question since the meeting of the arbitral court at Geneva, whose very existence was the strongest possible affirmation of it. Under the terms of the rule as now understood the neutral state is expected not only to procure redress for injuries inflicted upon a belligerent within its territory, but also to respond directly for any serious and specific damages suffered by a belligerent through such violations of its neutrality as it can rightfully be expected to prevent. The degree of diligence which the neutral is required to exercise in the vindication of its neutrality has been fully considered already. When the liability of the neutral to the belligerent has once accrued by reason of the lack of reasonable vigilance, negligence, or willful omission upon its part, the exact nature and extent of the reparation cannot be determined by any fixed rule. It can only be settled by negotiation between the powers concerned in reference to the special facts and circumstances of the particular case. When a neutral state undertakes to procure redress for injuries done to a belligerent within its territory, it should act just as if its own dignity and interest were involved, and demand that the wrongdoer restore, as far as possible, the matter or thing affected to the condition in which he found it. In 1864 the government of Brazil demanded immediate reparation from the cabinet at Washington for the wrongful seizure in the harbor of Bahia of the Confederate cruiser Florida by the United

States steamer Wachusett. As exact reparation was impossible by reason of the fact that the Florida had foundered at Hampton Roads, the American government did what it could by surrendering the crew, and by offering special satisfaction to the violated sovereignty of Brazil by dismissing the consul at Bahia, by sending the captain of the Wachusett before a court-martial, and by saluting the flag of the Empire at the spot where the offence occurred. A year before, after the passenger boat Chesapeake, plying between Portland and New York, had been captured on its voyage by a small band of Confederates, she was pursued by an armed vessel of the United States and seized in British waters. For that violation of the territorial rights of Great Britain, of which its officers had been guilty, the United States not only apologized, but surrendered the vessel with the two captors found on her, and a third taken out of an English ship lying alongside.<sup>1</sup>

<sup>1</sup> For more complete statements, see Dana's Wheaton, notes 207 and 209; Wharton, Int. Law Dig., §§ 27, 399; Calvo, §§ 1032, 1033, 1079. As to the right of a neutral state to demand the return of property taken within its limits, see the French cases of La Christiana Colbiornsen and Le Daniel Fred-  
erick. Merlin, Rép. XIII, pp. 111-114. The first was restored as being within neutral territory at the time of capture; the second was condemned as having been *à plus d'une double portée du canon* from the neutral coast at the time of capture.

## CHAPTER III.

### DUTIES OF BELLIGERENT TOWARDS NEUTRAL STATES.

§ 631. **Notice to neutrals of commencement of war.**—While it is undoubtedly true, as heretofore explained,<sup>1</sup> that there is no necessity as between belligerents for notice of the fact that war has actually begun, or about to begin, as between a belligerent and neutral, there is a necessity for such notice for the reason that as there is no privity between the parties last named, neither duties nor liabilities can be imposed upon the neutral until the fact of the existence of war had been brought home to him. It cannot be claimed, however, that the law of nations requires a belligerent to give to a neutral express and formal notice of the fact that war has begun,—he can be held to the performance of neutral duties from the time when adequate overt acts should convince him of its existence. As war often breaks out before the issuance of a manifesto, in consequence of unforeseen events, or from the execution of conditional orders given to a military force, its beginning as between the belligerents themselves may date from the commission of any act which either may elect to consider hostile. But such an election does not bind the neutral; he can only be required to perform neutral duties from the time when it can be claimed that he has received adequate notice, actual or constructive, of the existence of hostilities. The issuance of a formal manifesto upon the part of a belligerent informing all the world of the commencement of war is not, therefore, a mere act of courtesy which he owes to neutrals, but a prudential act in his own interest enabling him to prove beyond question that, from its date, all third powers must obey the laws of neutrality so far as he is concerned. What has thus been said “as to the moment from which states, and therefore their subjects, become affected by the consequences of non-neutral action does not apply to cases in which neutral persons are engaged knowingly or even ignorantly in carrying out a naval or military operation for an intending belligerent.”<sup>2</sup>

§ 632. **Hostilities not to be carried on in neutral territory.**—The duty of a belligerent not to carry on hostilities in neutral territory is reciprocal to that which compels the neutral him-

<sup>1</sup> See above, p. 454.

<sup>2</sup> Hall, Int. Law, p. 597, note 1.

self so to vindicate his neutrality, by armed force if necessary, as to prevent a belligerent from infringing it. These correlative duties were the outgrowth of a common idea and matured side by side. The only legitimate fields for hostilities are territories of either belligerent, the high seas, or territory belonging to no one. The boundaries with which international law incloses the domain of a neutral state, whether consisting of land or water, must not be crossed by either belligerent without the neutral's consent, or in certain exceptional cases under the pressure of irresistible necessity. The ancient contention of Bynkershoek<sup>3</sup> that a belligerent has a right to pursue an enemy's vessel into neutral waters and complete her capture there, *dum ferveat opus*, has not received the general sanction and approval necessary to make it a part of the law of nations. One of the most generally recognized exceptions to the rule protecting neutral territory against invasion is that which concedes the right of a belligerent to cross the boundaries of a neutral for the purpose of self-defense when the necessity for the same is "instant, overwhelming, leaving no choice of means, and no moment for deliberation." The best illustration of that exception is to be found in the case of the *Caroline* heretofore cited for other purposes.<sup>4</sup> In that case the commander of a British force in Canada suddenly crossed the frontier of the United States in order to arrest and destroy a hostile expedition then being fitted out upon American soil for the purpose of invading Canadian territory. The government of the United States admitted that such invasions are defensible when the necessity for self-defense is instant and overwhelming. And yet even after the British cabinet had demonstrated the existence of such a necessity, it felt called upon to apologize for the action of its military commander for which it assumed official responsibility.

§ 633. No direct preparation for hostile acts to be made in neutral territory.—Before the present conception of neutral duty reached its maturity the rule which denies to a belligerent the right to carry on actual hostilities in neutral territory was so enlarged as to compel him to abstain from making in such territory direct preparation for acts of hostility. The essence of the prohibition last named has been already considered in what has been said in reference to the duty of a neutral to forbid the fitting out within its limits of hostile expeditions,

<sup>3</sup> *Quaest. Jur. Pub.*, I, 8.

<sup>4</sup> See above, pp. 171, 405.



whether such expeditions consist of the equipment of land forces under organized military command or of a ship or ships of war prepared in neutral ports for actual hostilities the moment they pass the neutral boundary.<sup>5</sup> It is, therefore, unnecessary to say more on those subjects than that the belligerent is in duty bound to abstain from doing whatever the neutral is required to prevent. The prohibition in question assumes its greatest importance so far as it relates to the conduct of belligerent warships in neutral waters to be specially considered hereafter.

§ 634. **All reasonable regulations for protection of neutrality to be respected.**—The restrictions to which a belligerent is subject in neutral territory are either those fixed and permanent regulations embodied in the law of nations of general application, or such as are contained in the municipal law of the neutral, depending entirely upon his will, which may be made or unmade, strengthened or relaxed at his pleasure. Of the latter no state has a right to complain so long as they are reasonable in themselves and are applied with absolute impartiality to both combatants. Such regulations must be faithfully observed either by land forces crossing a neutral frontier under circumstances subjecting them to internment or by belligerent warships seeking an asylum in a neutral port for the purpose of obtaining provisions or supplies. If they are not so observed, the neutral is armed with the present coercive power to enforce them, and also with the right to demand reparation for their infraction.

§ 635. **Belligerent warships in neutral waters. Hospitality and asylum.**—The rule forbidding the land forces of belligerents to enter neutral territory is greatly relaxed in its application to the entry of warships into neutral ports. Chief Justice Marshall has thus expressed it in the notable case in which the present status of warships in neutral waters was first authoritatively defined: “But the rule which is applicable to armies does not appear to be equally applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country, and the dangers often, indeed generally, attending it, do not ensue from admitting a ship of war, without special license, into a friendly port. A different rule, therefore, with respect to this species of military force has been generally

<sup>5</sup> See above, p. 678.

adopted. If, for reasons of state, the ports of a nation generally, or any particular ports be closed against vessels of war generally, or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and to remain in them while allowed to remain, under the protection of the government of the place."<sup>6</sup> Only in the event such a vessel is driven by stress of weather, or by unseaworthiness to seek shelter, can it demand, as a matter of strict law, the right of asylum and hospitality in a neutral port. Under all circumstances the neutral can couple the enjoyment of such privileges with reasonable restraints which the visitor must not refuse to obey. In addition to the observance of all quarantine rules, local revenue and harbor regulations,<sup>7</sup> the belligerent ship must respect all prohibitions designed to prevent the use of the neutral port for purposes other than those of immediate necessity. While the fighting force of such a ship may not be reinforced or recruited in such a port, nor supplies of arms and warlike stores or other equipments of direct use for war obtained, such supplies and equipments may be purchased as are necessary to sustain life or carry on navigation. If she is in need of repairs she may procure whatever is needful to put her in a seaworthy condition, including masts, spars and cordage. But she cannot make such structural changes as will increase her efficacy as a fighting machine, either of offense or defense. She may take in such provisions as she needs; and, if a steamer, she may purchase enough coal to enable her to reach the nearest port of her own country.

**Substance of Azuni's rules.**—The duties of warships in neutral ports have been summarized in the following rules, which are substantially those given by Azuni,<sup>8</sup> as of long practice in Europe: (1) All vessels of war, including privateers, must, during such stay, live in the greatest peace and tranquillity with all persons, and especially with the subjects and vessels of their enemies, though privateers or ships of war. (2) They are not allowed to receive on board, for the purpose of aug-

<sup>6</sup> *The Exchange v. McFaddon*, 7 Cranch, p. 141.

<sup>7</sup> See above, p. 305.

<sup>8</sup> 2 *Maritime Law*, ch. V, art. I, § 7. As to the treatment of ves-

sels of the revolted American colonies in Dutch ports, and protests of the British government, see 1 Martens, *N. Causes Célèbres*, 113. See also 2 *Ib.*, pp. 183, 332.

menting the number of their crews, any mariner of any nation whatever, not even those of their own country, who might happen to be enrolled for the military service. (3) They cannot increase either the number or size of their guns, nor the quantity of their warlike stores. Any capture on the same cruise after a violation of this rule is unlawful. (4) They ought not to keep watch in the port, nor endeavor to gain information of vessels of their enemy, which are expected to arrive there. In case they discover any vessel of an enemy, they cannot go out of the port to attack it. If they do so the artillery and vessels of the port may be employed to compel them to return. (5) They cannot set sail as soon as an enemy's ship has weighed anchor. Twenty-four hours, at least, ought to intervene between the departure of the one and that of the other. Where that time has elapsed, if the enemy-vessel be still in sight of the port, their departure ought to be delayed, until the vessel is out of sight, and it is unknown what course she has steered. (6) They cannot lie in wait in bays or gulfs nor conceal themselves behind capes, headlands or the small islands belonging to the neutral territory, to be on the look-out and ready to chase the vessels of their enemy. They ought not, in any manner, to hinder the approach of vessels of any nation whatever to the ports and shores of neutral powers. (7) While they are within the ports or in the territorial sea of a neutral power they can employ neither force nor stratagem in order to recover prizes in the possession of their enemies, nor to deliver their countrymen who are prisoners. (8) Except in cases of necessity they can neither sell, nor ransom prizes made by them, before a legal sentence has been pronounced on the validity of the capture,<sup>9</sup> although probable prizes may be repaired so as to be able to make the voyage to the prize port. To these may be added the rule which during the recent war with Spain drove Cervera from the Cape Verde Islands and Dewey from Hong Kong. (9) They can lie in such port only long enough to complete repairs or to procure supplies, including coal to last them to a home port or nearer destination, and they can revisit the same harbor only after a reasonable interval, to be declared by the neutral state, and generally fixed at from one to three months. (10) When not otherwise directed they may land their prisoners, but these thereupon become free. So long as prisoners are kept on board, however, the port authorities will

<sup>9</sup> See the case of the Chesapeake, miralty court. As to repairs, 2 before the Nova Scotia vice-ad- Opin. Atty. Gen. 86.

not interfere, and the fact that they are in friendly waters does not release them.<sup>10</sup>

**Negrin's rules.**—Negrin<sup>11</sup> has summarized the conditions upon which belligerent vessels are now admitted into neutral ports as follows: (1) The greatest harmony must be observed and the perfect peace of the port kept even with one's enemies; (2) there must be no recruiting to increase or complete the crews; (3) there must be no increase in the caliber of the artillery, and there must be no taking on of arms and munitions of war by war ships or privateers; (4) the place of asylum must not be used for the purposes of watching enemy ships or for obtaining information as to their future movements; (5) the port must not be abandoned until twenty-four hours after the departure of the squadron or ship of the enemy, mercantile or warlike, found therein; (6) no aid must be given, either by force or stratagem, to prizes found in the port; (7) and no attempt must be made to sell those brought there until they have been declared legitimate by a competent tribunal. It may be added that while it is within the right of a nation to prohibit the entry of warships of another, such an act is generally regarded as an affront. The British government so regarded the action of President Jefferson when, after the affair of the *Leopard* and *Chesapeake*, he issued a proclamation excluding British ships of war from American ports.<sup>12</sup>

§ 636. **The twenty-four hours' rule. Nashville and Tuscarora.**—One subject embraced in the foregoing rules is so important as to require more extended consideration. The old rule permitting a vessel of war to enjoy the security of neutral waters for as long a time as seemed good to her began to be limited in the last half of the eighteenth century by the establishment of regulations fixing hours of sojourn of belligerent vessels within such places, and interposing definite intervals between the sailings of such craft as were likely to come into hostile contact with each other.<sup>13</sup> While commanders of vessels of war were generally permitted to relieve themselves of the inconvenience of the last requirement by giving their word

<sup>10</sup> Vattel, III, c. 7, § 132; 1 Kent Commentaries, 109; But see Vattel, III, c. 7, § 109, note; Halleck, Int. Law, p. 870.

<sup>11</sup> *Derecho International Marítimo*, p. 180.

<sup>12</sup> See Mr. Canning to Mr. Mon-

roe, Sep. 23, 1807. 3 Am. St. Papers (For. Rel.), 200.

<sup>13</sup> For the rules laid down by Spain in 1759, see Ortolan, *Dip. de la Mer*, ii, 257; for those laid down by the Grand Duke of Tuscany, in 1778, see Martens (R), iii, 25. As

not to attack any vessel issuing from a neutral port shortly before them, commanders of privateers, who were often entirely excluded by reason of the disfavor in which they were held, were required to submit to a detention of twenty-four hours.<sup>14</sup> That rule has been extended to public ships of war by Great Britain, France, the United States, Italy and Holland. How near the new rule had approached to general acceptance at the outbreak of the American Civil War may be inferred from the following statement of Mr. Bernard, made not long thereafter: "The rule that when hostile ships meet in a neutral harbor, the local authority may prevent one from sailing simultaneously with or immediately after the other, will not be found in all books on international law. It is, however, a convenient and reasonable rule; it has gained, I think, sufficient foundation in usage, and the interval of twenty-four hours adopted during the last century in a few treaties and in some marine ordinances has been commonly accepted as a reasonable and convenient interval."<sup>15</sup> In 1861 France undertook to redefine and affirm both aspects of the rule by providing that a belligerent vessel should neither be permitted to remain in a port of that country for more than twenty-four hours, except in case of exhaustion of necessary provisions, injuries or stress of weather, nor to sail therefor until the lapse of twenty-four hours after the sailing of a possible opponent.<sup>16</sup> Like regulations were afterwards adopted by Great Britain, Spain and Brazil.<sup>17</sup> The practical difficulties incident to the execution of such a policy without special regu-

to the rules of the Genoese and Venetians, see *Ibid.*, 80.

<sup>14</sup> Pistoye et Duverdy, i, 108.

<sup>15</sup> *Hist. Acc. of the Neutrality of Great Britain*, p. 273. See also Bluntschli, § 776; Hall, pp. 651-52. After quoting Bluntschli's statement that "in strict law a ship of war cannot quit a neutral port for four-and-twenty hours after the departure of an enemy's vessel," Hall says, that "even if the twenty-four hours' rule becomes hardened by far longer practice than now sanctions it, the right of a neutral to vary his own port regulations can never be ousted. The rule can never be more than one to the enforcement of which a belligerent

may trust in the absence of notice to the contrary."

<sup>16</sup> M. Hautefeuille, in his *Quelques Questions du Droit International Maritime*, 1861, contended that certain of the prohibitions contained in the French order of June 10, 1861, were in conflict with previous treaties with the United States. Woolsey concludes that such order "was perfectly legal and just," because Hautefeuille "fails in his foundation of fact." *Int. Law*, p. 274. See also *U. S. Diplomatic Correspondence*, 1864, Pt. 3, p. 48.

<sup>17</sup> *Case of Great Britain*, Appendix III, pp. 19, seq.

lations became apparent to the power first named when its government was called upon to deal with the virtual blockades of the *Nashville* at Southampton, and the *Sunter* at Gibraltar. At the close of 1861, while the Confederate cruiser *Nashville* was in dock for repairs at the port first named, the United States ship of war *Tuscarora* arrived for the purpose, as it afterwards appeared, of preventing her exit. By keeping up steam and having her cables so arranged that she could slip them at a moment's notice, the *Tuscarora* claimed the right to precede the *Nashville* whenever she attempted to depart; and thus, by moving and returning within twenty-four hours, actually blockaded the latter in a British port. To terminate such a condition of things the British government, in the exercise of its clear neutral duty, ordered one of its warships to conduct the *Nashville* out to sea, at the same time forbidding her antagonist to leave the port until the lapse of twenty-four hours.<sup>18</sup> In order to prevent the repetition of such acts Great Britain adopted a series of neutrality regulations, more stringent than any hitherto published, providing, among other things, that while hostilities continued, any war vessel of either belligerent entering a British port "should be required to depart and to put to sea within twenty-four hours after her entrance into such port, except in case of stress of weather, or of requiring provisions, or things necessary for the subsistence of the crew, or repairs." In either of such contingencies the authorities of the port were commanded "to require her to put to sea as soon as possible after the expiration of such period of twenty-four hours." It was further provided that no ship of war of either belligerent should be permitted to leave a British port from which a ship of war or neutral vessel of the other belligerent had previously departed, until after the lapse of at least twenty-four hours after such departure. Although such regulations permitted the purchase of provisions and all other things necessary for the subsistence of the crews of such vessels, their supplies of coal were limited to the amounts necessary to take them to the nearest port of their own country, no two supplies of the same to be obtained in British waters within three months of each other.<sup>19</sup> Not long thereafter the French government, in its dealings with the American belligerents, fixed the limits of neutral hospitality in a

<sup>18</sup> British State Papers, North America, No. 2 (1873), pp. 242-44. 31, 1862; British State Papers, Report of the Neutrality Laws Commissioners, pp. 77, 78.

<sup>19</sup> Order in Council of January

rule which clearly drew the line between the necessary supplies furnished a belligerent vessel for the strengthening of her fighting qualities as distinguished from her "navigability."<sup>20</sup> The restrictions upon belligerent vessels in neutral waters, thus adopted by the leading European powers at the time in question, were repeated by the United States at the outbreak of the war between France and Germany;<sup>21</sup> and since that time by other powers, either wholly or in part, to such an extent that they are beginning to be regarded as rules of international law.

§ 637. **Sale of a belligerent warship in a neutral port. Case of the Sumter.**—In January, 1862, the Sumter arrived at Gibraltar in need of repairs, coal and other supplies, and before the middle of the next month her commander was complaining that he had "made every effort to procure a supply of coal without success. The British and other merchants of Gibraltar, instigated, I learn, by the United States consul, have entered into the unneutral combination of declining to supply the Sumter with coal on any terms. Under these circumstances I trust the government of Her Majesty will find no difficulty in supplying me."<sup>22</sup> The application was, however, refused, after reference to the law-officers of the crown, and in the meantime the arrival of three United States men-of-war at Gibraltar resulted in the blockade of the Sumter in that port. Her sale at public auction in the following December gave rise to a correspondence between the American minister, Mr. Adams, and Earl Russell, in which the latter said: "The neutral and belligerent have distinct rights in the matter: the neutral has a right to acquire such property offered to him for purchase, but the belligerent may, in the particular circumstances of the case, not recognize the transfer of such property, as being that of his enemy, only parted with to the neutral in order to protect it from capture on the high seas. The prize court of the belligerent, when property so circumstanced is brought before it, decides whether the transfer is fair or fraudulent."<sup>23</sup> In harmony with that declaration the Supreme Court of the United States held in the case of the

<sup>20</sup> Papers relating to the Treaty of Washington, II, p. 44; U. S. Diplomatic Correspondence, 1863, p. 715.

<sup>21</sup> President Grant's proclamation of Oct. 8, 1870. For. Rel.

<sup>22</sup> Service Afloat, p. 331.

<sup>23</sup> Earl Russell to Mr. Adams, April 10, 1863. U. S. Diplomatic Correspondence, 1863, pp. 26, seq.

Georgia<sup>24</sup> that a *bona fide* purchase for a commercial purpose by a neutral, in his own home port, of a ship-of-war of a belligerent that had fled to such port in order to escape from enemy vessels in pursuit, but which was *bona fide* dismantled prior to the sale, and afterwards fitted up for the merchant service, does not pass a title above the right of capture by the other belligerent. Such a vessel may be afterwards captured as a prize of war. The *Sumter*, however, was never captured. She escaped the vigilance of the blockading squadron, reached Liverpool in February, 1863, and after "being put under the English flag as a merchant ship, made one voyage to the coast of the Confederate States as a blockade-runner, entering the port of Charleston. Her new owner changed her name to the *Gibraltar*. She was lost afterwards in the North Sea, and her bones lie interred not far from those of the *Alabama*."<sup>25</sup>

**Buying and selling of merchant vessels in time of war.**—After a declaration of war, according to English and American practice, a neutral citizen may buy a merchant vessel of a belligerent, provided the sale is absolute. A conditional sale, as with right of repurchase, is not considered *bona fide*. Many purchases of American ships were made by British subjects during the careers of the Confederate cruisers, and like purchases were made of Chinese vessels by Americans during the Franco-Chinese war. It is not a violation of neutrality to sell a belligerent a vessel suited for privateering if its equipment, although warlike, is that frequently used by merchant ships. The case is otherwise if a war vessel, partially finished here, is taken abroad by one of our citizens and then sold to a belligerent.<sup>26</sup>

§ 638. **Belligerent's right to hold captured persons in neutral territory.**—In the case of *Sommersett*, Lord Mansfield said that "the state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by the positive law, which preserves its force long after the reasons, occasion and time itself from whence it was created, are erased from memory. It is so odious that nothing

<sup>24</sup> 7 Wallace, p. 32.

<sup>25</sup> Service Afloat, p. 345.

<sup>26</sup> 7 Opinions Attys.-General, 538; *The Sechs Geschwister*, 4 C. Rob., Admr., 100; *Moodie v. The Alfred*, 3 Dallas, 307, "If such a ship is subsequently employed in

trade with the enemy, very slight *indicia* of fraud would cause her condemnation." Halleck (Baker ed.) II, p. 135. See also *The Vigilantia*, 1 Rob., Admr., 13; *The Beron*, *Ibid.*, 102; *The Georgia*, 7 Wallace, 32; *The Georgia*, 1 Lowell, 96.



can be suffered to support it but positive law.”<sup>27</sup> Because the positive law of England did not support the captivity of Sommersett, while confined on board a merchant ship lying in the Thames and bound for Jamaica, he was delivered on *habeas corpus*. On that general principle all captured persons on board belligerent ships must be delivered when they come within the territory of a neutral, if they once touch the soil,—that is, if they ever come within limits in which the positive law upholding their captivity does not operate.<sup>28</sup> When in 1588 a large number of Turkish and Barbary captives escaped from one of the galleys of the Spanish Armada wrecked near Calais, they regained their liberty, and were sent back to Constantinople by the council of the French king, regardless of the claims of the Spanish ambassador.<sup>29</sup> In order to prevent that result in every case, nations by comity admit that the positive law of the enslaving state may be permitted to operate in neutral territory, so long as captured persons are kept on board a commissioned ship of a belligerent power, even though it be a privateer.<sup>30</sup> That concession is made in accordance with the general principle of extritoriality which respects the internal economy of ships of war independent, as a general rule, from the local jurisdiction of the state in whose waters they may happen to be. When, however, a captive passes beyond the ship and touches the soil he is a prisoner no longer.<sup>31</sup>

§ 639. **Belligerent's right to deal with prizes in neutral ports.**—The right of a belligerent to bring a prize into a neutral port and deal with it there depends upon the same general rule of comity that tolerates the detention of captured persons while confined within ships of war. The extent of the neutral's right to control the matter is best illustrated by the fact that it is now becoming usual for the neutral state to deny to a belligerent the right to bring prizes into its harbors, except in cases of danger or want of provisions, and then only for as

<sup>27</sup> 20 St. Tr. 79; 1 Evans, Decis. of Lord Mansfield, 95.

<sup>28</sup> Vattel, III, § 132; Bluntschli, § 785; Twee Gebroeders, 3 Rob., Admr., 165.

<sup>29</sup> Martin, *Hist. de France*, X, 93. Austria's Neutrality Ordinance of 1803 expressly provided: “Il ne sera pas permis aux Puissances belligérentes de mettre à terre

dans nos ports, etc., aucun individu comme prisonnier de guerre.

<sup>30</sup> As to the status of a privateer regularly commissioned see *L'Invincible*, 1 Wheaton, 238.

<sup>31</sup> As to the privileges of ships of war in territorial waters, so far as imprisoned persons are concerned, see Sir J. F. Stephen, *Hist. of the Crim. Law*, vol. ii, p. 49, seq.

short an interval as the circumstances of the case will allow. Under the older practice free entry was permitted, and prizes were sometimes adjudicated upon and sold, while lying in neutral waters, when it was not expedient to take them into the ports of the captor's country. As Phillimore has expressed it: "An attentive review of all the cases decided in the courts of England and the North American United States, during the last war (1793-1815), leads to the conclusion that the condemnation of a capture by a regular prize court, sitting in the country of the belligerent, of a prize lying at the time of the sentence in a neutral port, is irregular, but clearly valid."<sup>32</sup> Not until a belligerent has perfected his right to captured property by a definitive appropriation,<sup>33</sup> or by a valid judicial condemnation, does he acquire such a title as the neutral is bound to respect. For instance, while the taking as booty by one belligerent of what unquestionably belongs to another confers title upon the captor, as between the belligerents themselves, so soon as the seizure is effected by being brought within the captor's lines,<sup>34</sup> as to a neutral, the title is not complete unless there has been a deposit in a safe place or possession for twenty-four hours before neutral territory is entered.<sup>35</sup> In the same way title to the property of a neutral trader seized as contraband, or for breach of blockade, is not complete until after judgment by a prize tribunal. Therefore, under the old rule, the belligerent was permitted to bring his prize into a neutral harbor and keep it there until a suit for its condemnation in the proper court could be terminated. Then, under the usage as recognized by most writers, he had the right to sell the prize in the neutral port by virtue of such condemnation.<sup>36</sup> The transition from the older to the existing practice began as

<sup>32</sup> Int. Law, iii, cccclxxix, citing *The Henrick and Maria*, 4 Rob., Admr., p. 43; *The Christopher*, 2 Ibid., p. 207; *The Victoria*, Edwards, p. 97; *Hudson v. Guestier*, 4 Cranch, p. 293, and 6 Cranch, p. 281; *The Arrabella and Madeira*, 2 Gallison, p. 368. Phillimore then adds that "it appears to be the inclination of the English Prize Court, during the present war, to limit to cases of necessity the condemnation of vessels lying in a neutral port," citing *The Polka*, 1 Spink's Eccles. & Admr. Rep.

(1854), pp. 447-8. See also Dana's *Wheaton*, p. 479.

<sup>33</sup> As to the probable origin of the rule see above p. 575.

<sup>34</sup> Ayala, *De Jur. et Off. Bell.*, I, c. ii, § 37; Gentilis, *De Jure Belli*, III, c. 17; Pardessus, *Col. de Lois Maritimes*, ii, 338-9.

<sup>35</sup> "When the capture is completed, and the booty absolutely in the enemy's power, no inquiry is made how he came by such effects, and he may dispose of them in a neutral country." Vattel, III, § 132.

<sup>36</sup> Ortolan, *Dip. de la Mer*, ii, 303,

early as 1823, when Denmark inaugurated a movement, advanced by Great Britain, France, the United States, Prussia, Italy, Sweden, Holland, Spain, Portugal and the Hanseatic Towns, resulting in a set of regulations under which some powers admit prizes into some ports and exclude them from all the rest, while others either exclude them altogether or admit them only when taken by ships of war as distinguished from privateers. The one prohibition common to all such regulations is that forbidding the sale of a prize, however captured, in a neutral port.<sup>37</sup> The outcome of the movement thus made by neutral maritime states in the direction of total exclusion, which has been greatly accelerated by regulations issued during the conflicts of the middle of the present century, including the American Civil War, is the new rule which denies to belligerents the right to bring prizes into neutral ports except in cases justifying an entry under the right of asylum. If that rule has not yet become an obligatory part of international law, it is moving rapidly in that direction.

§ 640. **Attack of one belligerent upon another in neutral waters.**—Prior to and during the wars arising out of the French Revolution the violation of neutral waters by acts of war was so common that no great commotion was made when a cruiser, continuing its pursuit of a vessel into neutral territory, completed its capture there; or even when vessels of one belligerent were cut out of a neutral port by a boat expedition from the war ships of the other. When in 1759 Admiral Boscawen pursued the French fleet to the very shores of Portugal, near Cape St. Vincent, and captured or destroyed French vessels there, Great Britain apologized, but refused the earnest demands of Portugal for restitution or indemnification by which she could satisfy the claims of France upon her.<sup>38</sup> The failure of Portugal, helpless as she was, to enforce her demands against Great Britain, France alleged as one of the grounds of justification for her subsequent invasion. When in 1793 the French frigate *Ambuscade* captured the *George*, a British merchant vessel, in Delaware Bay and took her to

306, 310; Bynkershoek, I, c. 15; Martens, Précis, viii, ch. vi, sect. 6; 1 Kent Comm., p. 124; Manning, 387; Heffter, § 147; Bluntschli, §§ 777, 857; Hopner v. Appleby, 5 Mason, 77.

of the Neutrality Laws Commissioners, pp. 39-79; Calvo, § 2379; Hall, pp. 472, 642, 643; Lawrence, Principles Int. Law, p. 512.

<sup>38</sup> Mahan, Influence of Sea Power, p. 299.

<sup>37</sup> British State Papers, Report

Charleston as a prize, the government of the United States, upon the complaint of Great Britain, brought the matter to the attention of the minister of France, who ordered the vessel's restitution.<sup>39</sup> In the next year, however, when a flagrant violation of neutrality was committed by the capture of the French frigate *Modeste* in the harbor of Genoa by two English men-of-war, Great Britain neither restored the ship nor apologized for the violation of Genoese territory.<sup>40</sup>

**Effect of resistance to unlawful attack in neutral waters. Case of the Gen. Armstrong.**—From the foregoing incidents it is evident that when one belligerent attacks another in neutral waters the primary wrong is against the neutral whose sovereignty is violated. The primary duty, therefore, devolves upon the neutral to protect his guest, to seek indemnity from the wrongdoer, or to respond in damages for any failure upon his part to discharge such neutral obligations. If a belligerent, when attacked in neutral territory, elects to defend himself, instead of appealing for protection to his host, does his own violation of the neutral sovereignty free the neutral from all responsibility? During the war of 1812-1815 the American privateer, the *General Armstrong*, was found at anchor in the Portuguese harbor of Fayal by a British squadron. When a boat detached from the latter approached the privateer it was fired upon. The next day, after a vessel of the squadron had taken a position near the *General Armstrong* for the purpose of attacking her, her crew, who found themselves unable to resist, abandoned and destroyed her. The demand made by the United States against Portugal for large compensation for the owners of the privateer, which rested upon the assumption that the Portuguese governor had failed to discharge his duty as a neutral, was finally submitted to the arbitration of Louis Napoleon, then President of the French Republic. While his award recognized the fact that neutral territory had been violated, he refused indemnification because the privateer, instead of demanding protection from the Portuguese authorities at the time, elected to resist by battle the unjust British assault. He held that the privateer should have applied

<sup>39</sup> Mr. Jefferson to Mr. Ternant, May 15, 1793; opinion of Atty.-Genl., May 14, 1793; and reply of M. Genet, of May 27, 1793. Waite's Am. State Papers, i, 69-80; 1 Opinions Atty.-Genl., 32. As to the return in 1805 of an American vessel

captured near the mouth of the Mississippi by a British privateer, and taken to England as a prize on suspicion of unneutral character, see *The Anna*, 5 Rob., Admr., 373.

<sup>40</sup> Azuni, II, ch. V, p. 331.

“from the beginning for the intervention of the neutral sovereign.” Instead of that he said resort had been had to force by her captain on his own account, and in that way he had “failed to respect the neutrality of the foreign sovereign, and released that sovereign from the obligation in which he was, to afford him protection by any other means than that of pacific intervention.”<sup>41</sup> That doctrine, which has been approved in certain quarters without qualification, should certainly be modified in one particular. There can be no doubt that when a belligerent is attacked by another in neutral territory his primary duty is to appeal to the neutral sovereign for protection and to rely upon him for it, provided time suffices, and such sovereign has the will and power to respond to it effectively. If either of those conditions are wanting the unjustly assaulted belligerent should be permitted to exercise his natural right of self-defense without freeing the neutral from responsibility. In the case of *The Anne*,<sup>42</sup> Judge Story clearly recognized that right when he said that “while the ship was lying in neutral waters, she was bound to abstain from all hostilities, except in self-defense.” That qualification is supported inferentially by *Dana*, and with great cogency by *Lawrence*.

§ 641. **Belligerent right of angary.**—From what has been said heretofore it appears that the persons and property of neutral individuals residing in a belligerent state are, during the progress of hostilities, subject to all such exceptional measures as the exigencies of war render necessary, provided that no unjust discrimination is made in their application between subjects and foreigners.<sup>43</sup> As resident neutrals are thus assimilated with the mass of the population of the state in which they live, so far as its government is concerned, it is not entirely unreasonable that, to a certain extent at least, they should be dealt with in the same general way by an occupying belligerent. And yet as such neutrals are subjects of a friendly state and cannot be presumed to be personally hostile to such belligerent until the contrary appears, there are cogent reasons why neutral property, accidentally or temporarily

<sup>41</sup> For the text of the President's award see Ortolan, *Dip. de la Mer*, ii, 547. For the leading accounts of the case see *Dana's Wheaton*, note 208, p. 526; *Wharton, Int. Law Dig.*, §§ 27, 228, 399, 401; Cal-

vo, *Droit International*, § 2359; Hall, § 228; *Lawrence, Principles*, § 260.

<sup>42</sup> 3 *Wheaton*, 447.

<sup>43</sup> See above p. 554.

within belligerent territory, should be exempted from the indisputable general principle that neutral property, associated either permanently or for a considerable time with such territory, must suffer all the vicissitudes to which the property of subjects is liable. As a recognition of the fact that neutral property, accidentally or temporarily within the theater of war, is entitled to special consideration, occupying belligerents have recognized the duty of making just compensation for its appropriation. The right of a belligerent to use such property or even to destroy it when necessary, subject to liability for just compensation, is called *le droit d'angarie* or *angaria*, a term which has been anglicized into *angary*. Phillimore says, "it is an act of the state, by which foreign as well as private domestic vessels which happen to be within the jurisdiction of the state, are seized upon, and compelled to transport soldiers, ammunition or other instruments of war; in other words, to become parties against their will to carrying on direct hostilities against a power with whom they are at peace. The owners of these vessels receive payment of freight beforehand. Such a measure is not without the sanction of practice and usage, and the approbation of many good writers upon international law. \* \* \*

At all events, justice demands that the owners of such goods and vessels be indemnified for all damages caused by the interruption of their lawful gains, and for the possible destruction of the thing themselves, though so high an authority as M. Massé says that usage has not hitherto gone that length."<sup>44</sup> It appears that a considerable portion of the French expedition to Egypt in 1798 was carried in neutral vessels seized in the ports of France.<sup>45</sup> Less than ten years before Martens had said in his *Précis* (§ 269) that "it is doubtful whether the common law of nations gives to a belligerent, except in cases of extreme necessity, the right of seizing neutral vessels lying in his ports at the outbreak of war, in order to meet the requirements of his fleet, on payment of their services. Usage has introduced the exercise of this right, but a number of treaties have abolished it." About the same time, however, Azuni, treating the right as existing in all cases of "necessity of public utility," declared that any vessel attempting to avoid it is liable to confiscation.<sup>46</sup> At a later day both Heffter (§ 150)

<sup>44</sup> Int. Law, iii, § xxix.

<sup>45</sup> Martens (R.), vii, 163.

<sup>46</sup> 1 *Droit Maritime*, Part 1, ch.

III, art. 5. In art. VI he says:

"The right of stopping or detaining the vessel of a friend is derived

and Bluntschli (§ 795) have recognized the existence of the right, with more or less reserve; and Dana,—after reviewing the leading authorities and certain provisions upon the subject contained in treaties between the United States, Prussia and Venezuela,—concludes that “these treaties certainly seem to recognize this *angaria* as a right, or at least as a practice of nations, and only seek to regulate its exercise.”<sup>47</sup> Halleck says, “by virtue of this right, neutral vessels may be appropriated by a belligerent, on payment of a reasonable price for compensation. It is akin to the right of prestation by which neutral vessels may be hired by a belligerent, on payment of freight beforehand, and to embargo or arrest of princes.”<sup>48</sup>

**Right of angary as exercised during the Franco-Prussian War of 1870-1871.**—The most recent examples of the exercise of the right of angary occurred during the Franco-Prussian War, when it was invoked as a justification for the appropriation of personal property belonging to Swiss, Austrian and British subjects. Between six and seven hundred railway carriages belonging to the Central Swiss Railway, in addition to a considerable quantity of Austrian rolling stock, were seized for military purposes by the German authorities of Alsace, who appear to have retained the property so seized for some time. A clearer and more important application of the right grew out of the seizure, almost at the same moment, of six British merchant vessels by the German general commanding at Rouen, who sunk them in the Seine at Duclair to prevent French gunboats from running up the river in order to cut off communication between the German corps operating on both banks. When the German military authorities failed to make agreements with the captains of the vessels to sink them, after the removal of their cargoes and the payment of their value, the refusal of the captains to enter into such an arrangement was “considered to be an infraction of neutrality,” which was followed by the sinking of vessels by firing upon them while some members of their crews appear to have been still on board. Count Bismarck, in defending this proceeding, maintained that “the measure in question, however exceptional

from the same source as that of impressing ships. \* \* \* This detention is made upon the payment, to the vessels retained in such circumstances, of a reasonable freight, equal to what they might have otherwise earned.”

See also Molloy, *De Jure Maritimo*, I, ch. 6; Loccenius, *De Jure Marit.*, I, c. v., § 3; Massé, *Droit Commercial*, I, l, ii, tit. 1, c. 2, § 7.

<sup>47</sup> Dana's *Wheaton*, note 152, p. 373.

<sup>48</sup> *Int. Law* (Baker ed.), i, p. 485.

in its nature, did not overstep the bounds of international war-like usage," because he said that "the report shows that a pressing danger was at hand, and every other means of meeting it was wanting; the case was, therefore, one of necessity, which even in time of peace may render the employment or destruction of foreign property admissible under the reservation of indemnification."<sup>49</sup> The British government evidently accepted that statement as a correct exposition of the international rule upon the subject, as it only demanded that the persons whose property had been destroyed should receive just compensation.

§ 642. **Reparation to neutral state for violation of its neutrality.**—The conclusion has been reached already that a belligerent state which violates the neutrality of another must make prompt and adequate reparation. As there is no precise international rule defining the form in which or the extent to which such reparation should be made, it must be fixed in each case according to its special facts and circumstances, through diplomatic negotiation. When property is illegally captured by a belligerent within neutral territory it must be restored with such expressions of regret, or, may be, with such additional compensation, as the nature of the offence shall warrant. A typical illustration of the proper procedure in the event of the illegal capture of a vessel of one belligerent by that of another in neutral jurisdiction is to be found in the case of the *Florida*, seized in Brazilian waters by the *Wachusett*, a warship of the United States. When Brazil demanded reparation, the United States, unable to restore the *Florida*, which had been accidentally sunk in Hampton Roads, sent the commander of the *Wachusett* to a court-martial, dismissed the consul who had advised the attack, and saluted the Brazilian flag at the place where the capture was made. When the *Chesapeake* was illegally seized in British waters, under circumstances equally indefensible, the government of the United States vindicated its dignity and self-respect by promptly surrendering the vessel and the men found on board, with an ample apology for the violation of neutral territory of which its officers had been guilty.<sup>50</sup>

<sup>49</sup> D'Angeberg, Nos. 914, 920, 250; Ann. Reg., for 1870, p. 110; 957; State Papers, 1871, lxxx. c. Hall, pp. 765-67.

<sup>50</sup> See above, p. 686.



## CHAPTER IV.

### LEGITIMATE NEUTRAL COMMERCE.

§ 643. **Belligerent states and neutral individuals.**—In the three preceding chapters an attempt has been made to outline the growth of the law of neutrality, and to illustrate its application to the reciprocal duties of a neutral towards belligerent states and of a belligerent towards neutral states considered as corporate persons. From what has thus been said of the law of neutrality as between state and state it appears that it is only an element in that body of rules known as international public law, slowly evolved out of the experience of civilized nations, whose breach constitutes an international wrong which can be righted only through the application of an international remedy. It is scarcely necessary to remark that, so far as definiteness and precision are concerned, the law of neutrality regulating the relations of state with state is in nowise distinguishable from the main body of law, if law it can be called, appertaining to that subject. In the five following chapters consideration will be given to the action of belligerent states dealing directly with neutral individuals through the application to them of a system of law more definite and precise in its nature, because formulated and administered, as a general rule, by trained publicists or jurists sitting in prize courts, after full forensic discussion and mature deliberation.

§ 644. **Conflict between neutral and belligerent interests.**—The rights now enjoyed by legitimate neutral commerce are the final outcome of centuries of struggle carried on, on the one hand, by neutral individuals striving to trade unhindered by war; and, on the other, by belligerents striving to weaken their opponents by depriving them of the benefits of maritime commerce, whether carried on in their own ships or in those of neutrals. While it is impossible to assign an exact date to the beginning of the struggle for the freedom of neutral commerce it must have been in progress long before the compilation of the *Consolato del Mare*, generally regarded as a gradual collection of the maritime customs of the commercial cities of the Mediterranean made between the twelfth and fourteenth centuries. As stated heretofore the compilation was probably called *Consolato* because it embodied the rules according to

which the judge-consuls established in the maritime cities of Spain determined the controversies brought before them.<sup>1</sup> The fact that the *Consolato* contains a definite and comprehensive rule based upon the principle that you should confiscate the goods of your enemy and protect those of your friend proves conclusively that, prior to its promulgation, there was a usage to that effect authoritative, at least, in the Western Mediterranean. The rule of the *Consolato*, based upon the character of the goods, may therefore be justly regarded as the first recorded compromise between conflicting neutral and belligerent interests. The first assault made upon that rule came from the French, who resolved to forbid, if possible, all intercourse between neutrals and an enemy through the introduction of the doctrine of hostile infection, under which the carriage of a hostile cargo rendered the ship also liable to capture, and the loading of a neutral cargo on a hostile ship rendered both liable. The counter-blast against this retrograde movement upon the part of France came from the Dutch, who, as carriers rather than producers of merchandise, naturally became the champions of the principle that such a freedom should be given to neutral commerce as would enable the neutral trader to keep up intercourse with any customer in time of war as in time of peace. The result of this conflict between the French and the Dutch was to place in juxtaposition two maxims embodying two essentially distinct propositions of law: Free ships—free goods, Enemy ships—enemy goods. The existing freedom of neutral commerce is the outcome of the compromise embodied in the Declaration of Paris through which the parts of each system most favorable to neutrals were blended in a working rule which, if not yet authoritative international law binding upon all maritime states, is likely soon to be so. The real nature of the rule in question,—referring to belligerent goods carried in neutral vessels, and to neutral goods in belligerent vessels,—can only be fully understood after an examination of each progressive stage of the prolonged conflict out of which it finally arose.

§ 645. **Rule of the Consolato-ownership of goods as the test.**—There can be no doubt that the rule of the *Consolato* had to struggle for existence against an earlier and harsher practice, which so lightly regarded the rights of the neutral carrier that the Genoese and Venetians, when at war, searched the ships of the neutral Greeks and made prisoners of the subjects of

<sup>1</sup> See above, p. 355, note 48.

their opponents hidden on board.<sup>2</sup> The fact that the rule thus established maintained itself in the Europe of the Renaissance and the Reformation down to the days of Henry IV. of France and of Dutch Independence is persuasive at least of its intrinsic justice, providing as it did for the safety of the property of a friend found under a hostile flag while condemning that of an enemy when taken in a neutral bottom. In either case the question of freight was equitably regulated. If an enemy cargo was found on a neutral vessel the captor could compel it to carry the goods to a place of safety only upon the payment of the freight it would have received from the original owners. If a neutral cargo was found on an enemy ship the owners of the former had the right to ransom the latter from the captor and proceed upon the voyage. If such owners refused to exercise that right the captor was authorized to send the ship to a port of his own country, and there require them to pay the freight contracted for in the first instance. If the captor refused to permit the owners of the cargo to enter into such an arrangement, he not only forfeited his claim to freight, but subjected himself to liability for damages.<sup>3</sup> Such was the nature and application of the rule which Grotius approved in a general way when he said that the vessel of a friend did not become lawful prize because an enemy's goods were laden thereon, unless such lading took place with the consent of the ship-owner. And to that he added that when neutral goods were found on an enemy's ship their situation should do no more than raise a presumption of their hostile character rebuttable by proof that they were really neutral.<sup>4</sup> Gentilis,<sup>5</sup> while admitting that enemy goods found under a neutral flag were subject to seizure, asserted the liability of the captor to pay freight, a view reaffirmed with emphasis by Vattel,<sup>6</sup> who says, "if we find an enemy's effects on board a neutral ship, we seize them by the rights of war; but we are naturally bound to pay the freight to the master of the vessel, who is not to suffer by such seizure. The effects of neutrals,

<sup>2</sup> Grotius, *De Jure Belli ac Pacis*, III, c. vi, note 6. Jenkinson's *Discourse on the Conduct of the Gov't of Great Britain*, pp. 30-31.

<sup>3</sup> *Consolato del Mare*, c. 273; Pardessus, *Us et Coutumes de la Mer*, ii, 304; Manning, *Law of Nations*, 280; Ward, *Maritime Law*, pp. 30-31.

<sup>4</sup> Neque amicorum naves in praedam veniunt ob res hostiles, nisi ex consensu id factum sit dominorum navis. *De Jure Belli ac Pacis*, III, c. vi, § 6, note. See also *Ibid.*, III, c. i, § 5, note 4.

<sup>5</sup> *De Advocacione Hispanica* I, c. 28.

<sup>6</sup> *Droit des Gens*, III, §§ 115, 116.

found in an enemy's ship, are to be restored to the owners, against whom there is no right of confiscation,—but without any allowance for detainer, decay, etc. The loss sustained by the neutrals on this occasion is an accident to which they expose themselves by embarking their property in an enemy's ship." It may be inferred that an early usage, substantially the same as that evidenced by the *Consolato*, protected neutral goods in enemy ships in the northern seas from the fact that during the war with Lübeck and other Hanse Towns, the Hollanders, in 1438, ordered that neutral goods found in enemy ships should not be made prize; and, it is said, that France observed a like rule down to the middle of the sixteenth century.<sup>8</sup> Such, in general terms, was the origin and nature of the rule of the *Consolato*, whose distinguishing feature was embodied in the principle that the ownership of the goods and not the character of the vehicle determined their liability to capture. On that ground this primitive law of capture at sea, which exempted the goods of a neutral found in the vessel of an enemy, as freely subjected the goods of an enemy when found under the flag of a neutral.

§ 646. **French invention of hostile infection.**—The first serious assault upon that part of the rule of the *Consolato* exempting the goods of a neutral found in the vessel of an enemy seems to have been embodied in the French ordinances of 1538, 1543 and 1584, the last of which provided that "if the ships of our subjects make a prize in time of war of enemy ships, in which are persons, merchandise, or other goods of our said subjects or allies, the whole shall be declared good prize as if the whole belonged to our said enemies."<sup>9</sup> The momentary return made by France to the earlier practice in the royal declaration of 1650, recognizing the freedom of neutral goods in enemy vessels, was abandoned, if ever actually enforced, by the reassertion of the right to confiscate neutral goods contained in the ordinances of 1681, 1704, 1744 and 1788. On the French regulations in force at their respective dates were modeled the Spanish ordinances of 1702, 1718 and 1779.<sup>10</sup> The French rule was also embodied in a series of treaties extending down to the First Armed Neutrality, which generally contained express stipulations authorizing the confiscation of neu-

<sup>8</sup> Hübner, *Ire partie*, ch. i, § 8; ix, art. 7; Ortolan, *Dip. de la Mer*, Ortolan, *Ib.*, 100. i, 101.

<sup>9</sup> Valin, *Ord. de la Marine*, iii, tit. <sup>10</sup> Ortolan, *Dip. de la Mer*, ii, 108.

tral goods when found in enemy vessels.<sup>11</sup> In 1681 a complete statement of the doctrine of infection was embodied in the maxim, “la robe ennemie confisque la marchandise et le vaisseau ami,”—a maxim under which the conjunction of enemy and neutral property on the high seas involved both in a like condemnation. That stringent rule confiscated not only enemy goods under a neutral flag, but neutral goods under an enemy flag, as well as the vessel of a neutral carrier of enemy merchandise.<sup>12</sup> Valin and Pothier<sup>13</sup> rest their defence of that invention of their nation upon the contention that those who favor the commerce of the enemy by embarking their goods upon his ships should be made to suffer their fate, the former asking, “how can it be that the goods of friends and allies, found in an enemy ship, should not be liable to confiscation, whilst even those of subjects are liable to it?” Ortolan, rather in a spirit of apology than defence, so construes the ordinance of 1681 as to give plausibility at least to the contention that it was intended to apply only to allies in a common war, and not to neutrals, despite the fact that it was so administered as actually to embrace both.<sup>14</sup>

§ 647. Dutch rule—nature of the vehicle as the test.—While France, in the days of her maritime greatness, was thus upholding, both by her treaties and ordinances, the strictest exercise of belligerent rights, the Dutch, in response to the touch of self-interest, espoused the cause of the neutral carrier. After having enforced from time to time a policy hostile to neutral vessels, engaged either in the carrying of Spanish goods to Flanders or in the carrying of provisions or any other merchandise into the Peninsula,<sup>15</sup> the Dutch, in 1646, made a convention<sup>16</sup> with France providing for the suspension for four years of the ordinance of 1584, asserting the rule that “*la robe d’ennemi confisque celle d’ami.*” As the suspending treaty provided that the ships of the Dutch “should free their cargo, notwithstanding the presence in it of merchandise, and even of grain and vegetables belonging to enemies, excepting always articles contraband of war,”<sup>17</sup> the Dutch negotiators concluded

<sup>11</sup> Hall, p. 742.

<sup>12</sup> Naval Ordonnance of 1681, Title ix.

<sup>13</sup> *Comm.*, liv., iii, tit. 9; *Des Prises*, art. 7; *Traité de Propriété*, No. 96.

<sup>14</sup> *Dip. de la Mer*, ii, 104.

<sup>15</sup> Camden, *Annales*. Anno 1576;

Grotius, *De Jure Belli ac Pacis*, III, c. i, § 5, note 6; *Hist.*, 8, 15, pp. 639, 829; Ward, *Maritime Law*, p. 51; Jenkinson, *Discourse*, pp. 33-34.

<sup>16</sup> Ortolan, *Dip. de la Mer*, ii, 110.

<sup>17</sup> “En telle sorte que les navires qui trafiqueraient avec la patente

that they had secured a concession of the principle that the neutral flag covered the cargo, excepting only contraband of war. When, however, Boreel, the ambassador of the United Provinces, attempted to enter into a permanent convention with France, after the expiration of the provisional one, that illusion vanished in the presence of the discovery that the French commissioners so construed the agreement of 1646 as to exempt from condemnation only the vessel of the neutral carrier of enemy goods. That the French had no idea of conceding the principle of free ships, free goods, is evident from the letter of Boreel who wrote to the Grand Pensionary, De Witt: "I have obtained the abrogation of that pretended French law, that *enemies' property involves in confiscation the property of friends*; so that, if henceforward any goods belonging to the enemies of France be found in a neutral Dutch vessel, *these goods alone will be liable to condemnation; and the vessel will be released, together with all the other property on board*. But I find it impossible to obtain the object of the twenty-fourth article of my instructions, which says that the *immunity of the vessel shall extend to the cargo, even if enemies' property.*"<sup>18</sup> Despite that momentary failure the Dutch, between 1646 and the end of the seventeenth century, succeeded in securing from Spain, Portugal, France, England and Sweden the recognition in twelve treaties, of the rule of free ships, free goods, coupled with the concession of enemy ships, enemy goods.<sup>19</sup> The only like treaty of that century to which neither the Dutch nor French were parties was that concluded between England and Portugal in 1652.<sup>20</sup> And here let the fact be emphasized that down to the beginning of the eighteenth century, the principle of free ships, free goods, with the corollary, was simply an exception to a general rule which prevailed in the absence of an express convention to

de l'amiral des Provinces-Unies, seront libres et rendront aussi toute leur charge libre, bien qu'il y eut dedans de la marchandise, même des grains et légumes, appartenant aux ennemis; sauf et excepté toutefois les marchandises de contrebande de guerre." Art. I.

<sup>18</sup> Vattel, III, § 115, note.

<sup>19</sup> Treaty with Spain, 1650 (Dumont, vi, i, 571); with Portugal, 1661 (Ib., ii, 369); with France,

1661 (Ib., 346); with France, 1662 (Ib., 415); with England, 1667 (Ib., vii, i, 49); with Sweden, 1667 (Ib., 38); with England, 1674 (Ib., 283); with Sweden, 1675 (Ib., 317); with France, 1678 (Ib., 359); with Sweden, 1679 (Ib., 440); with England, 1689 (Ib., ii, 236); with France, 1697 (Ib., 389). Cf. Dana's Wheaton, p. 583; Hall, p. 712 and notes.

<sup>20</sup> Dumont, vi, ii, 84.

the contrary. While France stipulated in favor of the exception in many treaties, she reasserted in her regulations of 1704, 1744 and 1788<sup>21</sup> the doctrine that neutral goods become enemy under an enemy's flag, a doctrine embodied in the Spanish ordinances of 1702, 1718 and 1779.<sup>22</sup> According to a computation made by Ward and adopted by Phillimore<sup>23</sup> thirty-four treaties were entered into between 1713 and 1780 in which no mention whatever was made of the principles free ships, free goods; enemy ships, enemy goods. In the face of such conditions the Dutch, as neutral carriers intent upon securing the immunity of their flag, began by buying the privilege in particular cases in treaties conceding to others the right to confiscate their merchandise when found in a belligerent ship. The problem to be worked out involves the process through which the doctrine of free ships, free goods,—first established as an exception to a contrary general rule in a treaty made between Spain and the United Provinces in 1650,<sup>24</sup>—has received such universal acceptance as to make it the governing rule of the civilized world.

§ 648. **British theory and practice.**—The doctrine of the *Consolato* denying the liability to capture of neutral goods in enemy bottoms,—a doctrine reaffirmed by Gentilis in his declaration that property which does not belong to an enemy is nowhere confiscable,<sup>25</sup>—was recognized from the outset by Great Britain, subject to the limitation authorizing a belligerent to take enemy goods from a neutral vessel on the high seas, provided he released it with payment of freight. The first treaty in which she ever surrendered that belligerent right was that made with Portugal in 1652, a treaty recognizing the rule of free ships, free goods, which, after confirmation in 1661 and 1703, was abandoned by the treaty of Rio Janeiro in 1810.<sup>26</sup> Great Britain also recognized the principle of free ships, free goods in treaties entered into at the Peace of Utrecht, 1713, with France and the United Provinces, and also with Spain.<sup>27</sup>

<sup>21</sup> As to the modifications made in the *Réglements* of 1774 and 1778, see Walker, *Science of Int. Law*, pp. 296-7. See also Valin, *Ord. de la Marine*, iii, tit. ix, art. 7; Pistoze et Duverdy, i, 344 and 360; Ortolan, *Dip. de la Mer.*, ii, 108.

<sup>22</sup> Not until 1780 did the private rules of Spain exempt either enemy goods or the neutral vessel

from confiscation. Martens (R), iv, 270.

<sup>23</sup> *Int. Law*, iii, § clxxxii.

<sup>24</sup> Manning, *Law of Nations* (Amos's ed.), bk. v. ch. vi.

<sup>25</sup> *Res non hostium non bene capitur ullibi. De Jure Belli*, II, c. 22.

<sup>26</sup> Hansard, cxlii, 491.

<sup>27</sup> Dumont, viii, i, 348, 379, 409.

It was then stipulated, as between the parties in question, that the ships of each shall be free to carry goods not contraband, and persons not military,<sup>28</sup> pertaining to enemies of the other, a principle sanctioned in a commercial treaty of the same date between France and Holland.<sup>29</sup> The few exceptions thus made to the general rule British statesmen and jurists claimed in nowise hindered its enforcement, through the seizure of enemy goods in neutral bottoms, in any case in which their country was not bound by treaty stipulations to the contrary. Such statesmen and jurists were, therefore, quick to respond when in 1752 the Prussian government attempted to justify its confiscation of the interests of English creditors in the Silesian loan by asserting that "Prussian vessels, although laden with property belonging to the enemies of England, were a neutral place, whence it follows that it is exactly the same thing to have taken such property out of the said vessels as to have taken it upon neutral territory."<sup>30</sup> The English reply to the Prussian claim that the confiscation in question was justifiable,—a reply characterized by Montesquieu<sup>31</sup> as a veritable "Réponse sans réplique,"—demonstrated that the contention of the Prussian jurists that, by the common law of nations as it then stood, the goods of enemies found on neutral vessels were not liable to seizure and condemnation was as untenable as their assertion that stock in the public debt held by subjects of the offending country could be lawfully seized by way of reprisal.<sup>32</sup> Three years after that controversy had been settled by the compromise embodied in the Treaty of Westminster, 1756, the Danish civilian, Hübner, published at The Hague the treatise in which he reiterated the Prussian view in the statement that "it is universally agreed that a belligerent cannot attack an enemy in a neutral place, nor capture his property there. Neutral goods on a free or neutral ship shall be extended to persons sailing on the same, in such wise that, though they be enemies of one or both the parties, they shall not be taken from the free ship, unless they be military persons, actually in the service of the enemy."

As to the subsequent confirmations of the principles in the treaties of 1721 and 1739 between Great Britain and Spain, in the treaty of Aix-la-Chapelle, in 1748, and in that of Paris in 1763, between Great Britain, France and Spain, see Wheaton's *Hist. Law of Nations*, 120-125.

<sup>28</sup> The commercial treaty of Utrecht between France and Great Britain (Dumont, viii, i, 345) provided that the liberty granted to

<sup>29</sup> *Ibid.*, viii, i, 366.

<sup>30</sup> Martens, *Causes Célèbres*, ii, 117.

<sup>31</sup> *OEuvres*, vi. p. 445.

<sup>32</sup> See above, p. 442.



vessels are unquestionably neutral places. Consequently when they are laden with enemy's goods a belligerent has no right to molest them because of their cargoes." <sup>33</sup> Unfortunately the conclusion thus reached that the goods of an enemy could not be seized in a neutral bottom rested upon the assumption of the extritoriality of a merchant vessel which had no real existence either in theory or in fact. Nevertheless that conclusion received the earnest support of the Northern powers; and, when Great Britain persisted in resisting it by the enforcement of the old practice of seizing enemy goods in neutral vessels, those powers drew together for its defence in the First Armed Neutrality League of 1780.

§ 649. **Armed Neutralities of 1780 and 1800.**—In the outline heretofore drawn of the history of those leagues the statements were made (1) that one of the four principles which became the basis of the First Armed Neutrality was that the neutral flag should cover all goods not contraband; (2) that before the claim thus set up had been determined, peace was concluded at Versailles in 1783 between Great Britain, France and Spain, reviving and confirming the treaties of Utrecht which had established between such contracting powers the principle of free ships, free goods; (3) that the programme upon which the Second Armed Neutrality of 1800 was based repeated the four principles embodied in the First; (4) that in the convention signed at St. Petersburg in June, 1801, between the government of George III. and the Emperor Alexander, Great Britain finally vindicated against the leagues not only the right of search of merchantmen under convoy as exercised by men-of-war, but also the liability to seizure by a hostile captor of goods actually the property of the subject of a belligerent laden under a neutral flag.<sup>34</sup>

§ 650. **American theory and practice.**—At this point some account should be given of the support rendered to the cause of the neutral carrier by the government of the United States. Prior to the Revolution which severed the English colonies in America from the parent state, Great Britain had made exceptions to the general rule of the *Consolato* in the treaty made with Portugal in 1652, in which for the first time she adopted the combined rule of free ships, free goods; enemy ships, enemy

<sup>33</sup> *De la Saisie des Bâtimens neutres, ou du droit qu' ont les nations belligérantes d'arrêter les navires des peuples amis* (La Haye, 1759), I, ptie ii, ch. ii, § 6.

<sup>34</sup> See above, p. 633-38, .

goods; in the treaties made with Holland in 1667 and 1674; and in the treaties of Utrecht of 1713, subsequently confirmed by those of 1721 and 1739, between Great Britain and Spain, by the treaty of Aix-la-Chapelle, in 1748, and by that of Paris in 1763, between Great Britain, France, and Spain.<sup>35</sup> While a conventional law thus united the two maxims in certain notable treaties, no ambiguity existed in the minds of English jurists as to the consuetudinary law upon the subject in the absence of treaties. According to the declaration made in 1753 by four experts,<sup>36</sup> including Murray, subsequently Lord Mansfield, "the law of nations has established:

That the goods of an enemy, on board the ship of a friend, may be taken.

That the lawful goods of a friend, on board the ship of an enemy, ought to be restored.

That contraband goods going to the enemy, though the property of a friend, may be taken as prizes; because supplying the enemy with what enables him better to carry on the war is a departure from neutrality."<sup>37</sup> Moving on the old lines the United States in making its first treaty of amity and commerce with France stipulated for free ships, free goods; enemy ships, enemy goods, as an exception to the general maritime law of nations regulating the intercourse of European states,<sup>38</sup> a law recognized by the United States as binding upon them during the War of the Revolution.<sup>39</sup> American prize courts accepted from the beginning the principle that exempted neutral property in an enemy's vessel from confiscation while consigning

<sup>35</sup> See above, p. 711.

<sup>36</sup> Sir G. Lee, then judge of the prerogative court; Dr. Paul, advocate-general; Sir D. Rider, attorney-general; and Mr. Murray.

<sup>37</sup> An extract from the opinion of the experts in question was delivered to Mr. Jay in 1794 by Sir W. Scott (Lord Stowell) and Sir J. Nicholas as the best "statement of the general principles of proceeding in prize causes in British courts of admiralty, and of the measures proper to be taken when a ship and cargo are brought in as prize within their jurisdiction." See Am. St. Papers (For. Rel.), 494ff; Wharton, *Int. Law Dig.*, §§ 330, 342,

<sup>38</sup> In Sec. 23 of the Commercial Treaty of 1778 it was agreed that as between the parties free ships were to make free goods, except contraband of war, of which a limited list was appended. The principle was set aside, however, by France during her war with England in 1796-97. Mr. Pickering, Sec. of State, to Mr. Pinckney, Jan. 16, 1797, 1 Am. St. Papers (For. Rel.), 559. The United States also embodied the new doctrine in the treaty of 1782 with the Dutch and in the treaty of 1783 with Sweden. *Treaties of the United States*, pp. 301, 303, 326, 752, 1044, 1046.

<sup>39</sup> See above, p. 136.

enemy property in neutral vessels to that fate. No effort was made to depart from that principle until the issuance of the ordinance of 1780 in which Congress recognized the programme of the Armed Neutrality of that year upon condition that it should be reciprocally recognized by the other belligerent states.<sup>40</sup> And yet despite that move in favor of a new rule that could claim only a conventional basis American statesmen, after the adoption of the present constitution, espoused anew the old doctrine as it had existed in the mother country when the Revolution began. As Jefferson declared in his letter to Genet of July 24, 1793: "I believe it cannot be doubted but that by the general law of nations the goods of a friend found in the vessel of an enemy are free, and the goods of an enemy found in the vessel of a friend are lawful prize. \* \* It is true that sundry nations, desirous of avoiding the inconveniences of having their vessels stopped at sea, ransacked, carried into port, and detained, under pretense of having enemy's goods on board, have, in many instances, introduced, by their special treaties, another principle between them, that enemy bottoms shall make enemy goods, and friendly bottoms friendly goods; a principle much less embarrassing to commerce, and equal to all parties in point of gain and loss. But this is altogether the effect of particular treaty, controlling in special cases the general principle of the law of nations, and therefore taking effect between such nations only as have so agreed to control it."<sup>41</sup> The subsequent departure of the executive department of the government of the United States from that clear and unmistakable declaration was the afterthought of a later time.<sup>42</sup>

**Rule of the Consolato adopted by the American judiciary.—** The judiciary of the United States never wavered in their adherence to the rule of the *Consolato* so long recognized by the European nations. In the words of Marshall, C. J., "the rule that the goods of an enemy found in the vessel of a friend are prize of war, and that the goods of a friend found in the

<sup>40</sup> Dana's Wheaton, p. 587.

<sup>41</sup> 1 Am. St. Papers (For. Rel.), 166; 1 Wait's St. Papers, 134.

<sup>42</sup> For the lame attempt to show that Mr. Jefferson's expression of opinion to Mr. Genet, in July, 1793, was not intended to be absolute, because he used the phrase, "I believe it cannot be doubted," see 6,

J. Q. Adams's Mem., 162 (July 7, 1823); Wharton, Int. Law Dig., § 342. See also Phillimore (iii (3 ed.), 315ff), who maintains that the United States did admit that the rule, free ships, free goods, was not a part of the law of nations at the outbreak of the war of the first French Revolution.

vessel of an enemy are to be restored, is believed to be a part of the original law of nations, as generally, perhaps universally acknowledged. Certainly it has been fully and unequivocally recognized by the United States. This rule is founded on the simple and intelligible principle that war gives a full right to capture the goods of an enemy, but gives no right to capture the goods of a friend. In the practical application of this principle, so as to form the rule, the propositions that the neutral flag constitutes no protection to enemy property, and that the belligerent flag communicates no hostile character to neutral property, are necessarily admitted. The character of the property, taken distinctly and separately from all other considerations, depends in no degree upon the character of the vehicle in which it is found.”<sup>43</sup> During the war which began between Great Britain and the United States in 1812 the prize courts of the latter uniformly enforced the rule that enemy goods in neutral vessels are liable to condemnation, except in cases in which the executive government had established the contrary rule of free ships, free goods by express treaty stipulation.

**An Exception.**—The only essential difference between the judge-made law of England and the United States upon this subject arose out of the refusal of the courts of the latter to recognize the distinction drawn by Lord Stowell in the case of the *Fanny*<sup>44</sup> to the detriment of neutral goods transported in an armed ship of a belligerent. In that case it was said that “a neutral subject is at liberty to put his goods on board a merchant vessel, though belonging to a belligerent, subject nevertheless to the rights of the enemy who may capture the vessel, but who has no right, according to the modern practice of civilized states, to condemn the neutral property. Neither will the goods of the neutral be subject to condemnation, although a rescue should be attempted by the crew of the captured vessel, for that is an event which the merchant could not have foreseen. But if he puts his goods on board a ship of force, which he has every reason to presume will be defended against the enemy by that force, the case then becomes very different. He betrays an intention to resist visitation and search, which he could not do by putting them on board a mere merchant vessel, and, in so far as he does this, he adheres

<sup>43</sup> The *Nereide*, 9 Cranch, p. 441 Dodson, 443.  
<sup>44</sup> 1818. See also *El Telegrapho*, Newb., 386.

to the belligerent; he withdraws himself from his protection of neutrality, and resorts to another mode of defence; and I take it to be quite clear, that if a party acts in association with a hostile force, and relies upon that force for protection, he is, *pro hac vice*, to be considered as an enemy." In the case of the *Nereide* that doctrine was expressly repudiated by the Supreme Court of the United States in a judgment declaring that "a neutral may lawfully employ an armed belligerent vessel to transport his goods, and such goods do not lose their neutral character by the armament, nor by the resistance made by such vessel, provided the neutral does not aid in such armament or resistance, although he charter the whole vessel, and be on board at the time of the resistance."<sup>45</sup>

**Conventional law as to free ships, free goods.**—While expressly confirming the rule of the *Consolato*, as "the original law of nations," American jurists and statesmen held from the outset that states have a perfect right to change it by convention between themselves whenever it is to their advantage to do so. At an early day the fact was recognized that the maxims, free ships, free goods; enemy ships, enemy goods, embody entirely distinct propositions; and that the stipulation in a treaty that free ships shall make free goods, does not imply the converse proposition that enemy ships shall make enemy goods. "Do the United States understand this subject differently from other nations? It is certainly not from our treaties that this opinion can be sustained. The United States have in some treaties stipulated for both principles, in some for one of them only, in some that neutral bottoms shall make neutral goods and that friendly goods shall be safe in the bottom of an enemy. It is therefore clearly understood in the United States, so far as an opinion can be formed on their treaties, that the one principle is totally independent from the other. They have stipulated expressly for their separation, and they have sometimes stipulated for the one without the other."<sup>46</sup> A typical illustration of such a

<sup>45</sup> 9 Cranch, 388, head note. Three years later that doctrine was affirmed in *The Atalanta*, 3 Wheaton, p. 409.

<sup>46</sup> *The Nereide*, 9 Cranch, p. 421. In that case the court was called upon to construe Art. 15 of the treaty of 1795 between the United

States and Spain, which "stipulated that free ships shall also give freedom to goods," without any provision, express or implied, that enemy ships shall make enemy goods. The court therefore held, as a matter of judicial construction, that the existence of the right

severance may be found in article twelve of the treaty made in 1785 between the United States and Prussia in which the principle of free ships, free goods was agreed upon without the correlative maxim of enemy ships, enemy goods.<sup>47</sup> When, however, that treaty expired by its own limitation in 1796 the American plenipotentiary was directed to suggest to the Prussian government, during the subsequent negotiation for its renewal, that the clause in question be omitted from the new treaty because the United States had learned from experience that such special stipulations were of little or no avail in the absence of a general recognition of the new rule by the maritime nations. "It is possible," said Mr. Pickering at the time, "that in the pending negotiations for peace (July, 1797, between Great Britain and France) this principle of free ships making free goods may be adopted by all the great maritime powers; in which case the United States will be among the first of the other powers to accede to it and to observe it as a universal rule."<sup>48</sup> In a reply made by Mr. J. Q. Adams, minister at Berlin, in the following October, he stated that "the principle of making free ships protect enemy's property has always been cherished by the maritime powers who have not had large navies, though stipulations to that effect have been in all wars more or less violated. In the present war, indeed, they have been less respected than usual, because Great Britain has held more uncontrolled the command of the sea, and has been less disposed than ever to concede the principle."<sup>49</sup> In article seventeen of the treaty made between Great Britain and the United States in 1794<sup>50</sup> it was provided that vessels, captured on suspicion of having on board enemy property or contraband of war, should be carried to the nearest port for adjudication; and, after that part of the cargo only which consisted of enemy property or contraband for an enemy's use had been made prize, such vessels should be permitted to proceed with the remainder of their cargoes. When in 1798 France complained<sup>51</sup> that such a stipulation was in conflict with the prior

last named could not be implied from an express grant of the former.

<sup>47</sup> Treaties of the United States, p. 899.

<sup>48</sup> Mr. Pickering, Sec. of State, to Mr. J. Q. Adams, July 17, 1797; 2 Am. St. Papers (For. Rel.), 250.

<sup>49</sup> 2 Am. St. Papers (For. Rel.), 251.

<sup>50</sup> Treaties of the United States, p. 379.

<sup>51</sup> Ward, p. 167. The essence of the complaint was that as the United States was bound to treat France as the *most favored* nation, it was also bound not to permit

agreements entered into with her in the treaties of 1778 and 1780, Pinckney said in a note to Washington that "the complaints of the French had reference, amongst other things, to the abandonment by the Americans of their neutral rights, in not maintaining the pretended principles of the modern law of nations, that free ships make free goods; and that timber and naval stores are not contraband of war. The necessity, however, for the strong and express stipulations of the Armed Neutrality itself by all the various powers which joined it, showed that those maxims were not in themselves law, but merely the stipulations of compact; that, by the real law, belligerents had a right to seize the property of enemies on board the ships of friends; that treaties alone could oblige them to renounce it; and that America, therefore, could not be accused of partiality to Great Britain, because she did not compel her to renounce it."<sup>52</sup> If the United States took a step backward in the treaty of 1794 with Great Britain providing that enemy property in a neutral vessel was good prize of war, the loss was made up in the next year in the treaty with Spain, in which it was stipulated that free ships should make free goods, without the correlative provision that enemy ships should make enemy goods.<sup>53</sup> When the negotiation between the United States and Prussia was finally concluded in 1799 a far less decided result was embodied in the article in which,—after a declaration that experience had "proved that the principle adopted in the twelfth article of the treaty of 1785, according to which free ships make free goods, has not been sufficiently respected during the last two wars, and especially in that which still continues,—" it was agreed that if "either of the contracting parties should be engaged in war, to which the other should remain neutral, the ships of war and privateers of the belligerent power shall conduct themselves toward the merchant vessels of the neutral power, as favorably as the course of the war then existing may permit; observing the principles and rules of the law of nations generally acknowledged."<sup>54</sup> In the next year the doctrine of free ships, free goods; enemy ships, enemy goods, was

French property on board American ships to be seized by British cruisers, while it prevented the seizure of British property in the same situation by the French. Cf. Phillimore, iii, § xcxcviii.

<sup>52</sup> 5 Am. St. Papers, 281, 286.

<sup>53</sup> See above, p. 717.

<sup>54</sup> On the expiration of the treaty of 1799, the twelfth article of the original treaty of 1785 was revived by article twelve of the treaty of 1828. Treaties of the United States, p. 916.

embodied in the treaty then made between France and the United States.<sup>55</sup> As stated heretofore, during the war begun between Great Britain and the United States in 1812, the prize courts of the latter firmly enforced seizures and confiscations against enemy goods in neutral bottoms, except as to those powers with whom then existing treaties had established the contrary rule of free ships, free goods.<sup>56</sup> And yet despite such enforcement by American prize courts of the old rule, there was a continual longing for the substitution of the new. In 1816 Mr. Monroe wrote to Mr. Adams: "It is also desirable to stipulate with the British government that free ships shall make free goods, though it is proper to remark that the importance of this rule is much diminished to the United States by their growth as a maritime power, and the capacity and practice of their merchants to become the owners of the merchandise carried in our vessels. It is nevertheless still important to them, in common with all neutral nations, as it would prevent vexatious seizures by belligerent cruisers, and unjust condemnations by their tribunals from which the United States have sustained such heavy losses."<sup>57</sup> Looking to the ultimate abolition of that condition of things the United States in their earlier negotiations with the South American republics proposed the establishment, throughout these continents, of the principle of free ships, free goods, limited, however, by the proviso that a belligerent may justly refuse that benefit to a neutral, unless extended to such neutral by the opposing belligerent. A typical illustration of such a proviso was embodied in the treaty of 1846 between the United States and New Granada, in which it was stipulated that the rule of free ships, free goods, should be understood "as applying to those powers only, who recognize this principle, but if either of the two contracting parties shall be at war with a third, and the other remains neutral, the flag of the neutral shall cover the property of enemies whose governments acknowledge this principle and not of others."<sup>58</sup> In 1823 the United States sub-

<sup>55</sup> Treaties of the United States, p. 322, Arts. XIV, XV.

<sup>56</sup> See above, p. 716.

<sup>57</sup> Mr. Monroe, Sec. of State, to Mr. Adams, May 21, 1816. MSS. Inst., Ministers.

<sup>58</sup> Treaties of the United States, p. 195, Art. 15. The Republic of Colombia, established in 1819, was

divided, in 1831, into three independent republics, New Granada, Venezuela, and Ecuador. In 1862 its name was changed to the United States of Colombia, and in 1886 the states were abolished and the country became the Republic of Colombia.



mitted to all the leading European nations a proposal to abolish by treaty private war at sea, and to restrict contraband. "The tenth article of the draft proposes the adoption of the principle that free ships make free goods and persons, and also that neutral property shall be free, though laden in a vessel of the enemy. The government of the United States wishes for the universal establishment of this principle as a step towards the attainment of the other, the total abrogation of private maritime war."<sup>59</sup> "The principle upon which the government of the United States now offers this proposal to the civilized world is, that the same precepts of justice, of charity, and of peace, under the influence of which Christian nations have, by common consent, exempted private property on shore from the destruction or depredation of war, require the same exemption in favor of private property upon the sea."<sup>60</sup>

§ 651. **Declaration of Paris, 1856.**—From what has now been said it appears that the concerted efforts in favor of the principle of free ships, free goods, as defined in the programme of the Armed Neutralities, were finally frustrated by Great Britain who rose triumphant from the conflict with the clear and definite admissions of the maritime convention of St. Petersburg, 1801, not only of the right of search of merchantmen under convoy, but of the right of a belligerent to seize and confiscate the goods of an enemy when found in a neutral bottom.<sup>61</sup> From that time down to the Congress of Vienna the disorganized forces of the neutral trader, so far from advancing the cause for which they had contended, seriously compromised it by trampling "as belligerents upon the doctrines they had championed as neutrals; while Great Britain and France vied with one another in attacks upon innocent commerce, each justifying its severities on the plea that they were adopted in retaliation for illegal acts committed by the other. At the end of the struggle no definite code of maritime capture had received universal acceptance."<sup>62</sup> Clearly perceiving that force had utterly failed to attain the end in view the government of the United States, in the midst of the period of peace that divides the great settlement of 1815 from the beginning of the Crimean War, resolved to appeal

<sup>59</sup> Mr. Adams, Sec. of State, to Inst., Ministers. Wharton, Int. Mr. Rush, July 28, 1823. MSS. Law Dig., § 342.

Inst., Ministers.

<sup>61</sup> See above, p. 637.

<sup>60</sup> Mr. Adams, Sec. of State, to Mr. Middleton, Aug. 13, 1823. MSS. <sup>62</sup> Lawrence, Principles of Int. Law, p. 567.

to the maritime nations to unite in the establishment of a conventional law having for its ultimate object not only the establishment of the principle of free ships, free goods, but "the total abrogation of private maritime war." That far-reaching proposal was, however, so far in advance of the times that it never became binding even on the United States, except in cases of special treaty stipulation. After all the resources of force and persuasion had thus failed to compel or persuade the maritime states to emancipate neutral commerce, the end came at last as an accidental result of the alliance of Great Britain and France in the war begun in 1854 for the defence of the Turk against Russia. To remove the inconvenience that would have resulted from the conflicting policies of two allies—one claiming the right to capture enemy goods in neutral vessels, and the other the right to capture neutral goods in enemy vessels,—Great Britain agreed to admit, during the war, the freedom of enemy property, not contraband, found under a neutral flag, while France suspended upon her part her old claim of enemy ships, enemy goods. In order to emphasize the fact that such concession was special and temporary, the former was careful to declare that "to preserve the commerce of neutrals, Her Majesty is willing, for the present, to waive a part of the belligerent rights appertaining to her by the law of nations. \* \* \* Her Majesty will waive the right of seizing enemy's property, laden on board a neutral vessel, unless it be contraband of war."<sup>63</sup> That temporary surrender of the rule of the *Consolato* by the greatest of the maritime powers in favor of the new rule, which the interests of her own world-wide commerce demanded, was made final on April 16, 1856, when Great Britain, France, Austria, Prussia, Russia, Sardinia, and Turkey subscribed to the Declaration of Paris, whose second and third articles provide that "the neutral flag covers enemy's goods with the exception of contraband of war. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag."<sup>64</sup> The signatories also bound themselves "to bring the present Declaration to the knowledge of the states which have not taken part in the Congress of Paris, and to invite them to accede to it." That invitation has since been accepted by substantially all of the family of nations with the notable ex-

<sup>63</sup> See the agreement of the two France, under date of March 28-29, powers resulting in the concurrent 1854. Cf. Manning (2nd ed.), 249. declarations of England and

<sup>64</sup> Martens (N. R. G.), xv, 791.

ceptions of the United States, Spain, Mexico, China, and Venezuela. The refusal of the United States arose out of the failure of the Declaration completely to embody the aspiration expressed in its notable appeal of 1823. This republic proposed, in what is called the Marcy or American Amendment, to accede to the Declaration, if an article should be added protecting all private property not contraband from capture at sea. When that proposal, favored by Russia, France, Prussia, Italy and the Netherlands, was defeated, probably by reason of the opposition of Great Britain, it was in the next year formally withdrawn.<sup>65</sup> Nevertheless the conduct of the United States since that time has been substantially the same as it would have been if it had actually signed the Declaration. During the war with Mexico no letters of marque were issued; and during the Civil War the President, although armed by Congress with the power to issue such letters, did not exercise it.<sup>66</sup> In the Spanish-American war, although neither combatant was a signatory of the Declaration, both were careful to observe its principles. Thus while it is true that the Great Charter of neutral commerce has not yet received the formal ratification of all, or substantially all of the family of nations, it has received the actual ratification of substantially all, and is fast becoming, if it is not already, a recognized part of the law of nations. If Captain Mahan is right in believing that "the principle that the flag covers the cargo is forever secure,"<sup>67</sup> then the capture of private property at sea, not contraband, must be limited in future to enemy property in enemy vessels.

§ 652. **Effect of the final clause of the Declaration.**—And yet the fact cannot be ignored that the final clause provides that "the present Declaration is not and shall not be binding, except between those powers who have acceded, or shall accede to it." Certainly a neutral who has observed the rule of free ships, free goods, although a non-signatory power, has a clear moral right to be treated as such by all belligerents who are parties to the agreement. Acting upon that theory both combatants in the Franco-Prussian war of 1870-71 extended the protection of its principles to the property of American and

<sup>65</sup> Mr. Marcy, Sec. of State, to Annual Message, 1856; 144 Edinb. Mr. Sartiges, July 28, 1856, MSS. Rev., 353.

Notes, France; same to Mr. Seibels, July 14, 1856, MSS. Inst., <sup>66</sup> Dana's Wheaton, Note 173.

Belgium; President Pierce, Fourth <sup>67</sup> Influence of Sea Power, ch. I, p. 84.

Spanish citizens, although the states of neither had formally adopted its provisions. If the question be asked whether or no a belligerent, who has signed the Declaration, is bound in a war with another, who has not, to recognize its rules in dealings with neutrals whose governments have acceded to it, the answer must be given that practice favors the idea that he is bound. In 1860 when China, a non-signatory power, was at war with Great Britain and France, both applied the second and third articles of the Declaration to neutral trade; and that course was repeated by Chili and Peru when they were allied against Spain, a non-signatory power, in 1885. As a further illustration of the tendency in that direction reference may be made to the fact that during the war which began between China, a non-signatory power, and Japan, a signatory power, in 1894, the former made no attempt to capture Japanese goods under a neutral flag or neutral goods under a Japanese flag, while Japan manifested no disposition whatever to ignore the principles of the Declaration because China had not acceded to it.<sup>68</sup>

<sup>68</sup> Twiss, *Belligerent Right on Principles of Int. Law*, pp. 569-70. the High Seas, p. 8; Lawrence,

## CHAPTER V.

### CONTRABAND TRADE.

§ 653. **Ancient and medieval history of contraband.**—The statement has been made heretofore that the final emancipation of legitimate neutral commerce was the outcome of centuries of struggle carried on, on the one hand, by neutral individuals striving to trade unhindered by war, and, on the other, by belligerents striving to weaken their opponents by depriving them of the benefits of maritime commerce, whether carried on in their own ships or in those of neutrals.<sup>1</sup> From the very beginning of that struggle it was understood that such emancipation should never extend to the illegitimate neutral commerce involved in the transport of such commodities as are capable of being immediately used by one belligerent in the prosecution of hostilities against another. That self-evident principle of self-preservation so far antedated the birth of modern international law that several Roman emperors imposed heavy penalties upon the sale of arms, iron or other necessities to the barbarians; and as a perpetuation of that idea, the popes in their time, by edict or interdict (Latin, *bannum*, Italian, *bando*) put under the ban of the church such Christian traders as trafficked with infidels in weapons and munitions of war.<sup>2</sup> In that way the term contraband (*contrabannum*) came to be applied to the commerce in prohibited articles described in medieval Latin as *merces banno interdictæ*. And here let the fact be emphasized that, long before there was any consensus of opinion between nations as to what articles should be considered contraband, the power to define their character was admitted to reside in the sovereign of the country prohibiting their importation or exportation.

§ 654. **Grotian definition of contraband.**—By the first quarter of the seventeenth century ideas upon the subject of contraband had so far crystallized that Grotius was able to distinguish between those things which are useful only for the purposes of war, those which are not so, and those which are susceptible of indiscriminate use in peace and war. "There are some things," he says, "which are of use in war alone, as

<sup>1</sup> See above, p. 605.

cken), II, § 158; Gessner, *Le Droit*

<sup>2</sup> Cod. iv, 41, 1, Heffter (*Geff- des Neutres*, p. 71.

arms; there are others which are useless in war, and which serve only for the purposes of luxury; and there are others which can be employed both in war and in peace, as money, provisions, ships, and articles of naval equipment. Of the first kind it is true, as Amalasuintha said to Justinian, that he is on the side of the enemy who supplies him with the necessaries of war. The second class of objects gives rise to no dispute. With regard to the third class, embracing objects of ambiguous use (*incipitis usus*), the state of the war must be considered. If seizure is necessary for defence, the necessity confers a right of arresting the goods, under the condition, however, that they shall be restored unless some sufficient reason interferes."<sup>3</sup> No higher tribute to the comprehensiveness or permanency of Grotius's classification can be found than that embodied in the fact of its substantial reproduction by the Supreme Court of the United States, in 1866, in the following form: "The classification of goods as contraband or not contraband has much perplexed textwriters and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes. Lawrence's Wheat., 772, 776, note; The Commercen, 1 Wheat., 382; Dana, Wheat., 629, note; Pars. Mar. Law, 93, 94. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of the blockade or siege."<sup>4</sup> As there can be no real controversy as to articles used exclusively for peaceful purposes, the prolonged and inconsistent contentions carried on for centuries as to what articles do or do not constitute contraband have been confined in the main, first, to articles manufactured and primarily and ordinarily used for military purposes in time of war; second, to articles

<sup>3</sup> *De Jure Belli ac Pacis*, III, c. i, § 5.

<sup>4</sup> *The Peterhoff v. United States*, 5 Wallace 28-62.

which may be and are used for purposes of peace or war, according to circumstances.

§ 655. **Articles absolutely contraband—Arms and munitions of war.**—After the whole field has been examined, and due allowance made for the changes constantly going on in the materials which enter into the manufacture of arms and munitions of war, there is really no great divergence of opinion as to what they really are. As Chancellor Kent has expressed it, “it is the *usus bellici* which determine an article to be contraband, and as articles come into use as implements of war, which were before innocent, there is truth in the remark, that as the means of war vary and shift from time to time, the law shifts with them; not, indeed, by the change of principles, but by a change in the application of them to new cases, and in order to meet the varying uses of war.”<sup>5</sup> In a treaty made between Great Britain and Russia in 1781 it was declared that contraband of war shall consist of the following articles only: “Saltpeter, sulphur, cuirasses, pikes, swords, sword-belts, knapsacks, saddles and bridles, cannon, mortars, firearms, pistols, bombs, grenades, bullets, firelocks, flints, matches and gunpowder; excepting, however, the quantity of the said articles which may be necessary for the defense or use of the ship and those who compose the crew;”<sup>6</sup> and in another treaty entered into between the same parties in 1800 articles, which by common consent are regarded as contraband were declared to be, “cannons, mortars, firearms, pistols, bombs, grenades, bullets, balls, muskets, flints, matches, powder, saltpeter, sulphur, cuirasses, pikes, swords, belts, cartouch-boxes, saddles and bridles, beyond the quantity necessary for the use of the ship.” As an illustration of American practice, reference may be made to the treaty entered into between the United States of North America and the Republic of New Granada, in 1846, in which it was declared that “under this name of contraband, or prohibited goods, shall be comprehended:

First—Cannons, mortars, howitzers, swivels, blunderbusses, muskets, rifles, carbines, pistols, pikes, swords, sabres, lances, spears, halberts; and grenades, bombs, powder, matches, balls, and all other things belonging to the use of these arms.

Second—Bucklers, helmets, breast plates, coats of mail,

<sup>5</sup> International Law (Ed. Abdy.), ch. ix, p. 359.

<sup>6</sup> Cf. Wharton, Int. Law. Dig., § 368.

infantry belts, and clothes made up in the form and for the military use.

Third—Cavalry belts and horses with their furniture.

Fourth—And generally all kinds of arms and instruments of iron, steel, brass, and copper, or of any other materials manufactured, prepared and formed, expressly to make war by sea or land.

Fifth—Provisions that are imported into a besieged or blockaded place.”<sup>7</sup>

In the instructions given by the government of France to its naval officers during the Crimean War (March, 1854) the articles enumerated as contraband are “bouches et armes à feu, armes blanches, projectiles, poudre, salpêtre, soufre, objets d'équipement, de campement et de harnachement militaires, et tous instruments quelconques fabriqués à l'usages de la guerre.” In the Manual of Naval Prize Law, drawn up for the British Admiralty by Professor Holland, in 1888, goods absolutely contraband were said to embrace not only arms of all kinds and the machinery for their manufacture, ammunition and the materials of which it is made, gun cotton and clothing for soldiers, but also military and naval stores, including in the latter marine engines and their component parts, such as cylinders, shafts, boilers and fire-bars. The American Naval War Code declares that articles of the first class are such as “are primarily and ordinarily used for military purposes in time of war, such as arms and munitions of war, military material, vessels of war, or instruments made for the immediate manufacture of munitions of war.” These articles, when “destined for ports of the enemy or places occupied by his forces, are always contraband of war.”<sup>8</sup>

§ 656. **Articles which may or may not be contraband—Res ancipitis usus.**—Almost from the outset the fact was recognized that contraband cannot be limited to arms and munitions of war, that it must be so extended as to embrace a larger list of articles which may or may not be contraband according to the greater or less intimacy of their association with warlike operations. In that way a wide field for controversy was opened up between two sets of disputants, each prompted by motives of self-interest to insist upon an expansion or contraction of the list of contraband, according as the one or the other plan best served their own purposes. Great

<sup>7</sup> Treaties and Conventions of the U. S., p. 195.      <sup>8</sup> Art. 34.



Britain, as the possessor of the greatest sea power, has naturally stood forth as the representative of the idea which favors not only a long list of contraband goods, but also a policy of severity in dealing with those who attempt to traffic in prohibited articles. Against that policy, upheld in the main by English jurists and statesmen, has been arrayed the Continental publicists who have advocated a short list of contraband articles and a lenient method of dealing with those who offend in doubtful cases.<sup>9</sup> Between the two stand the statesmen and the publicists of America who, in the drafting of treaties and state papers, have inclined as much to Continental models as, in the making of judicial decisions, they have inclined to English precedents. Nothing, however, like uniformity in practice or consistency in principle can be attributed to any one of the disputants in the prolonged and selfish wrangle whose outcome has been only weariness and uncertainty. The conflicts between publicists as to the application of the principles involved have not been more marked than the inconsistent practices under which the same state has not only enforced one policy at one time and another at another, but has actually placed conflicting lists of contraband articles in different treaties almost at the same moment. Nothing like order can be extracted from such chaos except through examinations of particular controversies carried on between leading states as to certain controverted groups of articles.

§ 657. **Materials and machinery for manufacture of arms and munitions of war.**—If arms and munitions of war are contraband by the common consent of nations, it is no extreme extension of principle to associate with them the materials out of which and the machinery by which they are fabricated. While such is not the accepted usage of all nations, it is certainly the general practice of Great Britain and the United States so to regard them. Bynkershoek, who earnestly contended that the materials out of which contraband articles may be made are not themselves contraband,—because such an extension of the rule to all materials out of which something fit for war might be made would render the catalogue of contraband interminable,—qualified his general statement by an exception which admitted that materials for the build-

<sup>9</sup> Cf. Gessner, *Le Droit des Neutres*, 92-6, 109, 160; Kleen, *Contrebande de Guerre*, 30-37, 43; Ortolan, *Dip. de la Mer*. II, 190; Bluntschli, § 805; Geffcken, in Holtzendorff's *Handbuch* (1889), v, 719-24.

ing of ships might be properly prohibited, if the enemy is in great need of them and cannot well carry on the war without them.<sup>10</sup> On the same general principle saltpeter and sulphur have generally been included in the contraband list; and in the same category must be placed the materials necessary in the manufacture of the other various kinds of explosives created of late by the ingenious hand of modern invention. The British Admiralty Manual of Prize Law treats as absolutely contraband machinery for manufacturing arms, ammunition and materials for ammunition, including lead, sulphate of potash, muriate of potash, chlorate of potash, and nitrate of soda; gunpowder and its materials, saltpeter and brimstone, also guncotton. The American Naval Code declares absolutely contraband ammunition and explosives of all kinds and their component parts; machinery for the manufacture of arms and munitions of war, including saltpeter.

§ 658. **Materials for naval construction.**—In some of the treaties of the seventeenth century articles of naval construction were expressly included, while in others they were expressly excluded. In the absence of express treaty stipulation such articles were not then contraband under the general law of nations, according to Sir Leoline Jenkins, who, in reporting to King Charles II, in 1674, upon a case in which English tar and pitch, carried in a Swedish vessel and the produce of Sweden, had been captured and taken into Ostend for adjudication, said: "There is not any pretense to make the pitch and tar belonging to your Majesty's subjects to be contraband; these commodities not being enumerated in the twenty-fourth article of the treaty made between your Majesty and the crown of Spain, in the year 1667, are consequently declared not to be contraband in the article next following. \* \* \* These goods, therefore, if they be not made unfree by being found in an unfree bottom, can not be judged by any other law than by the general law of nations; and then I am humbly of opinion, that nothing ought to be judged contraband by that law in this case, except it be in the case of besieged places, or of a general notification made by Spain to all the world, that they will condemn all the pitch and tar they meet with."<sup>11</sup> In the last

<sup>10</sup> Quandoque tamen accidit, ut et gerere haud possit. *Quaest. Jur. navium materia prohibeatur, si Pub.*, I, c. 10.

hostis eâ quam maxime indigeat, <sup>11</sup> Wynne's *Life of Sir Leoline Jenkins*, ii, 751. The written opin-

clause is contained a declaration by a great authority on international law that, at that date, each state possessed the right, upon the outbreak of war, to draw up a list of such articles as it resolved to consider as contraband during its continuance. Upon that theory the United Provinces, during the war with England in 1652, and with Portugal in 1657, issued edicts placing naval stores in the list of contraband,—edicts so enlarged in 1689 as to embrace grain and provisions of every kind.<sup>12</sup> In 1799 we find Lord Stowell departing widely from the opinion of Sir Leoline Jenkins, when, in deciding the case of the Swedish convoy, determined in the English court of admiralty in that year, he said “that tar, pitch, and hemp, going to the enemy’s use, are liable to be seized as contraband in their own nature, can not, I conceive, be doubted under the modern law of nations; though formerly, when the hostilities of Europe were less naval than they have since become, they were of a *disputable nature*, and perhaps continued so at the time of the making of the treaty, or at least at the time of making that treaty which is the basis of it, I mean the treaty in which Whitlock was employed in 1656; for I conceive that Valin expresses the truth of this matter when he says: *‘De droit ces choses (speaking of naval stores) sont de contrabande aujourd’hui et depuis le commencement de ce siècle, ce qui n’étoit pas autrefois néanmoins;’*—and Vattel, the best writer upon these matters, explicitly admits amongst positive contraband, *‘les bois, et tout ce qui sert à la construction et à l’armement de vaisseaux de guerre.’*”<sup>13</sup> The foregoing opinion was delivered by the great English admiralty judge near the close of the mighty struggle between Great Britain and the powers united in the Armed Neutrality Leagues, a struggle terminated at last by the convention concluded between Great Britain and Russia in 1801, and subsequently acceded to by Sweden and Denmark. By the third article of that treaty it was declared, “that, in order to avoid all ambiguity in what ought to be considered as contraband of war, His Imperial Majesty of all the Russias and His Britannic Majesty declare, conformably to the eleventh article of the

ions delivered by that eminent prize cases, were published as an civilian, Judge of the High Court Appendix to Wynne’s Life.

of Admiralty in the reign of Charles II, in answer to questions submitted to him by the King or by the Privy Council, relating to

<sup>12</sup> Bynkershoek, *Quaest. Jur. Pub.*, I, c. x.

<sup>13</sup> The *Maria*, 1 Rob. Adm., 372.

treaty of commerce, concluded between the two crowns on the 10th (21st) February, 1797, that they acknowledge as such only the following articles, namely, cannons, mortars, fire-arms, pistols, bombs, grenades, balls, bullets, firelocks, flints, matches, powder, saltpeter, sulphur, helmets, pikes, swords, sword-belts, saddles and bridles; excepting, however, the quantity of the said articles which may be necessary for the defense of the ship and those who compose the crew; and all other articles whatever, not enumerated here, shall not be considered warlike and naval ammunition, nor be subject to confiscation, and of course shall pass freely, without being subject to the smallest difficulty, unless they be considered as enemy's property in the above settled sense."<sup>14</sup> To that rule, excluding naval stores from the list of contraband, France has adhered with consistency.<sup>15</sup> On the other hand, the United States and Great Britain have distinctly repudiated it. In 1797, in the course of a dispute with Spain, the government of the former declared that "ship timber and naval stores are by the law of nations contraband of war,"<sup>16</sup> and the decisions of its prize courts have been in the same direction, while the British Admiralty Manual of Prize Law now classes as articles absolutely contraband naval stores, such as masts, spars, rudders, and ship timber, hemp and cordage, sail cloth, pitch and tar.

§ 659. **Horses as contraband.**—Sharply as Great Britain and France have disagreed as to naval stores they have united in regarding horses as contraband. In the *Ordonnance de la Marine* of 1681, in which French law on the subject was distinctly declared, it was provided that "arms, powder, bullets, and other munitions of war, with horses and their harness, in course of transport for the service of our enemies, shall be confiscated;"<sup>17</sup> and, as a general rule, horses have been included in all English treaties with other powers, excepting a few contracted with Russia.<sup>18</sup> It is nevertheless a fact that in the

<sup>14</sup> Martens (R.), vii, 150-281.

<sup>15</sup> Pistoye et Duverdy, I, 445; II Volante, ib. 409; La Minerve, ib. 410.

<sup>16</sup> In the treaty of 1794, between Great Britain and the United States, in which several kinds of naval stores were declared contraband, it was added that "generally whatever may serve directly to the

equipment of vessels, unwrought iron and fir planks only excepted," shall partake of that quality. See Kent, Com. 1, p. 138.

<sup>17</sup> Valin, *Ord. de la Marine*, II, 264.

<sup>18</sup> Manning says that "all the principal powers have so looked upon them at different times, with the exception of Russia." p. 355.

British Manual of Prize Law horses are placed in the list of conditional contraband. That concession may be the outcome of the contention now made by certain publicists that horses and all other beasts of burden should be regarded as contraband or not according to the purpose for which they are intended. The United States and other American countries, accepting that idea, seem to limit the prohibition only to such horses as are intended for cavalry mounts.<sup>19</sup> It is difficult, however, to explain why horses imported for that purpose are less noxious than those destined for transport or artillery service.<sup>20</sup> As horses and other beasts of burden are seldom purchased during war for agricultural purposes every state should have the right to presume that they are destined for military use unless there is the most convincing proof to the contrary. Horses are included in an Austrian ordinance of 1864, limiting contraband in other respects to munitions, etc., saltpeter and sulphur; and in 1870 Count Bismarck complained that the "export of horses from England under existing circumstances provided the enemy of Prussia with the means of carrying on a war with a power in amity with Great Britain."<sup>21</sup>

§ 660. **Coal as contraband.**—Although the introduction of the use of coal into vessels of war began early in the last century, the Crimean War was the first maritime struggle of importance in which such vessels were propelled by steam power. Thus confronted by new conditions Great Britain, after stopping coals on the way to a Russian port, applied to them, as an article *incipitis usus*, her doctrine of conditional contraband. When the question again arose in 1859 in the war between Austria on the one hand and France and Piedmont on the other the Foreign Office warned British merchants that "it appears, however, to her Majesty's Government, that, having regard to the present state of naval armaments, coal may, in many cases, be rightly held to be contraband of war,

<sup>19</sup> See treaties made by United States with Brazil, 1828; with Colombia, 1846, and with Bolivia, 1858. Treaties and Conventions, pp. 105, 195, 90. As to that limitation, considered as an international rule, see Bluntschli, § 805.

<sup>20</sup> The contraband character of horses is maintained by Vattel, III, § 112; Kent, Lect., vii; Manning,

355; Calvo, §§ 2451, 2461, 2293. <sup>21</sup> State Papers, No. 3. 1870, Franco-Prussian War. Hall well says that "under the mere light of common sense the possibility of looking upon horses as contraband seems hardly open to argument.

They may no doubt be imported during war-time for agricultural purposes, as powder may be used

and therefore that all who engage in the traffic must do so at a risk, from which Her Majesty's Government cannot relieve them."<sup>22</sup> When the royal neutrality proclamation, issued upon the outbreak of the American Civil War, came under discussion in the House of Lords Earl Granville, after referring to articles clearly contraband, said "there are certain other articles the character of which can be determined only by the circumstances of the case,"—a remark made more definite by a declaration by Lord Brougham that coal might be contraband, "if furnished to one belligerent to be used in warfare against the other," and by a still more precise statement from Lord Kingsdown, who said that "if coals are sent to a port where there are war steamers, with a view of supplying them, they become contraband."<sup>23</sup> In accordance with such ideas coal was naturally listed in the British Admiralty Manual of Prize Law as conditional contraband. The same conclusion has been reached by the government of the United States despite the fact that in 1859 Mr. Cass declared that "the attempt to enable belligerent nations to prevent all trade in this most valuable accessory to mechanical power has no just claim for support in the law of nations; and the United States avow their determination to oppose it so far as their vessels are concerned."<sup>24</sup> The American Naval War Code declares coal conditionally contraband "when destined for a naval station, a port of call, or a ship or ships of the enemy."<sup>25</sup> The United States enjoyed the benefit of the English rule in the matter of the Geneva award in which Count Sclopis<sup>26</sup> said that "if an excessive supply of coal is connected with the other circumstances which show that it was used as a veritable *res hostilis*, then there is an infraction of the second article of the treaty. \* \* \* Thus, for example, when I see the Florida and the Shenandoah choose for their fields of action, the one the stretch of sea between the Bahama Archipelago and Bermuda, to cruise there at its ease, and the other Melbourne and Hobson's Bay for the purpose, immediately carried out, of going to the Arctic Seas, there to attack the whaling vessels,

for fireworks; but the presumption is certainly not in this direction." p. 683.

<sup>22</sup> Jurist, 1859, v, 203.

<sup>23</sup> Hansard, 3d series, vol. clxii, 2084 and 2087. Dana's Wheaton, p. 632.

<sup>24</sup> Mr. Cass, Sec. of State, to Mr. Mason, June 27, 1859. MSS. Inst., France.

<sup>25</sup> Art. 36.

<sup>26</sup> In the Geneva award. See Whart. Dig., § 369.

I cannot but regard the supplies of coal in quantities sufficient for such services infraction of the second rule of Article VI." Germany, going even farther than Great Britain and the United States, maintained during the war of 1870 that the English government should not only regard as contraband all cargoes of coal bound for the French fleet in the North Sea, but that all export of coal to French ports should be prohibited.<sup>27</sup> On the other hand, many of the Continental states have from the outset assumed a contrary position. In 1859 France declared that coal was not contraband, and that assertion she repeated in 1870. Among those who uphold her in that contention are numbered not only the greater part of the secondary states, but Russia herself, who, during the West African Conference of 1884, vigorously protested against the inclusion of coal amongst articles contraband of war, declaring at the same time that she would "categorically refuse her consent to any articles in any treaty, convention, or instrument whatever which would imply its recognition"<sup>28</sup> as contraband.

§ 661. Provisions as contraband.—From the founding of international law the opinion has prevailed that while provisions are not in themselves contraband, they may become so when their withholding offers a prospect of reducing the enemy by famine. The general views on that subject, expressed by Grotius and upheld by Bynkershoek,<sup>29</sup> received a more explicit statement from Vattel, who said that "commodities particularly useful in war, and the importation of which to an enemy is prohibited, are called contraband goods. Such are arms, ammunition, timber for ship-building, every kind of naval stores, horses,—and even provisions, in certain junctures, when we have hopes of reducing the enemy by famine.

\* \* King Demetrius hanged up the master and pilot of a vessel carrying provisions to Athens at the time when he was on the point of reducing that city by famine. In the long and

<sup>27</sup> State Papers, Franco-German War, 1870, No. 3; Calvo, § 2460; Bluntschli, § 805.

<sup>28</sup> Parl. Papers, Africa, No. iv, 1885, 132.

<sup>29</sup> *De Jure Belli ac Pacis*, II, c. ii, § 6; III, c. xvii, § 1; *Quaest. Jur. Pub.*, I, c. 9. Rutherford, in commenting on Grotius's declaration (III, c. i, § 5) as to the right

of seizing provisions on the ground of necessity, supposes his meaning to be that such seizure would not be justifiable "unless the exigency of affairs is such that we cannot possibly do without them." Inst. II, b. ii, ch. 9, § 19. It thus appears that the opinion of Grotius did not proceed upon the idea of contraband, but upon the

bloody war carried on by the United Provinces against Spain for the recovery of their liberties, they would not suffer the English to carry goods to Dunkirk, before which the Dutch fleet lay." And from the same author we learn that "in 1597 Queen Elizabeth would not allow the Poles and Danes to furnish Spain with provisions, much less with arms, alleging that 'according to the rules of war, it is lawful to reduce an enemy by famine, with the view of obliging him to sue for peace.'"<sup>30</sup> Under the shadow of such precedents the English government in 1793 and 1795 seized all vessels laden with provisions bound to French ports, alleging as justification that there was a prospect of reducing the enemy by famine, and that the British nation was threatened by a scarcity of the articles directed to be seized. After the instructions of June, 1793, had been revoked, a treaty was concluded between Great Britain and the United States, November 19th, 1794, in which it was provided that "whereas the difficulty of agreeing on the precise cases, in which alone provisions and other articles, not generally contraband, may be regarded as such, renders it expedient to provide against the inconveniences and misunderstandings which might thence arise; it is further agreed, that whenever any such articles so becoming contraband according to the existing law of nations, shall for that reason be seized, the same shall not be confiscated; but the owners thereof shall be speedily and completely indemnified."<sup>31</sup> Before the treaty in question could be ratified an Order in Council was issued in April, 1795, instructing British cruisers to stop and detain all vessels, laden wholly or in part, with corn, flour and other articles of provisions, bound to any port in France, and to send them to such ports as might be most convenient, in order that such provisions might be purchased on behalf of the government. When the legality of the proceedings was challenged by the United States, the issue was transferred to a mixed commission which awarded, under the seventh article of the treaty of 1794, to the owners of the vessels and cargoes seized under the Orders in Council full indemnity as well for the loss of a market as for the other consequences of their detention. The vital question of law,—the question involving a definition of the circumstances under

assumption of pure necessity upon the part of the capturing belligerent.

<sup>30</sup> *Droit des Gens*, III, §§ 112, 117, and note to § 112.

<sup>31</sup> *Treaties and Conventions*, p. 379.



which provisions and other articles, not generally contraband, might be regarded as such,—was, however, left undetermined. A judicial answer to that question was first given by Lord Stowell in the case of the *Jonge Margaretha*,<sup>32</sup> in which cheeses sent by a Papenberg merchant from Amsterdam to Brest, where a considerable French fleet was stationed, were condemned as contraband. After declaring that “I take the modern established rule to be this, that generally provisions are not contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it,” the judge proceeded to enumerate three causes of exception tending to protect provisions from condemnation as contraband. The first was that they are the growth of the country which exports them; the second, that they are in their native and unmanufactured state; the third, that they are intended for the ordinary uses of life, and not for military use. “As it is impossible to ascertain the final use of an article *incipitis usus*, it is not an injurious rule, which deduces the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed, if, at the time when the articles were going, a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful.”<sup>32a</sup> In the case of the *Commercen*<sup>33</sup> the rules laid down in the *Jonge Margaretha* were accepted and restated by the Supreme Court of the United States. Despite the suggestion made by Lord Stowell in the *Ranger*,<sup>34</sup> that a claim might legally be made to condemn all provisions, whether intended for military consumption or not, the sounder view undoubtedly is that provisions can only be contraband when intended for military use, or when sent to ports actually besieged or blockaded. Regardless of her usual devotion to a limited list of contraband articles France, during her hostilities with China in 1885, assumed an extreme position in an opposite direction by declaring shipments of rice destined for any port north of Canton to be contraband of war, by reason of “the importance of rice in the feeding of the Chinese population,” as well as in the feeding of the Chinese armies.<sup>35</sup> The unjustifiable attempt

<sup>32</sup> 1 Rob. Adm., 189.

<sup>32a</sup> Kent, Com. 1, p. 140.

<sup>33</sup> 1 Wheaton, 387. See also *Maisennaire v. Keating*, 2 Gallison, 325.

<sup>34</sup> 6 Rob. Adm., 125. See also the *Edward*, 4 Rob. Adm., 69.

<sup>35</sup> Mr. Kasson, then U. S. minister at Vienna, writing on the sub-

thus made by France to oppress the non-combatant population of China, as Great Britain had attempted to oppress the non-combatant population of France in 1793 and 1795, was met by a declaration from Lord Granville that the decision of no prize court attempting to give effect to the doctrine put forward by France would be respected.<sup>36</sup> Notwithstanding such recent action upon her part in the right direction Great Britain nevertheless attempted during the Boer War, by the seizures of the Bundesrath, the Herzog and the General in African waters,<sup>37</sup> to carry out a policy defensible, if at all, on the ground that by no other means could the legitimate rights of a belligerent be enforced in cases in which the only approach to an enemy's country from the sea is through neutral ports.

§ 662. **Money, metals, cotton, and clothing.**—Such articles, although not in themselves contraband, may become so under circumstances substantially the same as those that impart to provisions a noxious character.<sup>38</sup> While money may be lawfully sent to a belligerent country for the purchase of goods or for the payment of debts, its consignment for the purpose of assisting belligerent operations authorizes its treatment as contraband. Upon that ground the Supreme Court of the United States held that the general commanding at New Orleans during the Civil War was justified in ordering the removal from a Prussian vessel, outward bound, of silver plate and bullion believed to be intended for the promotion abroad of the interests of the Southern Confederacy.<sup>39</sup> During that contest it was also held that cotton was contraband because it took the place of money. As Mr. Bayard expressed it: "Cotton was useful as collateral security for loans negotiated abroad by the Confederate States Government, or, as in the present case, was sold by it for cash to meet current expenses, or to purchase arms and munitions of war. Its use for such purposes was publicly proclaimed by the Confederacy, and its

ject of the declaration of France to the Sec. of State, said, "the real principle involved goes to this extent, that everything the want of which will increase the distress of the civil population of the belligerent country may be declared contraband of war. The entire trade of neutrals with belligerents may be thus destroyed without the establishment of an effective block-

ade of ports. War itself would become more fatal to neutral states than to belligerent interests."

<sup>36</sup> Parl. Papers, France, No. 1, 1885. See Geffcken's comments in Holtzendorff's *Handbuch* (1889), iv, 723.

<sup>37</sup> Blue-book, Africa, 1900, No. 1.

<sup>38</sup> Cf. Manning Int. Law, p. 358.

<sup>39</sup> U. S. v. Diekelman, 92 U. S. 520.

sale interdicted, except under regulations established by, or contract with, the Confederate government. Cotton was thus officially classed among war supplies, and as such, was liable to be destroyed, when found by the Federal troops, or turned to any use which the exigencies of war might dictate. \* \* \* Cotton in fact was to the Confederacy as much munitions of war as powder and ball, for it furnished the chief means of obtaining those indispensables of warfare."<sup>40</sup> As to clothing and the materials from which it is made, there can scarcely be a doubt as to their contraband character when the fact appears that they are intended for military uses. In the Peterhoff<sup>41</sup> case "men's army bluchers, artillery boots and government regulation gray blankets" were said to belong to the first class of contraband articles because "destined directly to the rebel military service."

§ 663. Power to declare what is contraband. Conditional contraband. —At the beginning of this chapter the fact was emphasized that long before there was any consensus of opinion between nations as to what articles should be considered contraband, the power to define their character was admitted to reside in the sovereign of the country prohibiting their importation. Only the admitted tendency upon the part of English statesmen and jurists to cling to ancient forms, long after their vitality has departed, can account for the statement contained in the British Admiralty Manual of Prize Law that "it is a part of the prerogative of the crown during the war to extend or reduce the lists of articles to be held absolutely or conditionally contraband." Certainly nothing can be farther from the truth than the assumption that the sovereign of the British Empire or any other now possesses the power to enlarge the list of contraband articles regardless of the assent of other nations. While it is undoubtedly true that no general or precise agreement exists regulating the details of the entire subject, there does exist, first, a general understanding that arms and munitions of war, and the materials from which they are made, are in their nature contraband, and as such liable to seizure and condemnation when found on the way to an enemy's destination; second, that there are other articles not contraband in their own nature which may be treated as such when about to be applied to

<sup>40</sup> Mr. Bayard, Sec. of State to Mr. Muruaga, June 28, 1886. MSS. Notes, Spain. <sup>41</sup> 5 Wallace, 28.

warlike purposes as distinguished from the needs of a non-combatant population. In order to give scientific form to the latter classification English publicists invented the doctrine of occasional or conditional contraband which has been fully accepted in the United States. Despite the efforts of certain Continental jurists to deny the existence of such a doctrine the leaders among them have made such admissions as concede at least a limited application of the principle involved in it. Klüber, for instance, admits its existence in doubtful cases to be governed by surrounding circumstances,<sup>42</sup> while Ortolan maintains that *res ancipitis usus* may be treated as contraband under very exceptional conditions.<sup>43</sup> To such concessions may be added Bluntschli's declaration (§ 805) that such things as engines, horses and coal may be treated as contraband if it can be proven that they are destined for warlike uses,—articles classed by Heffter as prohibited goods when their transport to a belligerent by a neutral gives assistance manifestly hostile in its nature.<sup>44</sup> "These opinions concede," as Lawrence well says, "all that is essential in the British position."<sup>45</sup> It may, therefore, be confidently maintained that the power once vested in each sovereign to prescribe for himself a list of contraband articles, to be expanded or contracted at his pleasure, has been merged long ago in the primacy of overlordship vested in the family of nations as a whole. Certainly no extension of the contraband list can now be made by any one sovereign to the detriment of the interests of all the rest without their consent.

§ 664. State responsibility for individual action. Lord Westbury said that "in the view of international law the commerce of nations is perfectly free and unrestricted. The subjects of each nation have a right to interchange the products of labor with the inhabitants of every other country. If hostilities occur between two nations, and they become belligerents, neither belligerent has a right to impose, or to require

<sup>42</sup> *Droit des Gens Moderne de l'Europe*, § 288.

<sup>43</sup> *Dip. de la Mer*, II., 179. Ortolan excepts from this exception provisions and other objects of first necessity.

<sup>44</sup> "C'est seulement dans le cas où, par leur transport vers l'un des

belligérants, le commerce neutre prend le caractère manifestement hostile, que l'autre belligérant a le droit d'empêcher de fait." § 160.

<sup>45</sup> *Principles on Int. Law*, p. 609. See M. Kleen's criticism upon the English doctrine in his *Contrebande de Guerre* (1893), pp. 30-37.

a neutral government to impose any restrictions on the commerce of its subjects."<sup>46</sup> In time of war as in time of peace neutral merchants may trade even in arms and munitions of war at their peril. Such peril arises out of the right of a belligerent to intercept the transport to his enemy of such commodities as are capable of being immediately used in the prosecution of hostilities against himself. The infraction of law arises out of the act of the neutral individual whenever such act conflicts with the privilege of the belligerent. As Ortolan has expressed it: "Il ne s'agit pas d'actes d'un gouvernement qui rompraient la neutralité, mais d'actes de particuliers qui exercent leur trafic."<sup>47</sup> Or in the words of Lord Stowell "upon the breaking out of a war, it is the right of neutrals to carry on their accustomed trade, with an exception of the particular cases of a trade to blockaded places, or in contraband articles (in both which cases their property is liable to be condemned), and of their ships being liable to visitation and search."<sup>48</sup> As the neutral government to which such traders belong is not bound to restrain them from dealing in forbidden goods, neither is it permitted to interfere in their behalf if the articles in which they traffic are seized by one belligerent while on the way to the other. When war occurs all that a neutral government is required to do is to warn its subjects, generally in a proclamation of neutrality, of the risks they run as carriers of contraband goods, with an admonition that those who disregard such warning may not expect when calamity overtakes them to be sheltered by state protection. As the offense of transporting contraband is not com-

<sup>46</sup> *Ex parte* Chavasse, *re* Grazebrook, 34 L. J. N. S. 17. In that case was cited and approved the following passage from Kent (1 Com., 142): "It was contended on the part of the French nation in 1796, that neutral governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent powers. But it was successfully shown, on the part of the United States, that neutrals may lawfully sell at home to a belligerent purchaser, or carry themselves to the belligerent powers, contraband articles subject to the

right of seizure *in transitu*. This right has been explicitly declared by the judicial authorities of this country (*Richardson v. Ins. Co.*, 6 Mass. 113; the *Santissima Trinidad*, 7 Wheat. 283). The right of the neutral to transport, and of the hostile party to seize, are conflicting rights, and neither party can charge the other with a criminal act." See Mr. Abdy's criticism on Kent's position in *Abdy's Kent* (ed. 1878), p. 301.

<sup>47</sup> *Dip. de la Mer*, II., 199.

<sup>48</sup> *The Immanuel*, 2 Rob. Adm., 198.

plete until the quitting of neutral territory on a belligerent destination, a neutral government is not required by the law of nations to prohibit the sale of arms and munitions of war to belligerent agents within such territory. When, in 1793, the government of the United States was called upon by that of Great Britain to prevent the sale of arms and accoutrements to an agent of France, Jefferson, then Secretary of State, replied that American citizens "have been always free to make, vend and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means perhaps, of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal derangement of their occupations. It is satisfied with the external penalty pronounced in the President's proclamation, that of confiscation of such portion of these arms as shall fall into the hands of the belligerent powers on the way to the ports of their enemies. To this penalty our citizens are warned that they will be abandoned."<sup>49</sup> In accordance with that incontestable doctrine the Geneva Tribunal gave no damages against Great Britain because its government had refused to prohibit the trade in contraband goods carried on by English merchants with the ports of the Southern Confederacy.<sup>50</sup> Credit can not be given to the few publicists who claim that justice and equity demand that neutral states are bound to prohibit the sale of arms and other instruments of war within their territory to belligerent agents, especially when such traffic involves large transactions.<sup>51</sup> After a neutral government has prevented the departure of armed expeditions from its shores, and has interdicted the supply of fighting outfits to belligerent vessels in its ports, it can consign with a warning the individual neutral trader who takes his fate in his own hands to the jurisdiction of the prize court of the offended belligerent, subject only to the obligation of securing to him there a trial according to the recognized principles of international law.<sup>52</sup>

<sup>49</sup> Randolph, Correspondence of Phillimore, III., § ccxxx.; Blunt-Jefferson, III., 234. schli, § 76.

<sup>50</sup> See American Case, Pt. iv.; <sup>52</sup> Only the *commerce actif* is British Counter Case, Pt. iv. punishable under Bynkershoek's

<sup>51</sup> Hautefeuille, II., tit. viii., § 3; rule, non recte vehamus, sine

§ 665. **Belligerent destination. Deposit.** —From what has been said it appears that no offense can be committed by the sale or transport of contraband goods within neutral territory. The offense is not complete until after such goods have been sent, by land or sea, across the frontier with a belligerent destination.<sup>52a</sup> And as a destination is presumed to be belligerent if it is not manifestly friendly, a vessel is not to leave her course open to circumstances, and to make her destination dependent on contingencies. As she is liable to capture if in any contingency she may touch at a hostile port, she can only save herself by proving that the contingent intention was definitely abandoned.<sup>53</sup> As the offense is complete when a neutral vessel leaves port with a belligerent destination and a contraband cargo, so when the destination is reached and the cargo delivered, in technical language, "deposited," criminality ceases, because the goods are seizable on account of their noxious qualities, and not by reason of the act of the person carrying them. Therefore the penalty can only be inflicted before deposit terminates the liability. As Lord Stowell has expressed it in the case of the *Imina* just cited, "the articles must be taken *in delicto*, in the actual prosecution of a voyage to an enemy's port. Under the present understanding of the law of nations you cannot generally take the proceeds on the return voyage." The leading exception to that general rule, as laid down by the same judge in the case of the *Nancy*,<sup>54</sup> declares that the return voyage will not be regarded as a separate and innocent expedition when the outward and homeward voyage are really but parts of one transaction, planned and conducted from the beginning by the same persons as one adventure, especially in a case in which the presumption of guilt is increased by the carrying on the outward voyage of contraband goods and fraudulent papers. That extreme extension of belligerent rights, condemned by Continental and American publicists,<sup>55</sup> is modified certainly by implication in the provision of the British Admiralty

*fraude tamen vendimus. Quæst. Jur. Pub.*, I., c. 22.

<sup>52a</sup> See above, p. 741.

<sup>53</sup> The *Imina*, 3 Rob. Adm., 167; *Trende Sostre*, cited in the *Lisette*, 6 ib., 390n.

<sup>54</sup> 3 Rob. Adm., 126.

<sup>55</sup> Cf. Ortolan, *Dip. de la Mer*, III., ch. vi. "The soundness of

these last decisions may well be questioned (The *Rosalie* and *Betty*, Robinson's Adm'r Rep., ii., 343. The *Nancy*, ib. iii., 122); for, in order to sustain the penalty, there must be, on principle, a *delictum* at the moment of seizure." Dana's *Wheaton*, p. 649.

Manual of Prize Law,<sup>56</sup> which only requires that a commander shall detain a vessel returning under such circumstances.

§ 666. **Penalty for carrying contraband.**—Before the principle was settled that the damage to a belligerent from contraband trade results from the nature of the goods conveyed and not from the fact of transport, it was the ancient practice to confiscate both ship and cargo.<sup>57</sup> The milder modern practice of confiscating the contraband goods only is one of the notable developments of international trade in the seventeenth century. A relic of the earlier practice survives, however, in the rule which still condemns the vessel if the contraband cargo belongs to its owner. If the owner of the contraband articles is part owner of the ship his share in her is also forfeited upon the principle that “when a man is concerned in an illegal transaction, the whole of his property embarked in the transaction is liable to confiscation.”<sup>58</sup> Thus it may happen that a neutral who may carry the contraband goods of another neutral with no other penalty than the loss of freight, may suffer as the penalty of carrying his own contraband goods the loss of his vessel. If a neutral vessel is bound by a treaty of its own country to abstain from the act in question, the vessel is condemned for the act, although the cargo be not the property of its owner.<sup>59</sup> If there is a resort to fraudulent devices, such as false papers and false destination, for the purpose of defeating the right of search, or deceiving the searching officers, the vessel becomes subject to confiscation as well as the contraband cargo. The extreme contention of certain writers<sup>60</sup> that mere knowledge on the part of the owner of a vessel of her employment in the carrying of contraband involves the ship in the penalty imposed upon the noxious goods is certainly weakened by the absence of such a rule from Lord Stowell’s statement made as early as 1798, that “the carrying of contraband articles is attended only with the loss of freight and expenses, except when the ship belongs to the owner of the contraband cargo, or when the simple misconduct of carrying a contraband cargo has

<sup>56</sup> Holland, 23, 24. Lawrence, Kent’s Com., I., 146; Bynkershoek, Principles, 616.

*Quaest. Jur. Pub.*, ch. 12-14.

<sup>57</sup> Such was the ancient practice, except in France, where, until 1681, goods were only seized on payment of their value. The Neutralitet, 3 Rob. Adm., 295; Jonge Tobias, I., ib. 330; Atalanta, 6 ib. 440;

<sup>58</sup> Jonge Tobias, 1 Rob. Adm., 330.

<sup>59</sup> Dana’s Wheaton, p. 663.

<sup>60</sup> E. g., Bynkershoek, *Quaest. Jur. Pub.*, I., c. 12.



been connected with other malignant and aggravating circumstances.”<sup>61</sup> In the absence of any such “malignant and aggravating circumstances” the modern rule undoubtedly is that the vessel carrying contraband goods is visited with no other penalty than loss of time, freight, and expenses. The penalty of confiscation which falls upon contraband goods extends itself, however, to innocent goods on the same ship provided they belong to the same owner. As Lord Stowell has expressed it: “The law of nations in my opinion is, that to escape the contagion of contraband, the innocent articles must be the property of a different owner.”<sup>62</sup>

**Modifications by treaty.** The fact should here be emphasized that the growing interests of modern commerce are continually suggesting mitigations of existing penalties through treaty stipulations. A few exceptional treaties, such for instance as that made between the United States and Prussia in 1785,<sup>63</sup> impose temporary detention as the only penalty for the carrying of contraband. The treaty in question, after declaring that there shall be no “confiscation or condemnation and a loss of property” in such cases, provides that “it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding,” etc. Another attempt to remove the great inconvenience to commerce resulting from the detention of vessels is embodied in that class of treaties which provide that a neutral vessel has the right to purchase the free continuation of her voyage by abandoning to the belligerent whatever contraband goods she has on board, provided they are not greater in quantity than the captor can conveniently accommodate.<sup>64</sup> Some authorities go so far as to claim that such a right exists even in the absence of treaty.

<sup>61</sup> Ringende Jacob, 1 Rob. Adm., note 2. In the scheme of the Institut de Droit International for

<sup>62</sup> The Stadt Embden, 1 Rob. Adm., 31. a Règlement des Prises Maritimes, it is provided that “le navire arrêté pour cause de contrebande de

<sup>63</sup> Treaties and Conventions of U. S., 907. guerre peut continuer sa route, si

<sup>64</sup> Such provisions are contained in the treaties between Russia and Denmark, 1782 (Martens, R. iii., 476); the United States and Sweden, 1783 (ib. 571); Austria and Russia, 1785 (ib. iv., 78), and in other treaties cited by Hall, 692, sa cargaison ne se compose pas exclusivement, ou en majeure partie, de contrebande de guerre, et que le patron soit prêt à livrer celle-ci au navire du belligérant et que le déchargement puisse avoir lieu sans obstacle selon l'avis du

Although a practice, presupposing such a right, was followed by the Confederate States during the American Civil War, it can not be said to rest upon any generally recognized canon of international law. And it is not likely to be recognized as such, because as Dana has expressed it, "as the captor must still take the cargo into port, and submit it to adjudication, and as the neutral can not bind the owner of the supposed contraband cargo not to claim it in court, the captor is entitled, for his protection, to the usual evidence of the ship's papers, and whatever other evidence induced him to make the capture, as well as to the examination on oath of the master and supercargo of the vessel. It may not be possible or convenient to detach all these papers, and deliver them to the captor; and certainly the testimony of the persons on board cannot be taken at sea in the manner required by law. \* \* Indeed, a strong argument might be made for these considerations, that the article in the treaty can only be applied to a case where there is the capacity in the neutral vessel to insure the captor against a claim on the goods."<sup>65</sup>

**Pre-emption.** In the event the goods seized are undoubtedly contraband there can be no question that the belligerent captor may elect, from motives of policy, to acquire a title by purchase rather than through a judicial condemnation. Such a relaxation of the severe right of war was first made in favor of the products of the owner's country as in the case of the concession made at the end of the last century in favor of pitch and tar by Great Britain, who preferred to pay for them rather than seize them as lawful prize. "No unfair compromise," Lord Stowell said, "between the belligerent's rights, founded on the necessities of self-defense, and the claims of the neutral to export his native commodities, though immediately subservient to the purposes of hostility."<sup>66</sup> As a perpetuation of that principle the British Admiralty Manual of Prize Law provides that "the carriage of goods conditionally contraband, and of such absolutely contraband goods as are in an unmanufactured state and are the produce of the country exporting them, is usually followed only by the pre-emption of such goods by the British Government, which then pays freight to the vessel carrying the

commandant du croiseur." *Ann.*

<sup>66</sup> Sarah Christina, 1 Rob. Adm.,

*de l'Institut*, 1883, 218.

241.

<sup>65</sup> Dana's Wheaton, 665.

goods."<sup>67</sup> The real difficulty arises when an attempt is made to pre-empt goods not liable to confiscation as contraband of war. In that event the claim of pre-emption must rest (1) either upon the assumption that the right exercised by governments during the Middle Ages of seizing grain or other necessary articles found in the hands of foreigners in their ports, on promise of compensation, still survives;<sup>68</sup> or (2) on the necessity which may compel any government to take at its cost property from subjects or foreigners whenever self-preservation requires it.<sup>69</sup> Modern practice, which declines to recognize either claim in that extreme form, confines the right to times of war, and limits it to certain kinds of neutral goods bound to an enemy's port. "I have never understood," said Lord Stowell, "that, on the side of the belligerent, this claim [of pre-emption] goes beyond the case of cargoes avowedly bound for enemy's ports, or suspected on just grounds to have a concealed destination of that kind."<sup>70</sup> When a neutral and belligerent government cannot agree upon the fact whether or no certain captured goods are or are not contraband of war, they may agree by treaty on the right of pre-emption in order to escape "the difficulty of agreeing on the precise cases, in which alone provisions and other articles, not generally contraband, may be regarded as such." On that basis, as explained heretofore, compensation was granted to American owners of vessels and cargoes seized under the obnoxious British Orders in Council of 1793 and 1795 by the mixed commission appointed under the seventh article of the treaty of 1794.<sup>71</sup>

<sup>67</sup> Holland, p. 24. British Courts of Admiralty usually give "the original price actually paid by the exporter" (case of the *Haabet*, 2 Rob. Adm., 183), plus his expenses and a reasonable profit, generally calculated at ten per cent on the first cost. See Phillimore, III., §§ cclxviii.-lxx.; Heffter, § 161;

Calvo, §§ 2517-8; Ortolan, II., 220-230; Bluntschli, §§ 806 and 811; Lawrence, Principles, 620-22.

<sup>68</sup> Manning (Amos ed.), Bk. V., ch. viii.

<sup>69</sup> See above, p. 554.

<sup>70</sup> The *Haabet*, 2 Rob. Adm., 174-185.

<sup>71</sup> See above, p. 736.

## CHAPTER VI.

### NEUTRAL SERVICES, LAWFUL AND UNLAWFUL.

§ 667. **Distinction between unneutral service and the carrying of contraband.** The same general line of demarcation that divides legitimate neutral commerce from contraband trade divides certain services that may be lawfully rendered by a neutral to a belligerent from others that are unlawful and therefore unneutral. There was once a tendency to assimilate too closely unneutral service with the carrying of contraband goods, a tendency evidenced by the statement issued by the Russian government in 1877 of the rules that were to regulate its conduct in the war with Turkey in which it was said that “le transport de dépêches et de la correspondance de l'ennemi est assimilé à la contrebande de guerre;”<sup>1</sup> and by Article thirty-four of the scheme for a *Règlement des Prises Maritimes* of the Institut de Droit International, in which such service is associated with contraband trade under the title of *Des transports Interdits durant la Guerre.*<sup>2</sup> The same confusion appears in the royal proclamation issued at the beginning of the Civil War in the United States,<sup>3</sup> in which British subjects were warned against “carrying officers, soldiers, despatches, arms, military stores \* \* for the use of either of the contending parties.” It cannot justly be said that Hall failed to perceive with perfect clearness the distinction which must always be maintained between unneutral services and the carriage of contraband, because, while he uses the title “Analogues of Contraband,” he expressly declares that such services “differ from it in some cases by involving an intimacy of connection with the belligerent which cannot be inferred from the mere transport of contraband of war, and in others by implying a purely accidental and almost involuntary association with him. They are invariably something distinctly more or something distinctly less than the transport of contraband amounts to \* \* . The real analogy between carriage of contraband and acts of the kind in question lies not in the nature of the acts, but in the nature of the remedy applicable in respect of them.”<sup>4</sup> The distinction

<sup>1</sup> Journal de St. Pétersbourg, 14-  
26 Mai, 1877.

<sup>3</sup> May 13th, 1861.

<sup>4</sup> Int. Law, pp. 697-98. Lawrence

<sup>2</sup> *Tableau Général*, pp. 201, 202.

goes too far in the opposite direc-

is more sharply drawn, however, by Dana, who says that unneutral service is a topic which "requires a separate treatment from that of contraband, by reason of the actual state of the practice of nations, although logically it may seem to come within the same principle. \* \* The subject now under consideration is of a different character. It does not present cases of property or trade, in which such interests are involved, and to which such considerations apply, but simply cases of personal overt acts done by a neutral in aid of a belligerent."<sup>5</sup>

§ 668. Lawful neutral service. Carriage of private, diplomatic and consular correspondence.—The same considerations which permit a neutral to carry goods not contraband permit him to carry a certain class of mail matter, provided he has no good reason to believe, after the exercise of reasonable care, that it is of a noxious character. As a letter or despatch is not necessarily noxious, the bearer of it is not necessarily exposed to a penalty, because, in the words of Lord Justice Brown, a despatch is not like fire,—a neutral may carry it about without being bound to suppose that it is likely to do an injury.<sup>6</sup> In the case of the *Rapid*,<sup>7</sup> Lord Stowell disclaimed any intention to prescribe a rule that would deter a neutral master from taking private letters. In that case papers in an envelope addressed to a private citizen in Tonningen were given by a Dutch gentleman in New York to the master of an American vessel bound to Tonningen, a free port, from New York. The packet itself bore no evidence of a hostile official character, and the sender of it was not such an officer as required recognition by the government of the United States. When, therefore, it turned out that the packet contained letters with important information addressed to the Dutch government, which the receiver in Tonningen was to forward, the ship was released after the captain had made affidavit of his ignorance of the official character of the packet, and of its hostile destination.<sup>8</sup> Speaking of the diligence the

tion when he says: "In truth between the carrying of contraband and the performance of what we may call unneutral service, there is a great gulf fixed." Principles, p. 624.

<sup>5</sup> Dana's *Wheaton*, pp. 637-38.

<sup>6</sup> *Emmens v. Pottle*, xvi, Q. B. D., p. 358.

<sup>7</sup> *Edwards, Adm. Repts.*, 228.

<sup>8</sup> In the case of the *Susan* it was held, however, that ignorance of the nature of the despatches, unaccompanied by caution, was not sufficient to authorize the release of the vessel. The cases of the *Constantia*, *Susan* and *Hope*, all decided in 1808, are described in

captain was required to exercise, the learned judge said: "His caution must be proportioned to the circumstances under which such papers are received. \* \* If he is taking his departure from a port in a hostile country, and, still more, if the letters are addressed to persons resident in a hostile country, he is called upon to exercise the utmost jealousy. On the other hand, when the commencement of the voyage is in a neutral country, and is to terminate in a neutral country \* \* there is less to excite his vigilance." Even from official despatches, which are of course forbidden when their real character is known, are excepted those sent from accredited diplomatic or consular agents residing in a neutral country to their government at home, or inversely, because it is presumed that they are not written with a belligerent object. In the case of the *Caroline*,<sup>9</sup> an American vessel captured by a British cruiser in 1808 when on a voyage from New York to Bordeaux,—having on board a cargo of cotton, and also consular and diplomatic despatches from the French minister at Washington and a French consul in America for the government at home,—Lord Stowell, after declaring that, as a general rule, the carrying of despatches for the enemy by a neutral is illegal, excepted this case from its operation on account of the character of the person from whom the communication came. "He is not an executive officer of the government, acting simply in the conduct of its own affairs within its own territories, but an ambassador resident in a neutral state, for the purpose of supporting an amicable relation with it." It was further said that "the neutral country has a right to preserve its relations with the enemy, and you are not to conclude that any communication between them can partake, in any degree, of the nature of hostility against you." In the subsequent case of the *Madison*<sup>10</sup> (1810), an American vessel from Dieppe (held to be a hostile port) to Baltimore, having on board consular despatches only as distinguished from diplomatic, it was held that the neutral could carry them with impunity.

**Should postal vessels and mail bags be exempt from search?** The fact that the neutral carrier is permitted to convey certain classes of mail matter does not deprive the belligerent

a note by the reporter (6 Rob. Adm., 440) who gives the substance of the decisions without attempting to reproduce the language of the judge.

<sup>9</sup> 6 Rob. Adm., 464-70.

<sup>10</sup> Edwards, Adm. Repts., 224.

of the right to search his mail bags in order to ascertain whether or no he is engaged in the transport of noxious despatches. The ever-increasing importance to the world of regular and secret postal communication, and the serious inconvenience to a multitude of interests resulting from its interruption, long ago suggested the possibility of some arrangement under which mail steamers could be exempted from search, except under circumstances of grave suspicion. As steps in that direction may be noted the stipulation in the treaty of 1848<sup>11</sup> between the United States and Great Britain providing that in the event of war between them the mail packets shall be unmolested for six weeks after notice by either government that the service is to be discontinued, in which case they shall have safe conduct to return; and the rule adopted by the government of the United States during the Civil War that "public mails of any friendly or neutral power, duly certified or authenticated as such," found on board captured vessels, "shall not be searched or opened, but be put, as speedily as may be convenient, on the way to their destination. This instruction, however, will not be deemed to protect simulated mails verified by forged certificates or counterfeited seals."<sup>12</sup> In the prize case of the *Peterhoff*,<sup>13</sup> when the court ordered the mails found on board to be opened in the presence of the British consul, who was requested to select such letters as appeared to him to relate to the cargo and its destination, and then to forward the remainder, he refused to comply upon the ground that the entire mail should be forwarded unopened. After the United States Attorney at New York had been directed to pursue that course, notwithstanding the fact that there was reason to believe that there were some letters in the pouches containing evidence as to the cargo, Mr. Seward wrote to Mr. Adams<sup>14</sup> that "the President believes it is not less desirable to Great Britain than it is to the United States, and other maritime powers, to arrive at some regulation that will at once save the mails of neutrals from unnecessary interruption and exposure, and, at the same time, prevent them from being made use of as auxiliaries to unlawful designs of irresponsible persons seeking to embroil friendly states in the calamities of war." A

<sup>11</sup> U. S. Laws, ix, 965.

<sup>13</sup> 5 Wallace, 28.

<sup>12</sup> Instructions from Sec. of State to Sec. of the Navy, Oct. 31, 1862. See Dipl. Corr., 1863, Part I, p. 402.

<sup>14</sup> April 21, 1863. Dana's

Wheaton, pp. 660-61; Bernard's Neut. of Great Britain, 319-23.

genuine desire to hasten such a result was manifested in 1870 in the direction given by the government of France to its officers that "when a vessel subjected to visit is a packet-boat engaged in postal service, and with a government agent on board belonging to the state of which the vessel carries the flag, the word of the agent may be taken as to the character of the letters and despatches on board."<sup>15</sup> The question for future solution is this: Can belligerents afford to give up absolutely the right to intercept correspondence between the hostile country and its colonies, or a distant expedition sent out by it, upon a mere verbal or even written assurance from the agent of the neutral state which has no power to guarantee the innocence of the contents of mail bags of which it is ignorant. Hall believes, with good reason, that nothing better can be done than to concede such immunity to mail bags, as a general rule, subject to the right of the belligerent "to examine the bags upon reasonable grounds of suspicion being specifically stated in writing."<sup>16</sup>

§ 669. **Transport of diplomatic agents. The Trent affair.**—The rule that permits a neutral vessel to be the bearer of diplomatic despatches passing between a belligerent government and its diplomatic agents in a neutral country, also permits such a vessel to transport diplomatic agents themselves. If that plain and simple rule had been applied to the taking of Messrs. Mason and Slidell from the British mail-steamer Trent, in 1861, unconfused by the illogical attempt to prove that the Confederate Commissioners and their suite were contraband of war, the question at issue could have been solved without the slightest difficulty. If the distinction between unneutral service and the carrying of contraband had been as sharply defined then as now, such confusion could hardly have occurred. Messrs. Mason and Slidell had been appointed by the government of the Confederate States as its diplomatic agents at the Courts of St. James and the Tuileries, each with a secretary, after such government had been recognized as a belligerent power but not as a sovereign

<sup>15</sup> *Rev. de Droit Int.*, xi, 582. by the respective governments should be so treated; and, finally, that lines subsidized by them should have the same privileges. In a series of postal conventions between France and Great Britain that lines subsidized by them should have the same privileges. Martens (N. R.), xiii, 107; (N. R. G.) v, 183; Hertslet's Treaties, x, 108.

<sup>16</sup> *Int. Law*, p. 704.



state. While the commissioners stood in that status, after running the blockade to Havana, they took passage there, on their way to Europe, in the British mail-steamer Trent, bound from Havana to Nassau, from which latter port a regular line of steamers, connecting with the Trent, ran to England. Before the Trent reached Nassau, Captain Wilkes of the United States war steamer San Jacinto, after visit and search, took from her, on the high seas, the Confederate Commissioners, and then permitted her to proceed upon her voyage. Not until after the release of the prisoners,—upon the admission by the government of the United States that they should not have been taken out of the vessel, but should have been brought in, with the vehicle which carried them, for adjudication in a prize court,—did the discussion of the legal merits of the case really begin. In the despatch in which Mr. Seward, as Secretary of State, agreed to restore the commissioners to British custody he declared that “whatever disputes have existed concerning a right of visitation or search in times of peace, none, it is supposed, has existed in modern times about the right of a belligerent in times of war to capture contraband in neutral and even friendly merchant vessels.” From the bog in which he thus involved himself, in the hopeless attempt to apply the principles of law applicable to contraband to a case of neutral service, Mr. Seward was never able to extricate himself for the simple reason, to use the words of Mr. Bernard, that “it is incorrect to speak of the conveyance of persons in the military or civil employment of a belligerent as if it were the same thing as the conveyance of contraband of war, or as if the same rules were applicable to it. It is a different thing, and the rules applicable to it are different.” The real and primary question was whether or no the captured persons, as the accredited diplomatic agents of a government which had only reached the stage of belligerent recognition, were entitled to that free transport admitted to belong to the representatives of regularly organized sovereignties. After contending that they were, Earl Russel said that “it appears to Her Majesty’s government to be a necessary and certain deduction from these principles, that the conveyance of public agents of this character on their way to Great Britain and France, and of their credentials and despatches (if any), was not, and could not be, a violation of the duties of neutrality.” If, however, the contention of Earl Russell was unsound in that regard, as it may have been,

the fact remains that Messrs. Mason and Slidell were private persons, and as such clearly entitled to transport as ordinary passengers in the mail packet of a neutral. Their seizure in that capacity was certainly illegal. The great practical danger of the fallacious reasonings of Mr. Seward, on the theory that the persons in question could be treated as contraband, was clearly demonstrated by *Historicus*,<sup>17</sup> when he said "that they would serve to justify, and may be taken to encourage, the captain of the *Tuscarora* to seize the *Dover* packet-boat and carry her into New York for adjudication, in case Messrs. Mason and Slidell should take a through ticket for Paris."

§ 670. Unlawful neutral service. Transmission of signals or messages for a belligerent.—No overt act could be performed by a neutral in aid of a belligerent more clearly unlawful than the transmission of signals or the carrying of messages between two portions of a fleet engaged in concert in hostile operations, and not in sight of each other. It makes no difference whether such fleets or squadrons are in ports of their own country, in neutral ports, or on the high seas, or whether such signals are transmitted by the neutral directly or through a repeating neutral vessel. No matter whether such communications be verbal or written, important or unimportant to the general results of the war, as the criminality of the act depends alone upon the nature of the service in which the neutral is engaged. The same principle extends to signalling or bearing of messages between a land force and a fleet, or to the laying of a cable to be used chiefly or exclusively for hostile purposes.<sup>18</sup>

§ 671. Carrying of prohibited despatches or persons for a belligerent.—As stated heretofore the carrying of despatches

<sup>17</sup> Letters on Int. Law, p. 192. The best statements of the matter, pro and con, may be found in Montague Bernard, *Neutrality of Great Britain in the American Civil War*, ch. ix; Wharton, *Int. Law Dig.*, §§ 325, 328, 329, 374; Dana's *Wheaton*, note 228, on the "Carrying of Hostile Persons and Papers;" Hall, pp. 705-8; Lawrence, *Principles*, pp. 633-36; Walker, *Science of Int. Law*, pp. 131-34; and Marquardsen, *Der Trentfall*.

In the work last named the entire subject of the transport by neutrals of belligerent persons and papers is ably discussed.

<sup>18</sup> "The national character of places at which the illegal service begins and ends is also immaterial. If the message is to be carried from Portsmouth to Hong-Kong by stages, the neutral that carries it on its way between neutral ports, by agreement with the belligerent government, is violating the duties

(excepting such as are diplomatic and consular) for the enemy by a neutral is illegal,—despatches being defined by Lord Stowell to be “official communications of official persons, on the public affairs of the government.”<sup>19</sup> After the proper subtraction has been made, prohibited despatches may be defined to be such as are military or naval, or such as pass between the belligerent government and the officials of its colonies and dependencies. In the case of the *Atalanta*,<sup>20</sup>—a Bremen ship detained at the Isle of France by the French governor in order that she might carry despatches from him to the Minister of Marine at Paris, despatches so concealed by the supercargo that they were only discovered by the British captor accidentally,—the vessel was held responsible for the act of the supercargo. The learned judge said, “how is the intercourse between the mother country and the colonies kept up in time of peace? By ships of war or by packets on the service of the state. If a war intervenes, and the other belligerent prevails to interrupt that communication, any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensible neutral character, does in fact place himself in the service of the enemy state. \* \* In the transmission of despatches may be conveyed the entire plan of campaign, that may defeat all the projects of the other belligerent in that quarter of the world.” The same principle which denies to a neutral the right to bear noxious despatches for a belligerent likewise prohibits the transport of certain classes of persons in his service. While no penalty attaches to a neutral who receives on a regular packet-boat individuals who come on board as ordinary passengers and pay for their berths as such, even should it transpire that they are officers of either the one or the other of the combatants,<sup>21</sup> military or naval persons coming on board as such, and travelling at the expense of a belligerent power, must be carried by a neutral at the peril of seizure and confiscation.

§ 672. **Neutral vessels engaged as transports in service of a belligerent.**—When neutral vessels are regularly hired as

of neutrality as much as any other parties to the transaction.” Dana’s *Wheaton*, p. 638.

<sup>19</sup> *The Caroline*, 6 Rob. Adm., 464-470.

<sup>20</sup> 6 Rob. Adm., 440.

<sup>21</sup> Such was the opinion of Lord

Stowell, who said in the case of the *Friendship* (6 Rob. Adm., 420) that “if he were going merely as an ordinary passenger, as other passengers do, at his own expense, the question would present itself in a different form. Neither this court

transports in the service of a belligerent there can be no doubt that they are engaged in unneutral service, such transports being defined to be "vessels hired by the government to do such acts as shall be imposed upon them, in the military service of the country."<sup>22</sup> In that case an American vessel made a contract, concealed or destroyed, with the agent of the French government in the United States, to carry to France about eighty French officers and seamen, survivors of the crews of wrecked French vessels constituting a part of the French naval marine. As it appeared that the compensation for the use of the vessel was paid by the French government, that she was to take no cargo, and that while on board the men were to be under military control and supervision, it was held that "their military character travelled with them," and that the vessel was "a transport engaged in the immediate military service of the enemy." In the same year was decided the case of the *Orozembo*,<sup>23</sup> a neutral American vessel condemned by an English prize court because the owner or his agents had agreed with the government of Holland, then at war with Great Britain, to go from Rotterdam to Lisbon, in order to take in three Dutch military officers of distinction destined to Batavia. As it appeared from the contract produced that the vessel was to take no cargo, and was to receive one thousand dollars per month for the employment, regardless of the number on board, it was held that she had been let as a transport to the Dutch government to convey military and other persons on their way from the home state to a distant dependency,<sup>24</sup> a conclusion strengthened by the fact that she held out a false destination to Macao. In the earlier case of the *Carolina*,<sup>25</sup>—a Swedish vessel engaged as one of the fleet of French transports between Italy and Egypt and employed under the direction and control of French military and naval officers,—it was held that the vessel was good prize, despite the fact that the master set up that the vessel was so employed against his consent, by force and fraud. While he doubted that fact, Lord Stowell held in effect that when a neutral vessel is found in the transport service of the enemy

nor any other British tribunal has ever laid down the principle to that extent."

<sup>22</sup> *The Friendship*, 6 Rob. Adm., 425.

<sup>23</sup> 6 Rob. Adm., 430.

<sup>24</sup> Such the court held to be the real contract, despite the fact that the one produced purported to have been made with a private citizen at Lisbon.

<sup>25</sup> 4 Rob. Adm., 256.

she should be condemned, no matter whether the enemy obtained her by force or fraud, or by voluntary contract. It is not necessary, however, that it should appear that any special contract or agreement was made by the neutral captain or owner to place a vessel in the service of a belligerent, if she be seized while actually giving him assistance. Under such circumstances the vessel will not be saved from condemnation if it appears, in the event of capture, that those controlling her knowingly performed an unlawful or unneutral act. Guilty knowledge upon their part is the gravamen of the question; and as the presumption is that they possessed it, the burden is upon them to prove ignorance. And as excusable ignorance constitutes the only ground for leniency, it is necessary that they should prove that they took all reasonable precautions to avoid error. Ignorance pure and simple will not avail to prevent forfeiture.<sup>26</sup>

§ 673. **Penalty for the performance of unneutral service.**—From what has now been said the distinction clearly appears between the carrying of contraband goods—merely a commercial venture whose injuriousness to a belligerent results from the nature of the goods conveyed and not from the fact of transport—and the performance of unneutral service which consists of hostile overt acts performed by a neutral in aid of a belligerent. In the first case, a belligerent destination and a contraband cargo must co-exist in order to constitute the offense; in the second, the destination of the neutral vessel is of no importance whatever. As the nature of the service in which she is engaged is the real criterion of guilt, she may be seized and condemned for the performance of such service, if unlawful, while sailing between two neutral ports. The real bond that unites two offenses so dissimilar in character is the common principle upon which the seizure is made and the penalty inflicted. In either case the injured belligerent, without appealing to the sovereignty to which the offender belongs, stops the contraband trade, or interrupts the unneutral act by force, and then inflicts the penalty directly upon the guilty individual. In the case of unneutral service the penalty is generally more severe because the acts involved are more positively hostile. The liability of a vessel engaged

<sup>26</sup> Whether a vessel not in the be *pro hac vice* enemy property, enemy's service, but doing hostile see the case of the Tulip, 3 Wash- acts for his benefit, can be held to ington's Repts., 181.

in such service to capture and condemnation, which begins with the commencement of its performance, does not end until she has deposited the forbidden persons, delivered the noxious despatches or concluded other forbidden acts. If taken *in delicto*, the despatches are seized, the persons become prisoners of war, and the peccant ship is confiscated, with any part of the cargo which may belong to her owner.<sup>27</sup>

<sup>27</sup> The *Caroline*, 4 Rob. Adm., 1 Wheaton, 391; Ortolan, *Dip. de la* 256; the *Friendship*, 6 ib. 420; the *Mer*, II, 234; Phillimore, III, § Orozembo, ib. 430; the *Commercen*, cclxxii.

## CHAPTER VII.

### BLOCKADE.

§ 674. Blockades as compromises between belligerent and neutral interests.—As the primary purpose of blockade is to force the enemy to surrender by cutting off his supplies of every kind, it is not strange that the belligerent practice of prohibiting all trade with the enemy should be as ancient as war itself. From the records of the thirteenth and fourteenth centuries it seems to have been usual for belligerent states to issue proclamations, on the outbreak of war, warning all persons not to attempt to import victuals or merchandise into enemy territory under penalty of seizure and confiscation.<sup>1</sup> In the early days of modern international law it was a question whether powerful nations would permit neutrals during war to trade at all with their enemies,—they often assumed that the mere issuance of proclamations to the effect that enemy ports were blockaded suspended neutral trade, even when such proclamations were supported by a notoriously insufficient force. So well settled were such ideas in the first quarter of the seventeenth century that Grotius declares that “if the supplies sent hinder the execution of my design, and the sender might have known as much, as if I had besieged a town or blocked up a port, and thereupon I presently expect a surrender or a peace, that sender is obliged to make me satisfaction for the damage that I suffer on his account, as much as he that shall take a person out of custody that was committed for a just debt, or help him to make his escape, in order to cheat me; and proportionally to my loss I may seize his goods, and take them as my own, for recovering what he owes me.”<sup>2</sup> And then speaking with special reference to the introduction of supplies into a blockaded place, he adds that “if my enemy’s injustice towards me be evident, the neutral who aids him in his unjust war will be guilty not only of a civil, but of a criminal offense, and may be punished accordingly.”<sup>3</sup> A little more than a century later Bynkershoek said that “to

<sup>1</sup> See Proclamation of Henry III, 1223; letter of Edward II to Philip V of France. *Foedera*, I, p. 440, ib.

<sup>2</sup> *De Jure Belli ac Pacis*, III, c. i., § 53.

<sup>3</sup> *Ibid*, III, c. i., § v. 3.

III, p. 880.

carry supplies to a besieged enemy has been always a capital offense in friends, equally as in subjects, after notice given to them, and sometimes even without notice; and further, that if the supplies be intercepted by the belligerent, he may not only confiscate them, but inflict corporal, if not capital, punishment upon those who seek to introduce them."<sup>4</sup> Twenty years thereafter Vattel wrote that "all commerce with a besieged town is absolutely prohibited. If I lay siege to a place, or even simply blockade it, I have a right to hinder anyone from entering it, and to treat as an enemy whosoever attempts to enter the place, or carry anything to the besieged parties, without my leave; for he opposes my undertaking, and may contribute to the miscarriage of it, and thus involve me in all the misfortunes of an unsuccessful war."<sup>5</sup> The counter movement, which had for its object a modification of such extreme claims in favor of the rights of neutral traders, may be said to date from the Ordinance of June 26, 1630, issued by the States General of the United Provinces on the advice of their courts of admiralty, for the purpose of regulating the blockade of the ports of Flanders, then in the possession of the Spanish crown. The necessity for such regulation grew out of the fact that "their High Mightinesses keep the said ports continually blockaded by their vessels of war at an excessive charge to the state, in order to hinder all transport to and commerce with the enemy; and because those ports and places are reputed to be besieged, which has been from all time an ancient usage after the example of all kings, princes, powers, and other republics, which have exercised the same right on similar occasions."<sup>6</sup> Not however until the latter half of the eighteenth century was there any decided and concerted action to establish the principle that the right of a neutral to trade with blockaded territory can not be cut off unless, (1) a blockade exists *de facto*; (2) that there is reputation of its existence; (3) that there has been an undoubted intention to violate it.

**Armed neutralities and Declaration of Paris.**—A notable effort in the right direction was made when the First Armed Neutrality of 1780 embodied in its Declaration the statement that "in order to determine what characterizes a blockaded port, that term shall only be applied to a port where, from

<sup>4</sup> *Quaest. Jur. Pub.*, I, c. II.

*tima*, p. 158, and note to the *Hurtige Hane*, 3 Rob. Adm., p. 327;

<sup>5</sup> *Droit des Gens*, III, § 117.

<sup>6</sup> Robinson's *Collectanea Martima*, Twiss, War, pp. 189-95.



the arrangement made by the attacking power with vessels stationed off the port and sufficiently near, there is evident danger in entering the port.”<sup>7</sup> In the case of the *Betsey*,<sup>8</sup> decided in December, 1798, Lord Stowell declared that “on the question of blockade three things must be proved; 1st, the existence of an actual blockade; 2nd, the knowledge of the party; 3rd, some act of violation either by going in or coming out with a cargo laden after the commencement of the blockade.” In that definition of the elements which must enter into an actual blockade was embodied the compromise finally made between belligerents and neutral interests. By that compromise the fact was recognized that “the right of blockade is founded not on any general unlimited right to cripple the enemy’s commerce with neutrals by all means effectual for that purpose, for it is admitted on all hands that a neutral has a right to carry on with each of the belligerents during war all the trade which was open to him in time of peace, subject to the exceptions of trade in contraband goods and trade with blockaded ports. Both these exceptions seem founded on the same reason, viz., that a neutral has no right to interfere with the military operations of a belligerent either by supplying his enemy with the materials of war; or by holding intercourse with a place which he has besieged or blockaded.”<sup>9</sup> The provisions of the First Armed Neutrality of 1780, which contained the inadmissible principle that the blockading vessels must be stationary, were repeated in the second of 1800, which contained the further restriction that no lawful capture could occur unless an attempt was made by the peccant vessel to enter after notice had been given by the commander of the blockading squadron.<sup>10</sup> Against such extreme statements in favor of neutral rights were directed the counterblasts embodied in the British Orders in Council of 1806 and 1807, and the Berlin and Milan decrees of Napoleon, unwarrantably reviving the restrictions

<sup>7</sup> Que pour déterminer ce qui caractérise un port bloqué, on n’accorde cette dénomination qu’ à celui, où il y a, par la disposition de la Puissance qui l’attaque avec des vaisseaux arrêtés et suffisamment proches, un danger évident d’entrer. See above, p. 634.

<sup>8</sup> 1 Rob. Adm., p. 93.

<sup>9</sup> For an elaboration of that idea,

see Martens, *Précis*, Bk. viii, ch. vi.; 2 Azuni, ch. ii.

<sup>10</sup> Et que tout bâtiment naviguant vers un port bloqué ne pourra être regardé d’avoir contrevenu à la présente Convention, que lorsqu’ après avoir été averti par le commandant du blocus de l’état du port, il tâchera d’y pénétrer en employant la force ou la ruse.

of blockade in all their ancient severity. At that time it was that France declared the British Isles to be in a state of blockade, despite the fact that she dared not send a single squadron to sea for fear of capture by the British navy; and Great Britain placed in the position of blockaded ports all places from which her commercial flag was excluded.<sup>11</sup> During that period of violence and confusion it was that a general disregard by belligerents of the rights of neutral commerce, apart from the matter of blockade, produced the irritation which culminated in the war of 1812 between Great Britain and the United States. Not until the period of calm that followed the great settlement of 1815 did passions so far subside as to make possible the final and definitive settlement of 1856. At the outbreak of the war with Russia in 1854 Great Britain and France declared their intention "to maintain the right of a belligerent to prevent neutrals from breaking any effective blockade, which may be established with an adequate force against the enemy's ports, harbors, or coasts;" and at its close they joined with the other leading maritime states in declaring that "blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy."<sup>12</sup>

§ 675. Classification of blockades—Strategic, commercial and pacific.—From what has now been said as to the origin of blockade it appears that, in its inception, it was a military expedient of the greatest strategic value in time of war for the ultimate reduction of some vitally important place in the possession of the enemy. Unlike siege, blockade implies no intention to get possession of the blockaded place, simply a purpose to reduce it by obstructing access to it.<sup>13</sup> While in the wider meaning of the term blockade implies obstruction of a passage to or from a place by land or sea, it is usually confined to the obstruction interposed by naval forces to communication by water.<sup>14</sup> An effective blockade as now understood is one "maintained by a force sufficient really to prevent access to the coast of the enemy." A great enlargement of the original idea of a military or strategic blockade, carried

<sup>11</sup> Manning (Amos ed.) Bk. v., ch. vi., ment l'accès du littoral de l'ennemi. Martens (N. R. G.) XV, p. 792.

<sup>12</sup> Les blocus, pour être obligatoires, doivent être effectifs, c'est-à-dire, maintenus par une force suffisante pour interdire réelle-

<sup>13</sup> Woolsey, Int. Law, § 202.

<sup>14</sup> Pitt-Cobbett, Cas. Int. Law, p. 301; Davis, Int. Law, p. 366.

on for the purpose of reducing the particular place blockaded, was made when the process of obstruction was extended far beyond the scene of warlike operations in order to weaken the resources of the enemy generally by cutting off his external trade. Such a condition of things would occur if Great Britain, in the event of war with the United States, should blockade the entire western coast of this republic, while military operations were confined to the Atlantic seaboard and the Canadian frontier.<sup>15</sup> When the legality of such blockades, known as commercial blockades, was still debatable, upon the ground that the harm they inflict upon neutrals is greater than the advantage they give to belligerents, the statesmen of the United States expressed themselves more or less positively against them. At the beginning of the last century Marshall, as Secretary of State, said that "on principle it might well be questioned, whether this rule can be applied to a place not completely invested by land as well as by sea. If we examine the reasoning on which is founded the right to intercept and confiscate supplies designed for a blockaded town, it will be difficult to resist the conviction that its extension to towns invested by sea only is an unjustifiable encroachment on the rights of neutrals."<sup>16</sup> And in 1859, on the outbreak of the Italian war, Mr. Cass, then Secretary of State, issued a circular to American representatives in Europe in which it was declared that "the blockade of a coast or of commercial positions along it, without any regard to ulterior military operations, and with the real design of carrying on a war against trade, and from its very nature against the trade of peaceable and friendly powers, instead of a war against armed men, is a proceeding which it is difficult to reconcile with reason or with the opinions of modern times. To watch every creek and river and harbor upon an ocean frontier, in order to seize and confiscate every vessel with its cargo attempting to enter or go out, without any direct effect upon the true objects of war, is a mode of conducting hostilities which would find few advocates if now first presented for consideration. Unfortunately, however, the right to do this has been long recognized by the law of nations, accompanied indeed with precautionary conditions, intended to prevent abuse, but which experience has shown to be lamentably inoperative."<sup>17</sup> Regardless, however.

<sup>15</sup> Hall, p. 657.

<sup>17</sup> Mr. Cass, Sec. of State, to Mr.

<sup>16</sup> Mr. Marshall to Mr. King, Sep. Mason, June 27, 1859; 3 Wharton, 20, 1800; 3 Wheaton, Appendix. Int. Law. Dig., § 361.

of its inconveniences and imperfections the government of the United States, after the outbreak of the Civil War, instituted along the entire coast of the Southern Confederacy the most extensive commercial blockade the world has ever seen, a blockade which finally assumed serious military importance in so far as it promoted a scheme of conquest materially advanced by the cutting off of supplies from every side. In the light of that precedent the right to institute a commercial blockade, often questioned prior to that time, may be said to be undisputed at the present day. Entirely apart from blockades in time of war, which may be either strategic or commercial, stand pacific blockades heretofore described as one of the means of forcible restraint or redress short of actual hostilities.<sup>18</sup>

§ 676. **Law of blockade as construed by two distinct schools.** —As the largest experience in the actual conduct of blockades during the last century fell to the lot of Great Britain and the United States, a certain practical value should attach to a set of principles recognized by both as necessary for the maintenance of a practice which refuses to shackle belligerents with too severe and impracticable restrictions. In opposition to the English and American school, whose views on some points are accepted by Prussia and Denmark, stands a group of Continental powers, with France at their head, which firmly adheres to a stricter construction of the law of blockade in favor of neutral interests. The leading subjects as to which the opposing schools disagree are those involving (1) the circumstances under which a neutral becomes affected with knowledge of a blockade; (2) the rule with regard to the proper maintenance of a blockade; (3) as to the warning necessary to vessels in a blockaded port; (4) as to the acts constituting a breach of blockade. From the same data of fact in any one of the enumerated cases a different conclusion may be reached according as the theory of one school or the other is accepted as the major proposition in the syllogism. In what follows British and American theory, as embodied in what may be called for convenience the British rule, will be accepted as the basis of the running contrast to be made with Continental theory embodied in what may be called for convenience the French rule.

§ 677. **By what authority and within what limits blockades**

<sup>18</sup> See above, p. 444.

may be instituted.—As blockade is not a necessary consequence of a state of war, it must be specially instituted as an act of war under the express or implied authority of the sovereignty responsible for it. While general instructions given to the commander of a belligerent force do not necessarily imply competent orders, his implied powers are supposed to invest him with such sovereign authority as will enable him, when operating far from home, to cope with the contingencies of the service in which he is engaged. Subordinate officers are not authorized to create or vary a blockade at their will; and when an officer not armed with the proper authority has assumed the right to institute a blockade, captures effected under it can only be validated retrospectively by a subsequent adoption of his act by his state.<sup>19</sup> According to English and American theory blockade is not confined to a seaport, but may be extended to any avenue of communication such as a river, bay or other portion of the enemy's coast, and to any necessary portion of the high seas outside of the three-mile limit. Such a rule conflicts, of course, with the ideas of the Continental publicists who claim that as blockade is simply the displacement by a belligerent of the territorial jurisdiction of his blockaded enemy, it cannot be carried on beyond the limits of territorial waters.<sup>20</sup>

**Access to contiguous territory.**—The blockade of enemy ports can not, however, be permitted to obstruct access to the contiguous possessions of a neutral state, as in the case of the blockade of rivers forming the boundary between enemy and neutral territory, or in the event of the blockade of a river the upper portion of whose navigable course is beyond the frontiers of the hostile state. Under such circumstances a belligerent can maintain only such a blockade as will permit the neutral to have free access to his own ports or territory, and at the same time permit other neutrals to communicate freely with him. It was therefore held that a blockade of Holland was not broken by a destination to Antwerp;<sup>21</sup> and during the American Civil War the trade to Matamoros, on the Mexican shore of the Rio Grande, was conceded to be perfectly lawful

<sup>19</sup> The *Hendrick and Maria*, 1 Rob. Adm., p. 148; The *Juffrow Maria Schroeder*, 3 ib., p. 154; The *Rolla*, 6 ib., p. 365; The *Franciska*, X Moore, p. 46; 3 *Phillimore*, § cclxxxviii; Calvo, § 2555.

<sup>20</sup> Hautefeuille, *Droits des Nations Neutres*, tit. ix., ch. I, § 1; Ortolan, *Diplomatie de la Mer*, II., ch. ix.; Calvo, § 2567.

<sup>21</sup> The *Frau Ilsabe*, 4 Rob. Admr., p. 64.

by the courts of the United States. The rule was then laid down that it was a duty incumbent on vessels with a neutral destination to keep south of the dividing line between Texan and Mexican territory; and in the case of vessels captured for being north of that line, the judges refused, while restoring them, to allow them costs and expenses.<sup>22</sup> A blockade cannot extend beyond the area controlled by the operations of the forces maintaining it. Internal means of transport by canals, through which ships may gain access to the sea at a point which is not blockaded, may therefore be used with impunity. For that reason, during a blockade of Holland, a vessel and cargo sent to Embden, in neutral territory, and issuing from that port were not condemned.<sup>23</sup>

§ 678. **Blockades to be binding must be effective.**—The assault made upon “paper blockades” by the First Armed Neutrality of 1780 was embodied in the provision that blockades to be effective must be maintained by vessels stationary and sufficiently near to produce evident danger in entering; and, in the second of 1800, that definition was repeated with the additional statement that no lawful capture could be made, unless the peccant vessel attempted to enter after notice from the commander of the blockading squadron.<sup>24</sup> After a long interval followed the Declaration of Paris of 1856, providing that “blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.” Lord Russell, writing in 1863 as to the meaning of that Declaration, said that it “was in truth directed against what were once termed ‘paper blockades’; that is, blockades not sustained by any actual force, or sustained by a notoriously inadequate naval force, such as an occasional appearance of a man-of-war in the offing, or the like. \* \* The interpretation, therefore, placed by Her Majesty’s government on the Declaration was, that a blockade, in order to be respected by neutrals, must be practically effective.”<sup>25</sup> The most satisfactory definition perhaps of the difficult term “practically effective,” generally approved by English and American judges and text writers, is to be found in the case of the *Franciska*, where it was said that in order to maintain a proper blockade a place must be “watched by a force sufficient

<sup>22</sup> *The Peterhoff*, 5 Wallace, p. 54; *The Dashing Wave*, *ib.* 170; *The Science*, *ib.* 178; *The Volant*, *ib.* 179.

<sup>23</sup> *The Stert*, 4 Rob. Adm., p. 65.

<sup>24</sup> See above, p 761.

<sup>25</sup> Lord Russell to Mr. Mason, Feb. 10, 1863, ap. Bernard, 293.

to render the egress or ingress dangerous; or, in other words, save under peculiar circumstances, as fogs, violent winds, and some necessary absences, sufficient to render the capture of vessels attempting to go in or come out most probable."<sup>26</sup> Under that rule the government of Great Britain naturally accepted the contention of that of the United States, made during the American Civil War, to the effect that the legal efficiency of the blockade of Charleston,—usually maintained by one ship lying off the bar between the two principal channels, with two or three others cruising outside within signalling distance,—was not destroyed by the absence of the Niagara, a blockading vessel whose withdrawal, in the attempt to intercept a cargo of arms expected at another part of the coast, left the harbor open for at least five days. It was admitted under the British rule that there was no cessation of the Charleston blockade despite the fact that a large number of vessels succeeded in passing it, owing to the peculiar nature of the coast.<sup>27</sup> As there is no rule requiring the blockading squadron to remain within a certain distance of the place blockaded, provided access is really interdicted, Buenos Ayres was held to have been sufficiently blockaded by vessels stationed in the vicinity of Monte Video; and, in like manner, the blockade of Riga was maintained, during the Russian war in 1854, at a distance of one hundred and twenty miles from the town by a ship in the Lyser Ort, a channel three miles wide, forming the only navigable entrance to the gulf.<sup>28</sup>

**Opinions of continental publicists.**—A majority of the modern Continental publicists so construe the principle embodied in the Declaration of Paris as to revive that contained in the First Armed Neutrality of 1780. The substance of their contention is that the immediate entrance to a port must be so guarded by stationary vessels as to render ingress practically impossible, or at least to expose any ship attempting to pass to a cross fire from the guns of two of them. Under that view a vessel is justified in attempting to enter whenever any accidental circumstance puts an end temporarily to the blockade. While Heffter (§ 155) does not hold that temporary absence involves a cessation of blockade he requires that vessels shall

<sup>26</sup> Spinks, *Prize Cas.*, p. 115; x *ain*, chs. X and XII; Glass, *Marine Moore*, *Privy Council Cases*, p. 58; *Int. Law*, p. 91.

Phillimore, III, § cxcxiii-iv; Blunt-schli, § 829.

<sup>28</sup> *The Franciska*, Spinks, 115; Hall, pp. 726-27.

<sup>27</sup> Bernard, *Neut. of Great Brit-*

be "stationnés en permanence et en assez grand nombre pour empêcher toute espèce de communication avec la place ou le port investi." And in the same vein Ortolan<sup>29</sup> claims that a blockade is not effective unless "toutes les passes ou avenues qui y conduisent sont tellement gardées par des forces navales permanentes, que tout bâtiment qui chercherait à s'y introduire ne puisse le faire sans être aperçu et sans en être détourné." The proposed Règlement des Prises Maritimes, adopted by the Institut de Droit International, declares in a more conservative spirit, that a blockade is to be considered effective "lorsqu'il existe un danger imminent pour l'entrée ou la sortie du port bloqué, à cause d'un nombre suffisant de navires de guerre stationnés ou ne s'écartant que momentanément de leur station," with the proviso that "si les navires bloquants s'éloignent de leur station pour un motif autre que le mauvais temps constaté, le blocus est considéré comme levé."<sup>30</sup>

§ 679. How knowledge of blockade must be communicated to neutrals. —According to the British rule, recognized by Prussia and Denmark<sup>31</sup> as well as by the United States, a belligerent may be justified in seizing the property of a neutral who attempts to violate a blockade, even when no official or formal notice of its existence has been served upon him, provided he sails for the blockaded port from a place at which the fact of blockade is so notorious that ignorance of its existence is practically impossible. It was said in a notable case that "if a blockade *de facto* be good in law without notification, and a wilful violation of a legal blockade be punishable with confiscation, propositions which are free from doubt, the mode in which knowledge has been acquired by the offender, if it be clearly proved, can not be of importance."<sup>32</sup> And yet while, under the letter of the law, a vessel sailing for a blockaded port from one in which the fact of blockade is so notorious that ignorance of its existence is really impossible may be seized and confiscated without further warning, such a proceeding is looked upon with disfavor. As Dr. Lushington expressed it, in passing in the first instance on the case of the *Franciska*, "unless the notoriety of the blockade be so

<sup>29</sup> *Dip. de la Mer*, II, p. 328.

*Le Droit des Prises Maritimes*,

<sup>30</sup> *Ann. de l'Institut*, 1883, p. 218.

*Rev. de Droit Int.*, x, pp. 240, 212.

<sup>31</sup> As to the Prussian and Danish Prize regulations, see Bulmerincq,

<sup>32</sup> *The Franciska*, x Moore, p. 46.



great, that according to the ordinary course of human affairs the knowledge thereof must have reached all engaged in the trade between the ports so blockaded, a warning to each vessel approaching is indispensably requisite." Under that rule knowledge of the fact can not be presumed when vessels sail before the official notice of a blockade is proclaimed; or when they approach a port closed by a merely *de facto* blockade, instituted on the authority of an officer commanding in neighboring seas, whose existence had not become notorious before their departure for such port. Under such circumstances, in which a guilty knowledge can not be presumed, vessels are simply turned back with such a notice endorsed on their papers as the French practice requires.<sup>33</sup> And, despite the assumption that a neutral who sails for a port with full knowledge that it is blockaded when his voyage is begun ought to expect to find it in the same state when he arrives, a mitigation is made in favor of a vessel that sails with such full knowledge from a place far distant from the blockaded port. And so it was held during the wars at the beginning of the last century that a vessel sailing for Europe from America did not become liable to capture simply because she was destined to a blockaded port, the presumption in favor of the continuance of blockade being necessarily weakened by the lapse of time sufficient for a long voyage. It was further held, however, that inquiry as to the continued existence or suspension of blockade, justifiable under such circumstances, ought to be made, not at the blockaded port, but at intermediate places where fraud is less likely to be the motive of it.<sup>34</sup> With the growing application of steam to maritime navigation and the consequent shortening of voyages, and with the rapid dissemination of news through newspapers and the electric telegraph, the rule, under which sailing from a neutral port with intent to enter a blockaded port and with knowledge of the existence of the blockade subjects a vessel to condemnation,

<sup>33</sup> *Vrow Judith*, 1 Rob. Adm., p. 151; *The Neptunus*, 2 ib. p. 114; British Admiralty Manual of Prize Law, p. 34. *Vrow Johanna*, 2 ib., p. 109; Mr. Justice Story in the *Nereide*, 9 Cranch, p. 440.

<sup>34</sup> *The Betsy*, 1 Rob. Adm., p. 334. The rule is different, however, when a vessel sails with the intention of inquiring whether a blockade *de facto* is continued or not. *Naylor v. Taylor*, 4 Manning & Ryland, 531.

becomes every day more reasonable. As Chief Justice Chase expressed in the case of the *Circassian*, "we are entirely satisfied with this rule. It was established, with some hesitation, when sailing vessels were the only vehicles of ocean commerce; but now when steam and electricity have made all nations neighbors, and blockade-running from neutral ports seems to have been organized as a business, and almost raised to a profession, it is clearly seen to be indispensable to the efficient exercise of belligerent rights."<sup>35</sup> Formal and official notice of the existence of blockades is nevertheless a recognized part of British and American practice, both by proclamation announcing the date upon which the designated place will be blockaded, and also by warning vessels, when they approach, of the existence of the blockade. Whenever blockade is instituted under the direct authority of either government, the fact is always communicated to foreign states, and through them to their subjects. The mandate contained in Mr. Lincoln's proclamation of April 19, 1861, that vessels should be individually warned, was so construed by Commodore Pendergrast, in notifying the actual commencement of the blockade of the Virginia coast in July of that year, that only "those coming from abroad, and ignorant of the blockade, will be warned off."<sup>36</sup>

**French theory and practice.**—Under the French rule, followed by Italy, Spain and Sweden,<sup>37</sup> the neutral is not injuriously affected by any information gained previous to his arrival at the blockaded place. Even if he has received information through his own government he is not bound by it,—he still has the right to proceed to the entrance of the blockaded port and there ascertain personally whether or no blockade exists at that moment. While it is the practice of France, and of other states sharing her views, to issue proclamations announcing the existence of blockades, they are regarded simply as acts of courtesy, as the subjects of neutral

<sup>35</sup> 2 Wallace, p. 151.

<sup>36</sup> In the case of *The Hiawatha* (2 Black, 675) it was insisted that "according to the President's Proclamation of the 19th of April, the *Hiawatha* was not liable to capture, until 'the commander of one of the blockading vessels' had 'duly warned' her, indorsed 'on her register the date and fact of

such warning,' and she had again attempted 'to leave the blockaded port.'" The court answered that "it would be absurd to warn parties who had full previous knowledge."

<sup>37</sup> Bulmerincq, *Le Droit des Prises Maritimes, Rev. de Droit Int.*, X, pp. 220, 400, 441; Negrin, p. 213.

nations are not deemed to be prejudiced by them. According to the French rule, which Calvo<sup>38</sup> thinks should be accepted as the rule of law, especial notification is necessary, in addition to the diplomatic announcement which ought also to be given. Where that view prevails the neutral trader is only liable to seizure and confiscation for an attempt to enter a blockaded port, after he has been individually warned by one of the blockading squadron,<sup>39</sup> with the fact of such warning endorsed on the ship's papers with mention of the date and place of notification. In harmony with that practice is the contention of those Continental writers who claim that the neutral trader who sails for a blockaded port in the hope of finding a free entry through the chances of war, the effects of the weather, or through any other cause, is not to be punished, if perchance his hope fails to be justified by conditions actually existing at the time of his arrival.<sup>40</sup>

§ 680. **What acts constitute a breach of blockade. English and American rule.**—As English and American practice bases the liability to seizure on knowledge of the fact of the existence of blockade, coupled with the presumption that under ordinary circumstances it will continue, the neutral trader, as a general rule, subjects his property to confiscation from the time he sails with a clear destination to a blockaded port. As the test of criminality is intention, in the event of doubt, all acts performed from the commencement of the voyage may be looked to as evidence of it. If it thus appears that the trader, although anxious to enter the prohibited place, resolved to inquire on the way as to the existence of blockade, in order that he might desist from his purpose in the event of an affirmative answer to his inquiry, his property is not subject to condemnation. In all such cases it is incumbent upon the trader to show that an intention to inquire really existed, because acts of a doubtful character, in the absence of full explanation, will be interpreted against him.<sup>41</sup> As a precaution against fraud the rule has been laid down that inquiries, which should be made at points sufficiently distant from the blockaded harbor, must not be withheld until its very entrance is reached. "The neutral merchant is not to

<sup>38</sup> *Droit Int.*, § 2581. See, also, Pistoye and Duverdy, I, p. 370; Hautefeuille, tit. ix, ch. ii, § 2.

tice upon the approaching neutral.  
<sup>40</sup> Ortolan, *Dip. de la Mer*, II, pp. 334-411.

<sup>39</sup> A vessel not engaged in the blockade can not serve a valid no-

<sup>41</sup> The Despatch, 1 Acton, 163.

speculate on the greater or less probability of the termination of a blockade, to send his vessels to the very mouth of the river, and say: 'If you do not meet with the blockading force, enter. If you do, ask a warning and proceed elsewhere.' Who does not perceive the frauds to which such a rule would be introductory.<sup>42</sup>" "If approach for inquiry were permissible, it will be readily seen that the greatest facilities would be afforded to elude the blockade.<sup>43</sup>" A breach of blockade may be committed even when the peccant ship does not actually cross the forbidden line, as in the case of vessels lying outside, and receiving their cargoes from lighters or other craft issuing from the blockaded port.<sup>44</sup>

**Case of the Circassian.**—In his comments on the application of the general rule now under consideration Hall says that "during the American Civil War the courts of the United States strained and denaturalized the principles of English blockade law to cover doctrines of unfortunate violence. A vessel sailing from Bordeaux to Havana, with an ulterior destination to New Orleans, or in case that port was inaccessible, to such other place as might be indicated at Havana, was condemned on the inference that her owner intended the ship to violate the blockade if possible, notwithstanding that the design might have been abandoned on the information received at the neutral port."<sup>45</sup> That the rule laid down by the Supreme Court of the United States in the case in question rested upon an entirely different data of fact is evident from its opinion which declares that "we agree, that if the ship had been going to Havana with an honest intent to ascertain whether the blockade at New Orleans yet remained in force, and with no design to proceed further if such should prove to be the case, neither ship nor cargo would have been subject to lawful seizure. But it is manifest that such was not the intent. The existence of the blockade was known at the inception of the voyage, and its discontinuance was not ex-

<sup>42</sup> The Irene, 5 Rob. Adm., p. 80.

<sup>43</sup> Mr. Justice Field in the *Cheshire*, 3 Wallace, p. 235. See, also, the *Hurtige Hane*, 2 Rob. Adm'r, p. 127; *The Charlotte Christine*, 6 ib., p. 101; *The James Cook*, Edwards, 264; *Ortolan*, *Dip. de la Mer.*, 349 and 353.

<sup>44</sup> *The Maria*, 6 Rob. Adm., p. 201; *Charlotte Sophia*, ib. 202n.

"Of course a vessel taking on board cargo, at a port not under blockade, which has arrived from a blockaded port by canal or lagoon navigation, does not commit an infraction of the blockade; and conversely a vessel so delivering cargo is not liable to capture."

Hall, p. 735, note 3.

<sup>45</sup> *Int. Law*, p. 735.

pected. The vessel was chartered and her cargo shipped with the purpose of forcing the blockade. The destination to Havana was merely colorable. It proves nothing beyond a mere purpose to touch at that port, perhaps and probably, with the expectation of getting information which would facilitate the success of the unlawful undertaking."<sup>46</sup> The force of the criticism of the eminent English publicist is broken of course the moment it appears that the data of fact on which it was based had no real existence.

**French rule.**—The logical result of French requirements as to the kind of evidence necessary to bring knowledge home to the neutral trader as to the existence of blockade, in the absence of presumption as to its continuance, is the rule that no condemnation is justifiable until, after special notification, an actual attempt has been made, by force or fraud, to pass into or out of the blockaded place.<sup>47</sup> If however a vessel, which has received in the course of her voyage a regular notification from a belligerent cruiser of the blockading country of the existence of the blockade, is seized while prosecuting her original design, but before an actual attempt to enter the blockaded place, the French rule permits an inference of intention to commit a breach of blockade.<sup>48</sup>

§ 681. **Right of ingress and egress to and from a blockaded port.**—The usage is generally respected which permits neutral vessels, lying in belligerent ports when blockade begins, to come out with cargoes bought and shipped, *bona fide*, prior to its commencement.<sup>49</sup> The authorities of the blockaded place are usually notified of the institution of the blockade, with a designation of the time within which neutral vessels will be permitted to go out. According to the practice of most nations no further notice is given; and, as it is a reasonable assumption, after the blockade has existed for a time, that

<sup>46</sup> Hunter v. U. S. ("The Circasian"), 2 Wallace, p. 135.

<sup>47</sup> Que pour que le blocus devienne légalement obligatoire avec toutes ces conséquences, il faut que la notification diplomatique, considérée avec raison comme toujours utile, soit dans chaque cas particulier complétée, corroborée par une notification spéciale aux neutres qui se présentent sur la ligne du blocus. Calvo, § 1152.

<sup>48</sup> Ibid, 1176.

<sup>49</sup> The Juno, 2 Rob. Adm., p. 119.

In such cases the time of shipment is a most material fact. The Betsy, 1 Rob. Adm., p. 93. The privilege is extended to cases where there has been a delivery of goods on board ship, or in lighters, but not to shipments from warehouses. The Rolla, 6 Rob. Adm., p. 371. To take on board cargo, after the blockade has begun, is a fraudulent violation of it. The Vrow Judith, 1 Rob. Adm., p. 152; The Nep-

"it is impossible for those within to be ignorant of the forcible suspension of their commerce," warning to each ship, even in the absence of general notice, is deemed superfluous under such circumstances.<sup>50</sup> While the British rule provides that "*prima facie* every vessel whatsoever, laden with a cargo, quitting a blockaded port, is liable to condemnation on that account, and must satisfactorily establish her exception to the general rule,<sup>51</sup> the French practice probably extends the privilege of special warning to vessels issuing from a blockaded port with cargo laden after the commencement of blockade.<sup>52</sup> As the privilege of refuge in a blockaded port can not be denied to a neutral ship in distress, from stress of weather, want of provisions or the like, she must be permitted to pass out when her needs have been satisfied, provided her cargo remains intact;<sup>53</sup> and a like indulgence should be extended to a vessel employed exclusively by a minister of a neutral state for the transport of distressed marines to his own country,<sup>54</sup> to a neutral vessel which has legally entered with a cargo found to be unsalable,<sup>55</sup> and to a neutral vessel permitted to pass the blockade, after coming to the port in ignorance of its existence. In the case last named, however, the privilege is not extended to a cargo taken on board in the blockaded port.<sup>56</sup> Although, strictly speaking, access to such a port is forbidden to ships of war as well as to merchant vessels, it is usual as a matter of courtesy to permit such ships of a neutral state to pass in and out subject to proper and necessary restrictions.<sup>57</sup>

tunus, *ib.*, 171; the *Juno*, *ib.*, p. 119; the *Hiawatha*, Blatchford, Prize Cases, p. 19. notwithstanding the blockade." Bluntschli, § 838.

<sup>50</sup> The *Vrow Judith*, 1 Rob. Adm., p. 152. Knowledge of a recently established blockade may be inferred from facts. The *Herald*, 3 Wallace, p. 231.

<sup>51</sup> The *Otto and Olaf*, Spinks, p. 259; the *Frederick Molke*, 1 Rob. Adm., 88.

<sup>52</sup> The *Eliza Cornish*, Pistoye et Duverdy, 1, p. 387.

<sup>53</sup> The *Charlotta*, Edwards, 252; the *Hurtige Hane*, 2 Rob. Adm. 127. Such neutral ships must, however, "respect the regulations preserved by the maritime power that gives them authority to pass

<sup>54</sup> The *Rose in Bloom*, 1 Dodson, p. 58.

<sup>55</sup> The *Potsdam*, 4 Rob. Adm., p. 89.

<sup>56</sup> The *Juffrow Maria Schroeder*, 3 Rob. Adm., 160. As to the contrary usage of Prussia and Denmark in reference to the coming out of vessels from a blockaded port with cargoes shipped after its commencement, see *Rev. de Droit Int.*, X, 212, 239.

<sup>57</sup> *Ortolan*, *Dip. de la Mer*, II, p. 329. The same privilege has been extended in some recent wars to mail steamers, with a guarantee

**Period usually allowed for exit.**—The period of fifteen days is usually designated as the minimum time within which the exit of neutral vessels from a blockaded port is permitted. Such was the rule adopted by England and France during the Crimean war; by the United States during the American Civil war; by France in the war of 1870; and by Denmark in 1848 and 1864. That limit is often extended, however, for special reasons, as much as three times that number of days. After the institution of the blockade at New Orleans in 1861, the commander of the blockading squadron extended the time in favor of vessels of deep draught as the water on the bar of the Mississippi was then unusually low; and in 1838 France, in establishing the blockade of Buenos Ayres, fixed the time within which neutral vessels could go out at forty-two days.<sup>58</sup>

**Licenses.**—In the case of the *Franciska*,<sup>59</sup> Dr. Lushington said that by the law of nations “a belligerent may not concede to another belligerent, or take for himself, the right of carrying on commercial intercourse prohibited to neutral nations; and therefore no blockade can be legitimate that admits to either belligerent a freedom of commerce denied to the subjects of states not engaged in war. The foundation of this principle is clear, and rooted in justice; for interference with neutral commerce at all is only justified by the right which war confers of molesting the enemy, all the relations in the nature of trade being by war itself suspended.” The Lords of Appeal in applying that doctrine to the British Orders in Council issued at the commencement of the war with Russia, under which free ingress into Russian ports was granted for a certain time to Russian vessels sailing from ports in the British dominions, and free egress from Russian ports for a certain time to Russian vessels bound with cargoes to British ports,—held that during the interval covered by such orders no valid blockade of the Russian ports in the Baltic could be maintained by the British fleet.<sup>60</sup> When a license is granted

that the immunity would not be abused as a cloak for forbidden trade. *Glass, Marine International Law*, p. 102.

<sup>58</sup> *Consul Mure to Lord John Russell*, June 6, 1861, ap. *Bernard*, p. 242; *Martens (N. R.)* xv. p. 503; *Hall*, p. 733; *Dana's Wheaton*, Note 235; the *Prize Cases*, 2 *Black*, 676.

<sup>59</sup> *Spinks*, p. 135.

<sup>60</sup> *x Moore*, P. C. p. 56. The Lords of Appeal said in that case that “no doubt ships of one belligerent at the outbreak of war, found in the ports of another, into which they have entered for peaceful purposes, with the expectation of the continuance of peace, form an exceptional class which has a strong

in a particular case on special grounds, although there is no express provision in it or in a blockading order to that effect, if it appears to have been the intention of the sovereign granting it that the permission given by it should not be suspended by an order of blockade, it is not affected thereby. Thus in the case of the *Hoffnung*<sup>61</sup> it was held that when a license had been granted to certain vessels, pursuant to a power given to the king in council by an act of parliament, to import Spanish wool from ports of Holland, it operated to protect the parties acting under it from the effects of a blockade, which had been notified on the same day on which the license was granted. "I think," Lord Stowell said, "that I am bound to presume that it was intended the parties should have the full benefit of importing these articles without molestation from a blockade, which could not be unknown to the great Personage, under whose authority, and in whose name the license issued."

§ 682. Effect of the cessation of blockade.—English and French theories are at one as to the principle that the restrictions imposed upon neutral commerce by blockade depend for their validity solely upon the fact that a blockade really exists at a given time. The conflict in the application of that principle arises out of diverging opinions as to the circumstances under which a blockade may cease to exist. It is admitted, however, on all hands that the right of the belligerent to subject a neutral to penalties ceases from the time when the blockade is no longer effectively maintained.<sup>62</sup> For that reason the contention put forward by the government of the United States in 1861, that a blockade

claim to an indulgent exercise of the right of capture; and an express permission to such ship to enter their port of destination, though blockaded, might perhaps not affect the validity of the blockade."

<sup>61</sup> 2 Rob. Adm., p. 162. In the case of the *Orion* (Stewart's Reports, p. 506) Sir Alexander Grant held that the opinion of Lord Stowell in case of the *Hoffnung* remained untouched by his subsequent *dictum* in the *Byfield* (Edwards, p. 188). In the case of the *Orion* Sir A. Croke held that a

license to an enemy protected him in egress from a port subsequently blockaded, as the nature of the trade afforded a presumption of such being the intention of the license. Twiss, War, 227 seq.

<sup>62</sup> The *Nancy*, 1 Acton, p. 58; the *Rolla*, 6 Rob. Admr. p. 372. As to the manner in which a blockade once discontinued or abandoned may be renewed, see the *Hoffnung*, 6 Rob. Admr. p. 120; the *Hare*, 1 Acton's Reports of Cases before the High Court of Appeal, p. 261; *Phillimore*, III, p. 389.



established by proclamation continues in effect until notice of its relinquishment is given in the same way, has been justly criticised,<sup>63</sup> as the failure of a belligerent state to give notice of discontinuance can not prolong the life of a blockade which has in fact ceased to be because the port is no longer effectively watched. If the belligerent state which has formally notified the world of the commencement of a blockade fails to give prompt and equal publicity to its discontinuance, certainly no principle of justice can authorize the confiscation of a vessel seized while approaching a port between the actual cessation of the blockade and the public and formal proclamation of the fact. Nothing more can be required of a vessel captured under such circumstances than proof of the special state of facts upon which she relies, facts which may have exempted her from a penalty incurred at the outset of the voyage through an actual intention to violate the blockade. As in the case of a *de facto* blockade, or the resumption of a blockade, the burden of proof is cast always upon the captor, so in the case of a regularly notified blockade the court will assume its continued existence until that presumption is overcome by evidence.<sup>64</sup>

§ 683. Doctrine of continuous voyages as applied to breach of blockade.—An account has heretofore been given of the origin and nature of the rule of war of 1756, under which a neutral was not permitted to engage in trade with the enemy during a war from which he had been shut out during peace; and of the extension, in 1793, of that rule by Great Britain in such a way as to meet the conditions arising out of the opening by France to all neutrals of her coasting as well as her colonial trade. The merchants of the United States, who were heavy sufferers, often attempted to evade the prohibition by sailing from a French colonial port to an American port, and thence to Europe, as trade between the enemy's colonies and America, and between America and Europe was permitted by the British authorities. The British counterblast to that practical argument was a rule of judicial construction, embodied in the doctrine of continuous voyages, under which two voyages of the character indicated are treated as one, when a forbidden

<sup>63</sup> Mr. Seward to Lord Lyons, ¶7; the *Neptunus* (1798) 1 ib., 171; May 27, 1861; ap. Bernard, 238; the *Circassian*, 2 Wallace, p. 150; Hall, p. 731. the *Baigorry*, ib., p. 480; *Phillips*,

<sup>64</sup> The *Triheten*, 6 *Röb. Adm.*, p. more, III, p. 401.

cargo is carried to a forbidden destination.<sup>65</sup> In short a continuous voyage is one in which goods are finally carried to a hostile destination, after the vessel has touched at an intermediate neutral port in which she unloads and reloads before sailing for the forbidden port.<sup>66</sup> During the American Civil War that doctrine, which had been previously applied both to blockade and contraband, and which is undoubtedly sound in principle, was given a new and dangerous extension that has received from the publicists of the world, outside of the United States, general and emphatic condemnation.<sup>67</sup> The essence of that extension was embodied in the claim that neutral ships captured on a voyage to a neutral port could be condemned, not only when there was good reason to believe that the vessels themselves were intended to proceed further and to make an attempt to enter a blockaded Confederate port, but also when there was reason to suspect that their cargoes were to be transferred in the neutral port to other steamers and to be thus conveyed through the blockading squadron. In the case of the *Bermuda*, a vessel captured while she claimed to be en route between two neutral ports, it was held that "it makes no difference whether the destination to the rebel port was ulterior or direct; nor could the question of destination be affected by transshipment at Nassau, if transshipment was intended, for that could not break the continuity of the transportation of the cargo. \* \* A transportation from one point to another remains continuous, so long as intent remains unchanged, no matter what stoppages or transshipments intervene."<sup>68</sup> In the subsequent case of the *Springbok*, the Supreme Court of the United States, after reaffirming the doctrine laid down in the case of the *Bermuda*,—that "where goods, destined ultimately for a belligerent port, are being conveyed between two neutral ports by a neutral ship, under a charter made in good faith for that voyage, and without any fraudulent connection on the part of her owners with the ulterior destination of the goods, that the ship, though liable to seizure in order to the confiscation of

<sup>65</sup> See above, pp. 631-33.

<sup>66</sup> The *William*, 5 Rob. Adm. p. 385; the *Maria*, ib., p. 365. In the first case, a cargo taken on board at La Guayra was brought to Marblehead, Massachusetts, landed there, and re-embarked in the same

vessel with the addition of some sugar from Havana. Within a week of its arrival it was despatched to Bilboa. *Phillimore*, III, p. 309 seq.

<sup>67</sup> See above, p. 72.

<sup>68</sup> 3 Wallace, 514.

the goods, is not liable to condemnation as prize,"—condemned the cargo because a majority of the judges believed that the owners of it intended it to be sent on from Nassau to some blockaded Confederate port in some other vessel. The Court said that "upon the whole case we can not doubt that the cargo was originally shipped with intent to violate the blockade; that the owners of the cargo intended that it should be transhipped at Nassau into some vessel more likely to succeed in reaching safely a blockaded port, than the Springbok; that the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, one voyage; and that the liability to condemnation, if captured during any part of that voyage, attached to the cargo from the time of sailing."<sup>69</sup> The outcry against such a rule of law, admitting that the facts were as they were assumed to be by the court, rests upon the well-grounded objection that "if a belligerent may capture a neutral vessel honestly intended for a neutral port, and condemn her cargo because he vaguely suspects it will be transferred to some vessel unknown to him, and sent on to some hostile destination also unknown to him, a new disability has been imposed upon neutral commerce. States at war will in future be able to establish what has well been called a blockade by interpretation of any neutral port situated near the coast of an enemy."<sup>70</sup>

**§ 684. Penalty for breach or attempted breach of blockade.**—The penalty for a breach or attempted breach of blockade, in the event of capture, is the forfeiture of both ship and cargo, provided they belong to the same owner. If their owners are different, the vessel may be condemned and the cargo restored, when the person to whom it belongs is ignorant at the time of shipment that the port of destination is blockaded, or in case the vessel deviates from her legitimate course in order to enter a blockaded harbor. If, however, such deviation is made to a port, the blockade of which was known before the vessel sailed, the complicity of the owner of the cargo is assumed upon the theory that the change was prompted by his interests.<sup>71</sup>

<sup>69</sup> 5 Wallace, pp. 1-28.

<sup>70</sup> Lawrence, Principles, p. 597.

<sup>71</sup> The Comet, Edwards, p. 32; the Columbia, 1 Rob. Adm., p. 154; the Alexander, 4 ib., p. 93; the

Adonis, 5 ib., p. 258; the Marianna

Flora, 11 Wheaton, p. 57; the

Panaghia Rhomba, xii Moore, P. C.

p. 180; the Vrow Judith, 1 Rob.

Adm., 150.

## CHAPTER VIII.

### RIGHT OF VISIT AND CAPTURE.

§ 685. **Visit and capture in time of peace.**—Apart from treaty,<sup>1</sup> there is no right to visit a ship without a right to examine first her papers, and then, if they are not satisfactory, the cargo, in order that the actor may thus determine whether or no he will assume the responsibility of detaining the ship itself. The substantive right involved is the right of capture to which the right of visit and search is merely ancillary.<sup>2</sup> To justify the exercise of the substantive right the inquiring state must employ it to enforce some kind of jurisdiction lawfully belonging to it. From what has been said already it appears that even in time of peace the right may be exercised in the execution of revenue laws within the territorial waters of the offended state; in the case of vessels suspected of being piratical, provided it is asserted in good faith, on the high seas or in the territorial waters of the state to which the visiting vessel belongs; and in a proper case of self-defense.<sup>3</sup> A review has also been made of the history of the right of visit in time of peace as a means of ascertaining the real nationality of vessels suspected of being engaged in the slave trade, the claim to which right Great Britain really abandoned in 1858.<sup>4</sup>

§ 686. **Visit and capture, in time of war. Nature and scope of the right.**—Subject to the foregoing exceptions it may be said that the right of visit and capture “is strictly a belligerent right, allowed by the general consent of nations in time of war, and limited to those occasions.”<sup>5</sup> It is the process through which a belligerent gives effect to his rights over neutral property at sea which has become noxious to him by reason of some breach of the law of neutrality. By means of

<sup>1</sup> The *Louis*, 2 *Dodson's Adm.*, III, § cccxxvi; Webster's Works, vi, p. 238; the *Antelope*, 10 *Wheaton*, pp. 335, 339; Requelme, *Derecho Pub. Int.*, I tit. ii, ch. vii; Bello, *Derecho Int.*, pt. II, ch. viii, § 10; *Wheaton*, Hist. Law of Nations, pp. 706 seq.

<sup>2</sup> As to the British attempt to draw a distinction between the right of *visit* and the right of *search*, see *British Foreign State Papers*, xxx, p. 1165; Phillimore, <sup>3</sup> See above, pp. 310-11. <sup>4</sup> See above, pp. 238-40. <sup>5</sup> Judge Story in the *Marianna*

the visit he ascertains whether a merchant vessel carrying the flag of a neutral state is really such, and whether she has been guilty of any breach of the law; by means of the capture he puts himself in a position to inflict the proper penalty. As this right of a belligerent to control the intercourse between neutrals and his enemy is an incident of war, which can be waged only by or under the authority of a state, its exercise is limited to vessels provided with commissions by the sovereign power.<sup>6</sup> The claim that the right of visit and capture may be enforced against neutral men-of-war having ended with the beginning of the last century when it was disavowed by Great Britain in the case of the *Chesapeake* and *Leopard*,<sup>7</sup> it may now be said that only the private vessels of the neutral state are subjects of this belligerent privilege. Against them it can be asserted on the high seas and within the territorial waters of the belligerent or his enemy. In the words of Lord Stowell, "the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destination, is an uncontestable right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destination what they may, because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destination are; and it is for the purpose of ascertaining these facts that the necessity of this right of visitation and search exists. \* \* The right must unquestionably be exercised with as little of personal harshness and of vexation in the mode as possible, but soften it as much as you can, it is still a right of force, though of lawful force in something of the nature of civil process when force is employed, but a lawful force which cannot be lawfully resisted."<sup>8</sup>

§ 687. **Formalities of visit.**—While it is generally conceded that the right of visit must be attended with certain formalities, it has been held that a lack of conformity to the forms of visit, and of attention to the evidences of nationality, prescribed by the regulations of the state to which the visiting

Flora, 11 Wheaton, p. 1: "It is founded upon necessity, and is strictly and exclusively a war right, and does not exist in time of peace." Kent. 1 Com. p. 153.

<sup>6</sup> It must be exercised by the public ships of state—the regular navy—or by private vessels com-

missioned for the purposes of the particular war, called privateers. Phillimore, III, § cccxxx.

<sup>7</sup> See above, p. 302, and also Wharton, Int. Law Dig., §§ 315b, 319, 331.

<sup>8</sup> The *Maria*, 1 Rob. Adm., p. 359.

ship belongs, will not invalidate the capture, if the fact be proved before the prize court that a good cause for it really existed.<sup>9</sup> There is nevertheless a general disposition to observe certain formalities incident to the right of visit which are fairly well understood, despite the fact that no regulations as to all details have received universal assent. The usual method of approach for the purpose of visit and search is for the visiting ship, when at a reasonable distance, to hoist the national ensign and to fire a blank charge, known as the semonce or affirming gun.<sup>10</sup> It then becomes the duty of the neutral vessel to obey such summons by heaving to, to permit boarding,<sup>11</sup> and at the same time to display her national colors. According to the Naval War Code of the United States (Art. 32), prepared by a professional sailor,<sup>12</sup> "the following mode of procedure, subject to any special treaty stipulations, is to be followed by the boarding vessel, whose colors must be displayed at the time: The vessel is brought to by firing a gun with a blank charge. If this is not sufficient to cause her to lie to, a shot is fired across the bows, and in case of flight or resistance force can be used to compel the vessel to surrender. The boarding vessel should then send one of its smaller boats alongside, with an officer in charge wearing side arms, to conduct the search. Arms may be carried in the boat, but not upon the persons of the men. When the officer goes on board of the vessel he may be accompanied by not more than two men, unarmed, and he should at first examine the vessel's papers to ascertain her nationality, the nature of the cargo, and the ports of departure and destination. If the papers

<sup>9</sup> La Tri-Swiatitela, Dalloy, Jurisp. Gén. Ann. 1855, III, p. 73.

<sup>10</sup> Heffter, § 169; Hautefeuille, *Des Droits des Nations Neutres*, III, pp. 438-39. "We are not disposed to admit that there exists any such universal rule or obligation of an affirming gun, as has been suggested at the bar." Judge Story in the *Marianna Flora*, 11 Wheaton, pp. 48-50. See also Dahlgren, *Mar. Int. Law*, p. 103.

<sup>11</sup> In the absence of treaty stipulations, which were once over precise, the distance which the boarding vessel should maintain is unfixed by custom. As the old claim

of cannon shot distance can no longer prevail, nothing more can be said than that the distance should be a convenient one. According to modern usage the master of the merchantman may be summoned on board the cruiser with his papers. The *Eleanor*, 2 Wheaton, p. 262. The regulations of the German and Danish navies recognize that right. *Rev. de Droit Int.*, x, pp. 214, 238. For the contrary view, see Pistoye et Duverdy, 1, p. 237.

<sup>12</sup> Capt. Charles H. Stockton, U. S. N. Ortolan, who was himself a naval officer, complains that such

show contraband, an offense in respect of blockade, or enemy service, the vessel should be seized; otherwise she should be released, unless suspicious circumstances justify a further search. If the vessel be released, an entry in the log book to that effect should be made by the boarding officer."

§ 688. Examination of ship's papers.—Notwithstanding the fact that the number and form of such papers differ, according to the laws of the various maritime countries, it is generally admitted that they should always be sufficiently definite to determine the nationality of the ship, her destination, and the ownership of vessel and cargo. There should be (1) the register, vouching the nationality of the vessel, and specifying the owner, the name and size of the ship, and all other particulars necessary for identification; (2) the passport or sea letter issued by the neutral state; (3) the muster roll, containing names and other particulars concerning the crew; (4) the log-book; (5) the charter party, or other contract under which the ship is let for the current voyage; (6) invoices and bills of lading, and the duplicate of the bill of lading, or acknowledgment from the master of the receipt of the goods specified therein, and promise to deliver them to the consignee or his order.<sup>13</sup> In the hope of bringing about uniformity in the character and extent of such documents, the Institut de Droit International has proposed as a matter of international rule that every vessel shall be required to possess the following: (1) Les documents relatifs à la propriété du navire; (2) Le connaissement; (3) le rôle d'équipage, avec l'indication de la nationalité du patron et de l'équipage; (4) le certificat de nationalité, si les documents mentionnés sous le chiffre 3 n'y suppléent; (5) le journal de bord.<sup>14</sup> Absence of papers, as well as false papers, or gross irregularities, omissions or inconsistency in such as are produced, will justify detention

regulations are often open to criticism because "they have not been drawn by sailors." *Dip. de la Mer*, II, 256.

<sup>13</sup> A list of the papers required by the law of each civilized state will be found in the Manuals of Prize Law issued by the naval authorities of such of them as are maritime. "The papers generally expected to be on board of a vessel are: (1) The Register; (2) The

crew and passenger list; (3) The log book; (4) A bill of health; (5) The manifesto of cargo; (6) A charter party, if the vessel is chartered; (7) Invoices and bills of lading." Naval War Code of U. S., Art. 33. For the lists of the more important maritime nations, see Holland's Admiralty Manual of Naval Prize Law, pp. 52-9; Halleck (Baker ed.) ii, pp. 98-105.

<sup>14</sup> *Ann. de l'Inst.*, 1883, p. 217.

by a belligerent cruiser which has the right to expect information from documents in the usual and legitimate form.<sup>15</sup> After the visiting officer has questioned the master of the vessel and examined her papers, if circumstances of suspicion are thus revealed, but not otherwise, he has the right to call his boat's crew on board in order that they may make a thorough search of the ship.<sup>16</sup>

§ 689. Effect of resisting visit and search. Conflicting English and American rules. —As it is the duty of the neutral to submit to search, an obligation lies on the neutral ship to make no resistance. Any resistance, therefore, or attempt to escape, or to avoid the search and its consequences, by force or fraud, if such measures do not involve the destruction of the vessel at the time, may involve her, together with her cargo, in seizure and subsequent confiscation. When resistance is made by the master of the vessel, the question arises as to the effect of such resistance upon cargo, owned perchance by persons powerless to control his conduct. Notwithstanding that fact, however, English and American courts agree that in case of such resistance by a neutral master, both vessel and cargo become subject to confiscation.<sup>17</sup> Only in case the neutral goods are placed on board a belligerent merchantman are they exempt from confiscation in the event of capture after resistance by the master, because, while such master has a right to protect the belligerent goods of his cargo, the neutral shipper is not supposed to know when he makes the shipment that such resistance to search will occur.<sup>18</sup> If, however, the neutral places his goods on a belligerent ship of force, he is presumed to know that there is an intention to resist visit and search, and that force will be relied on to protect his goods. In that event, according to the rule of the English courts, confiscation will follow, because the neutral then "betrays an intention to resist visitation and search, which he could not do by putting them on board a mere merchant vessel, and, in so far as he does this, he adheres to the belligerent."

<sup>15</sup> Un des principes du droit des *Traité des Prises*, I, p. 416.

gens est, que tout navire droit être muni de pièces de bord, qui permettent de constater son identité, et de reconnaître sa nationalité. Tout navire neutre qui, en temps de paix, navigue armé sans pièces de bord, s'expose à être traité comme pirate. Pistoye et Duverdy,

<sup>16</sup> Ortolan, *Dip. de la Mer*, III, ch. vii.

<sup>17</sup> *The Maria*, 1 Rob. Adm., p. 377; *the Franklin*, 2 Acton, p. 106; *Holland's Manual of Prize Law*, pp. 43-44.

<sup>18</sup> *The Catherina Elizabeth*, 5 Rob. Adm. p. 232.



erent. \* \* If a party acts in association with a hostile force, and relies on that force for protection, he is *pro hac vice* to be considered an enemy."<sup>19</sup> As heretofore pointed out,<sup>20</sup> the Supreme Court of the United States, in a judgment from which Mr. Justice Story earnestly dissented, repudiated the English rule in that respect, and declared that a neutral may lawfully employ an armed belligerent vessel for the transport of his goods, without the loss of their neutral character, either by the armament, or by the resistance made by such vessel, although he charter the whole vessel and is on board at the time, provided he does not aid in such armament or resistance.<sup>21</sup>

§ 690. **Other grounds justifying capture.**—Apart from the causes already discussed, a vessel may become liable to capture (1) when there is reasonable ground to believe, from evidence obtained by the visit, that it is engaged in an illicit act, or that its cargo is liable to confiscation; (2) when the vessel is in possession of false documents, or when there has been a concealment, destruction, or defacement of documents. Under the first head may be ranged all offenses arising out of the carriage of contraband, including cases in which the owner of the ship is privy to their carriage, and all such offences as arise out of the performance of unneutral services or out of breach or attempted breach of blockade. Under the second head stands first the offence arising out of the possession of false documents which is invariably held to be a sufficient reason for bringing in a vessel for adjudication. While some countries, notably Russia and Spain, hold that the possession of false or double papers of any kind, renders both ship and cargo liable to confiscation, Great Britain and the United States adopt the more lenient view that the possession of such papers does not necessarily involve it. By the states last named such fictitious papers are only considered noxious, when they relate to the voyage in which the capture is made, and when there is reason to believe that they were prepared with the express intention to deceive the belligerent making the capture, or that they would operate as a fraud on the

<sup>19</sup> The *Fanny*, 1 Dodson, pp. 448-9. now completed it, and never in

<sup>20</sup> See above, p. 716. my whole life was I more entirely

<sup>21</sup> The *Nereide*, 9 Cranch, p. 441. satisfied that the court were wrong  
"I have been lately engaged in in their judgment." Story's *Life*,  
drawing up my dissenting opinion I, p. 256.

in the case of the *Nereide*. I have

rights of the captors, if admitted as genuine.<sup>22</sup> Even the destruction or "spoliation of papers," which is regarded as a more serious offence than concealment, does not necessarily involve confiscation. The severity of the French rule, which declared to be good prize all vessels with their cargoes on simple proof of the fact that their papers had been destroyed, regardless of their character,<sup>23</sup> has been tempered in English and American practice by a qualification which admits explanation even of a circumstance apparently so incriminating. If such explanation be frank and satisfactory the vessel will not be condemned for that offence alone. If, however, the destruction took place under circumstances indicating that the intent of the act was to conceal the real character of the papers, condemnation would no doubt follow.<sup>24</sup>

§ 691. Duties and liabilities of a captor.—After conducting his visit and capture with as much consideration for persons, and for the safety of property as the necessities of the case will admit, it is the duty of the captor to bring in, with all convenient speed, the captured property for adjudication in the most accessible prize court of his own state. If he takes his prize unnecessarily to an inconvenient port for adjudication he may be justly mulcted in demurrage, costs and damages.<sup>25</sup> If the vessel is destroyed, full compensation must be given to the neutral with damages and costs, because the destruction of a neutral ship is a punishable wrong,—if it can not be brought in for adjudication, it can and ought to be released.<sup>26</sup> If the captured vessel is not capable of reaching

<sup>22</sup> *The Eliza and Katy*, 6 Rob. Adm., p. 192; *the St. Nicholas*, 1 Wheaton, p. 417; *Blaze v. N. Y. Ins. Co.*, 1 Caines Rept., p. 565; *Phoenix Ins. Co. v. Pratt*, 2 Binney Rept., 308; *the Mars*, 6 Rob. Adm., p. 79; *Negrin*, p. 251; *Rev. de Droit Int.*, x, p. 611; *Halleck* (Baker ed.) II, p. 271 seq; *Duer on Ins.*, 1, p. 738.

<sup>23</sup> The severity of the French rule was there so modified in practice as to require that the destroyed papers should be proven to be such as would in themselves involve confiscation. *Pistoye et Duverdy*, II, p. 73, citing the case of *La Fortuna*. For a more ex-

treme application of the rule, see the case of *the Apollos*, *Ibid.* p. 81.

<sup>24</sup> *Bernardi v. Motteaux*, Douglas, Rept., 581; *the Rising Sun*, 2 Rob. Adm., p. 106; *the Hunter*, 1 Dodson, p. 487; *Livingston v. the Maryland Ins. Co.*, 7 Cranch, p. 544; *the Commercen*, 1 Wheaton, p. 386; *the Pizarro*, 2 *Ibid.* 241; *Kent. Com.*, p. 158.

<sup>25</sup> *The Anna*, 5 Rob. Adm. p. 385; *the Wilhemsberg*, *ib.*, p. 143; *the Catherina Elizabeth*, 1 *Acton*, p. 309.

<sup>26</sup> *The Felicity*, 2 *Dodson*, p. 383; *the Zee Star*, 4 *Rob. Adm.*, p. 71; *the Lucade*, *Spinks*, p. 221.

the port in which the adjudication is to take place, but can be safely taken to a neutral port, she should be taken thither and kept there, provided the local authorities will consent to receive her. In that event the ship's papers, the witnesses, and the necessary affidavits must be sent in charge of an officer to the nearest port of the captor in which a prize court sits. While the captured property is being brought in the captor must exercise due care in the preservation of both vessel and cargo; and, excepting the perils of the sea, he is liable for the results of his negligence. The prize master is regarded in the light of a bailee, and as such is held to a strict accountability in the event of the loss of the captured property.<sup>27</sup>

§ 692. **Burden on captor in prize court.**—Immediately upon his arrival in port, it is the duty of the prize master to institute proceedings for adjudication of his prize in the proper court, to which he should deliver the proper papers and furnish the necessary evidence for its examination. While the captor may detain persons as witnesses, he can not treat them as prisoners of war, nor can he exact pledges with respect to their future conduct as a condition of their release. If he maltreats them the court will decree damages.<sup>28</sup> As the property in a neutral vessel or cargo does not vest in the belligerent upon the completion of the capture, he can acquire title only through a decree of condemnation pronounced by a competent court at the conclusion of proceedings conducted according to law.<sup>29</sup> Although the prize court in which such a decree is rendered sits ordinarily in the territory of the belligerent, the law which it administers upon his initiative is international law.<sup>30</sup> Under that law the neutral, in the absence of proof that he has rendered himself liable to penalties, has the benefit of the presumptions that flow from his professed neutrality. His goods being *prima facie* free from liability to seizure and confiscation, the burden is upon the

<sup>27</sup> *Der Mohr*, 4 Rob. Adm. p. 314; p. 239; the *Anna Maria*, 2 Wheat., Die *Fire Damer*, 5 ib., p. 357; the p. 332.

*Palmyra*, 12 Wheaton, p. 1; Locke <sup>29</sup> For an answer to the question, v. *The U. S.*, 7 Cranch, p. 339; to whose benefit does the capture Jecker v. *Montgomery*, 13 Howard, enure, see *The Ships Taken at* Genoa, 4 Rob. Adm., p. 403; the p. 505; the *George*, 1 Mason, p. 24. *French Guiana*, 2 Dodson, p. 157;

<sup>28</sup> *The Vrow Johanna*, 4 Rob. Adm. p. 351; the *San Juan Baptista*, Phillimore, III, § cclvi. <sup>30</sup> See above, p. 42.

5 ib., p. 23; *Rev. de Droit Int.*, x,

captor to satisfy the court by competent and sufficient evidence that he has committed such acts as should subject them to such penalties.<sup>31</sup>

§ 693. **Can convoyed ships be visited? Continental practice.**— In the account heretofore given of the origin and scope of the Second Armed Neutrality League of 1800 the fact was emphasized that as early as 1653 Sweden, after complaining that the goods of her subjects were plundered by privateers, gave orders to her ships of war convoying merchant vessels “to decline that they or any of those that belong to them be searched;” and in the next year, when some Dutch merchant vessels under convoy of a man-of-war were searched by the English, the States-General, while declining to make complaint, declared that they were “persuaded that such visitation and search tended to an inconveniency of trade.” Not, however, until the American War of Independence was the right of neutral states to protect their carrying trade by convoy seriously urged. Then it was that the Dutch stood forth as its defender, and to their side were soon drawn that group of maritime states known as the Baltic powers. The unyielding opposition set up by Great Britain to the attempt thus made to curtail the belligerent right of search really induced Denmark, Sweden, Prussia and Russia to unite in the Second Armed Neutrality League of 1800 which, after repeating the four principles embodied in the first, added another, declaring in effect that the statement of an officer in command of a neutral ship of war that there is nothing contraband on board the vessels convoyed by him should cut off further inquiry by the belligerent. The temporary concession made by Great Britain in the treaties concluded with Russia, Sweden and Denmark in 1801 and 1802,<sup>32</sup> whereby she agreed as a part of the compromise then entered into that the right to search merchant vessels under convoy should be subjected to certain limitations, was so far withdrawn by the treaties concluded between the same parties in 1812 and 1814 as to leave Great Britain, on the one hand, and the Baltic powers, on the other, free to maintain their original contentions.<sup>33</sup>

<sup>31</sup> Hall, pp. 761-2.

<sup>32</sup> See above, pp. 635-38.

<sup>33</sup> Martens (N. R.) 1, pp. 481 and 666, and III, p. 227. Les traités de paix conclus en 1812 et en 1814

entre de l'Angleterre, la Russie, la Suède et le Danèmark rétablirent les relations commerciales entre ces quatre quissances sur le pied des traités de la fin du XVIIIe siècle,

Since that time the Baltic powers, France, Germany, Austria, Spain and Italy, have given emphasis to the principle that merchant vessels under convoy are exempt from the right of search by providing in their naval regulations that the declaration of the convoying officer shall be accepted as final.<sup>34</sup> The Continental jurists, with but few dissenting voices, have united in the conclusion that the practice thus settled by a large group of nations has resulted in the establishment of the exemption from search of merchant vessels under convoy as a canon of international law.<sup>35</sup>

**English and American practice.**—While the Continental nations have been thus uniting in support of an expedient which certainly curtails the advantage of a belligerent state armed with a great sea power, Great Britain has firmly maintained her right to resort to the ancient practice upon which she has always acted, and which is now embodied in her Admiralty Manual of Prize Law.<sup>36</sup> So far as the judge-made law of the United States is concerned English and American jurists and text writers are in perfect accord. In the case of the *Nereide* Judge Story said, in his dissenting opinion, that “the law proceeds yet farther and deems the sailing under convoy as an act *per se* inconsistent with neutrality, as a premeditated attempt to oppose, if practicable, the right of search, and therefore attributes to such preliminary act the full effect of actual resistance.” That conclusion was prefaced by the statement that in relation to his commerce the neutral “is bound to submit to the belligerent right of search, and he can not lawfully adopt any measures whose direct object is to withdraw that commerce from the most liberal and accurate search without the application on the part of the belligerent of superior force.”<sup>37</sup> Kent expresses the same view when he says that “every belligerent power, who is no party to the agreement, has a right to insist on the only security known to the law of nations on this subject, independent of any special covenant, and that is the right of personal visitation and search, to be exercised by those who have an interest in making it. \* \* A merchant vessel has no right to say for itself,

sans faire revivre les principes transactionnels proclamés en 1801. Calvo, § 1219.

<sup>34</sup> For the announcement made by Prussia, Austria and Denmark during the war of 1864 that they

would not visit vessels under convoy, see Martens (N. R. G.) xv, p. 113.

<sup>35</sup> Cf. Calvo, § 1220.

<sup>36</sup> Holland, p. 2.

<sup>37</sup> 9 Cranch, pp. 439-40.

and an armed vessel has no right to say for it, that it will not submit to visitation and search, or to be carried into a proximate court for judicial inquiry."<sup>38</sup> The American publicist thus pointedly denies, in the latter part of his statement, the contention upon which the immunity of a convoyed merchantman is founded, and that is that the immunity from visit possessed by a ship of war extends itself to all vessels under its control.<sup>39</sup> The common law right to search vessels under convoy, thus asserted by American judges and text writers, has, however, often been surrendered by the political department of the government of the United States in treaties entered into, as a general rule, only with states in this hemisphere.<sup>40</sup> And, in the Naval War Code issued in 1900, a very close approach to Continental practice has certainly been made in the article (30) which declares that "convoys of neutral merchant vessels, under escort of vessels of war of their own state, are exempt from the right of search, upon proper assurances, based on thorough examination, from the commander of the convoy."

**Controversy between United States and Denmark as to convoy.**—The controversy in question grew out of the application by Denmark of the general principle that resistance to visit and search by a neutral master furnishes a good ground for capture to the following state of facts. It seems that large numbers of American vessels, after receiving cargoes of naval stores in Russia, were in the habit of assembling on the coasts of Sweden where they placed themselves under the convoy of British men-of-war until they were out of danger. To meet such conditions Denmark, then at war with England, issued in 1810 an ordinance relating to captures, which declares as good and lawful prize "such vessels as, notwithstanding their flag is considered neutral, as well with regard to Great Britain as the powers at war with the same nation, still, either in the Atlantic or Baltic, have made use of English convoy." It is

<sup>38</sup> 1 Com., p. 154.

<sup>39</sup> Ortolan, *Dip. de la Mer*, II, p. 271.

<sup>40</sup> The notable exceptions are the treaty with Sweden, 1816 (N. R., iv, p. 258), and that with Italy, 1871 (Treaties and Conventions, U. S., p. 581). Art. XIX of the last named provides that "the visiting and examining of a vessel shall apply only to those which

sail without a convoy; and when said vessels shall be under convoy the verbal declaration of the commander of the convoy, on his word of honor, that the vessels under his protection belong to the nation whose flag he carries, and, when bound to an enemy's port, that they have no contraband goods on board shall be sufficient."

unreasonable to suppose that in issuing such instructions to its cruisers, in the hope of breaking up a traffic which the nature of the cargoes involved certainly rendered suspicious, Denmark intended to do more than to lay down for the guidance of its tribunals such principles as that government understood to be just principles of law. After several stragglers had been captured, without actual resistance being made, they were condemned by the Danish prize courts on the ground that mere intention to resist, manifested by the simple fact of joining the convoy, was sufficient to involve confiscation. "The principle laid down in the ordinance, as interpreted by the Danish tribunals, was, that the fact of having navigated under enemy's convoy is, *per se*, a justifiable cause, not of capture merely, but of condemnation in the courts of the other belligerent; and that, without inquiring into the proofs of proprietary interest, or the circumstances and motives under which the captured vessel had joined the convoy, or into the legality of the voyage, or the innocence of her conduct in other respects." The protest of the government of the United States against that extreme position led to a negotiation in the course of which the American negotiator, the famous Wheaton, contended that "being found in company with an enemy's convoy might, indeed, furnish a *presumption* that the captured vessel and cargo belonged to the enemy, in the same manner as goods taken in an enemy's vessel are presumed to be enemy's property until the contrary is proved; but this presumption is not of that class of presumptions called *presumptiones juris et de jure*, which are held to be conclusive upon the party, and which he is not at liberty to controvert. It is a slight presumption only, which will readily yield to countervailing proof."<sup>41</sup> The final outcome was a

<sup>41</sup> Dana's Wheaton, pp. 699-708. As Mr. Wheaton was the negotiator of the treaty made with Denmark in 1830 for the settlement of the question at issue, special interest attaches to his very full account of the matter from his point of view. Dana says, however, at the conclusion of note 245, that "there seems little doubt that, in condemning these vessels, as the practice in respect to convoys then stood, and in the relations of Denmark with France, the Danish

courts did not violate any established rule of international law. Manning (p. 369) and Wildman (ii, 126) and Woolsey (§ 193) are of that opinion. Hautefeuille (tom. iii, p. 162-64) gives the arguments, but no opinion. Ortolan seems to doubt the soundness of the American position (tom. i, p. 245). Halleck gives the arguments and no opinion (pp. 617-619)." Hall evidently opposes Wheaton's views, p. 759, note 1.

treaty<sup>42</sup> signed between the United States and Denmark in 1830 in which the latter agreed to pay a sum *en bloc* by way of indemnity to the American citizens whose property had been seized, coupled with the declaration that the convention, having no other object than the termination of all the claims, "can never hereafter be invoked, by one party or the other, as a precedent or rule for the future."

<sup>42</sup> Treaties and Conventions of U. S., p. 235. Elliot's Am. Dip. Code, 1, p. 453.



# APPENDIX.

## "INSULAR TARIFF CASES."

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(Referring to last clause on page 601.)

<sup>53</sup> Since the text was printed the Supreme Court of the United States has delivered weighty judgments in the cases of *De Lima v. Bidwell*; *Dooley v. U. S.*; *Downes v. Bidwell*; *Armstrong v. U. S.*; *Goetze v. U. S.*; and *Crossman v. U. S.*, now known as the "Insular Tariff Cases," to be reported in 182 U. S. After a careful study of the prevailing opinions the author can discover no material departure from the following propositions, which he assumed to be settled and fundamental when the text was written: (1) That when territory is subdued by the armies of the United States, it passes under the despotic war power of the President, as commander-in-chief, who, in the exercise of that power, is unrestrained by the constitution and the laws of the United States; (2) that when territory is thus acquired by the United States by conquest, its holding is a mere military occupation until, by a treaty of peace, the acquisition is confirmed; (3) that when the new acquisition passes into a territorial condition the despotic war power vested in the President as commander-in-chief is superseded by the power of Congress which is equally unlimited, except as to such constitutional "prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place;" (4) that until the ceded territory is admitted as a state, it is not drawn within the circle of the constitutional guarantees which apply, in their entirety, to states only.

In the case of *De Lima v. Bidwell* the leading facts were these: The invasion of Porto Rico, begun in July, 1898, by the military forces of the United States, was suspended on August 12th by a protocol entered into between the Secretary of State and the French Ambassador on the part of Spain, providing for a suspension of hostilities, the cession of the island, and the conclusion of a treaty of peace. On October 18th Porto Rico was evacuated by the Spanish forces, and, on December 10th, a treaty was signed at Paris, under which Spain ceded the island to the United States. Such treaty was ratified by the President and Senate February 6th, 1899, and by the Queen Regent of Spain, March 19th. On March 2nd, an act was passed making an appropriation to carry out the obligations of the treaty; and, on April 11th, the ratifications were exchanged and the treaty proclaimed at Washington. *De Lima & Company* sued the Collector of the Port of New York to recover duties alleged to have been illegally exacted and paid under protest upon certain importations of sugar from San Juan, in the island of Porto Rico, during the autumn of 1899, and subsequent

to the cession of the island to the United States. The duties in question were exacted under the tariff act of July 24th, 1897, commonly known as the Dingley Act, which declares that "there shall be levied, collected, and paid upon all articles imported *from foreign countries*" certain duties therein specified. Unless Porto Rico was a "foreign country," within the meaning of the tariff laws, at the time these duties were levied, it was admitted that their exaction was illegal. As Congress had not acted in any manner in regard to Porto Rico, prior to the exaction of the duties in question, the island certainly remained a "foreign country" as to the United States, unless it had been transformed into domestic territory solely through the force of the treaty-making power, unaided by Congressional legislation. Prior to the announcement of the judgment in the De Lima case, the author assumed it to be settled by the decisions of the Supreme Court that, until the status of territory so occupied, and that of its inhabitants has been altered by adequate congressional legislation, such territory does not cease to be foreign, nor do its inhabitants cease to be aliens, in the sense in which those words are used in the laws of the United States. That conclusion was based in the main upon the pointed declarations made in *U. S. v. Rice*, 4 Wheat. 246, and in *Fleming v. Page*, 9 How. 603. The result of the effort of Justice Brown to reverse the rule thus settled can hardly be permanent, unless he has been able to overthrow the authority of *Fleming v. Page*,—first, by the assumption that the gravamen of that decision is mere *dictum*; second, by the assumption that a contrary rule was really announced in the subsequent case of *Cross v. Harrison*, 16 How. 164. Justice Gray expressed himself with sententious force, as to the first assumption, when he dissented from the conclusion announced by Justice Brown upon the ground that it appeared to him "irreconcilable with the unanimous opinion of this court in *Fleming v. Page*, 9 How. 603, 13 L. ed. 276, and with the opinions of the majority of the justices in the case, this day decided, of *Downes v. Bidwell*, 181 U. S." As to the second assumption, it is hard to understand how the conclusion reached in *Fleming v. Page* could be weakened by that announced in *Cross v. Harrison*, in view of the fact, as stated by Justice White in the case of *Downes v. Bidwell*, that the opinion in the latter case "pointedly referred to a letter of the Secretary of the Treasury directing the enforcement of the tariff laws of the United States, upon the express ground that Congress had enacted laws which recognized the treaty of cession. Besides, the decision was expressly placed upon the conditions of the treaty, and it was stated, in so many words, that a different rule would have been applied had the stipulations in the treaty been of a different character." The dominant idea which seems to have driven Justice Brown to the conclusion reached in the De Lima case, as stated by himself, was that "we are unable to acquiesce in this assumption that a territory may be at the same time both foreign and domestic." Such a scruple certainly has no foundation in the general canons of international law which even go so far as to recognize the principle that the same territory may possess, at the same moment, a belligerent and a neutral character. (See above, p. 594.) The most cogent reason, however, for the re-establishment of the rule,

supposed, for so long a time, to have been settled in *Fleming v. Page*, is to be found in the fact that the admission of a new community into our customs union is purely a political function that should belong exclusively to the federal legislature. To bring about such a change in the application of statute law, through judicial construction merely, is a dangerous extension of the power of judicial legislation.

The vacuum existing in the *De Lima* case, by reason of the lack of Congressional action, was filled by the enactment, on April 12th, 1900, of the act known as the Foraker Act, to provide temporary revenues and a civil government for Porto Rico, which took effect May 1st, 1900. The case brought by Downes against the Collector of the Port of New York was to recover certain duties, paid under protest, upon certain merchandise brought thither from San Juan, in the island of Porto Rico, during the month of November, 1900, imposed under the authority of the Foraker Act. The plaintiff assailed the constitutionality of that act on the ground that it conflicts with Art. 1, § 8, of the constitution of the United States, which provides that "all duties, imposts and excises shall be uniform throughout the United States." The question thus presented was this: To what extent does the federal constitution apply to a territory of the United States? The prolonged controversy on that subject, extending from the making of the present constitution, reached a decided stage when the Supreme Court declared, in 1879, without a dissenting voice, in the case of *First National Bank of Brunswick v. County of Yankton*, 101 U. S. 129, that "the territories are but political subdivisions of the outlying dominion of the United States. They bear much the same relation to the general government that counties do to the states, and Congress may legislate for them as states do for their respective municipal organizations. The organic law of a territory takes the place of a constitution, as the fundamental law of the local government. It is obligatory on, and binds the territorial authorities; but Congress is supreme and, for the purposes of this department of its governmental authority, has all the powers of the people of the United States, except such as have been expressly, or by implication, reserved in the prohibitions of the constitution." In *Church of Jesus Christ of L. D. S. v. United States*, 136 U. S., 1, the Supreme Court, speaking through Justice Bradley, said, in holding that Congress had power to repeal the charter of the church, that "the power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. \* \* \* Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the constitution, from which Congress derives all its powers, than by any express and direct application of its provisions." In the case of *Downes v. Bidwell* a bare majority of the Supreme Court, speaking through the weighty words of Justice Brown, reiterated that historic and unassailable doctrine in the declaration

“that the power over the territories is vested in Congress without limitation, and that this power has been considered the foundation upon which the territorial governments rest, was also asserted by Chief Justice Marshall in *M’Culloch v. Maryland*, 4 Wheat. 316, 422, 4 L. ed. 579, 605, and in *United States v. Gratiot*, 14 Pet. 526, 10 L. ed. 573.” So far from attempting to enlarge the power of Congress over the territories, as defined in the earlier cases, Justice Brown, in announcing the prevailing opinion in the case in question, manifested a decided inclination to narrow it, when he said: “To sustain the judgment in the case under consideration it by no means becomes necessary to show that none of the articles of the constitution apply to the island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only ‘throughout the United States’ or among the several states. Thus when the constitution declares that ‘no bill of attainder or *ex post facto* law shall be passed,’ and that ‘no title of nobility shall be granted by the United States,’ it goes to the competency of Congress to pass a bill of *that description*. \* \* \* Whatever may be finally decided by the American people as to the status of these islands and their inhabitants,—whether they shall be introduced into the sisterhood of states, or be permitted to form independent governments,—it does not follow that, in the meantime, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our constitution, and subject to the merely arbitrary control of Congress.” While the court was thus emphasizing the fact that the personal rights of inhabitants of territories are guarded, to some extent at least, by such constitutional limitations “as go to the very root of the power of Congress to act at all, irrespective of time or place,” it was careful to say that such provisions of the constitution as are operative only “throughout the United States” or among the several states, are applicable to the territories acquired by purchase or conquest, only when Congress shall so direct. An incontrovertible historical fact is recognized by the statement that the existing federal constitution was made for the “United States, by which term we understand the *states* whose people *united* to form the constitution, and such as have since been admitted to the Union upon an equality with them.” The court therefore concluded that “the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the constitution; that the Foraker Act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case.”

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