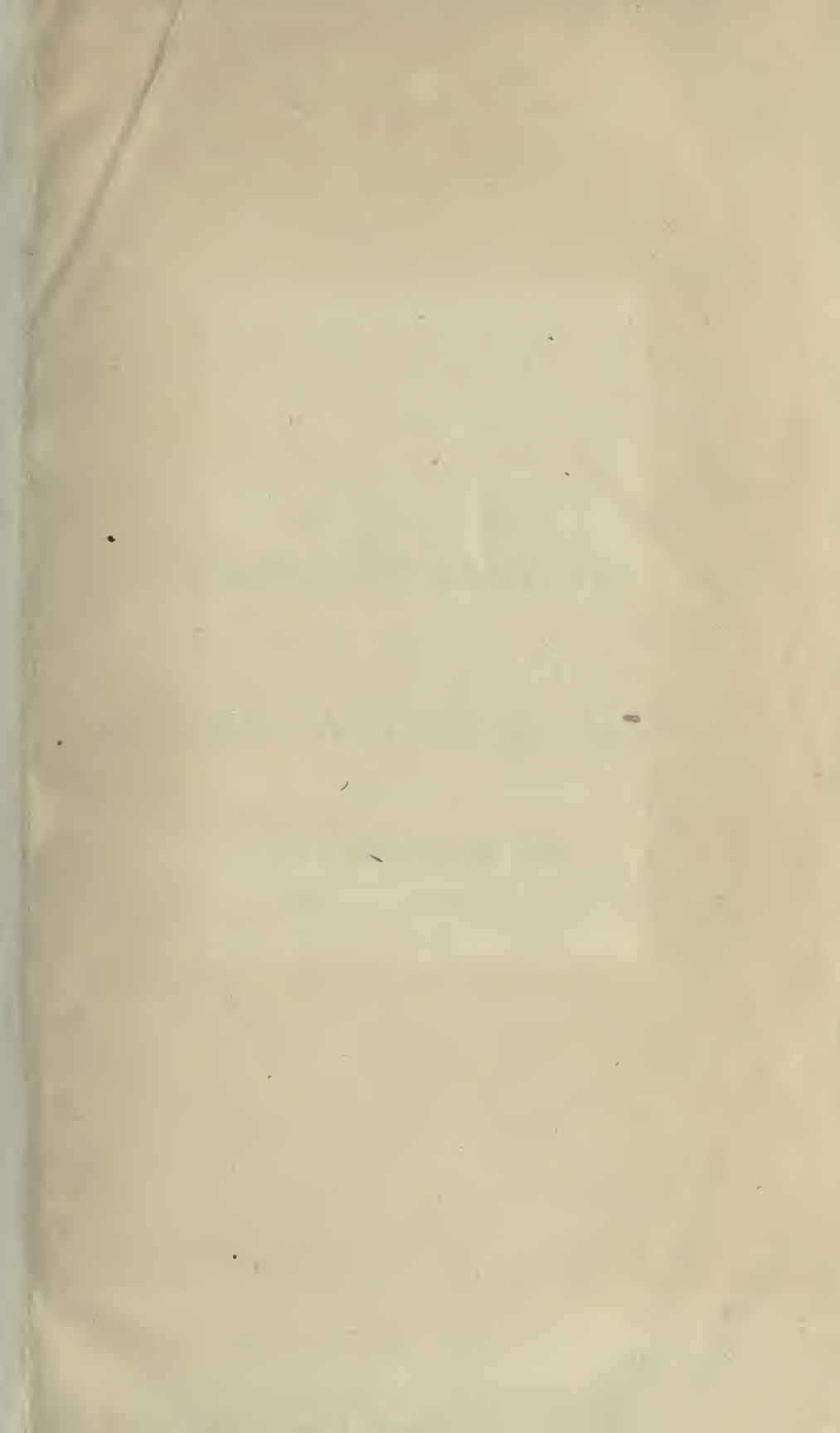


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WHEATON'S ELEMENTS  
OF  
INTERNATIONAL LAW.

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FIFTH ENGLISH EDITION,

*REVISED THROUGHOUT.*

### NOTE.

*Wheaton's 'Elements of International Law' was first published in 1836, in two editions, one appearing in Philadelphia and the other in London. The third edition was issued in 1846, in Philadelphia. In 1848, a French edition of the work was published at Leipsic and Paris; and in 1853 a second French edition was brought out at the same places. In 1857 an edition in English (called the sixth) was edited by W. B. Lawrence, and published in Boston; a second edition by the same editor appeared in 1863, also in Boston. The next issue, in 1864, was a translation into Chinese executed by order of the Chinese Government. The edition after that was the well-known one, edited by R. H. Dana, 1866, Boston. The first English edition proper was edited by A. C. Boyd and issued by the present publishers in 1878; the same editor prepared the second and the third edition, the latter in 1889. The fourth English edition, edited by J. B. Atlay, appeared in 1904.*



# WHEATON'S ELEMENTS

OF

# INTERNATIONAL LAW.

FIFTH ENGLISH EDITION,

*REVISED THROUGHOUT, CONSIDERABLY ENLARGED  
AND RE-WRITTEN*

BY

COLEMAN PHILLIPSON, M.A., LL.D., LITT.D.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW,

*Author of "Studies in International Law"; "Effect of War on Contracts";*

*"The International Law and Custom of Ancient Greece and Rome";*

*"International Law and the Great War";*

*Part Author of "Great Jurists of the World";*

*Editor of Foote's "Private International Jurisprudence"; etc.*

*WITH AN INTRODUCTION*

BY

THE RT. HON. SIR FREDERICK POLLOCK, Bt., D.C.L., LL.D.,

*Author of "Principles of Contract"; "The Law of Torts," etc.*

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## PREFACE

TO THE FIFTH ENGLISH EDITION.



THE present edition contains extensive additions, as well as a great number of modifications and corrections. The position of a good deal of the matter has been rearranged for the sake of systematic exposition and logical coherence. Several omissions have been made relating to subjects that have now lost their importance; whilst other questions are considered much more fully. Thus—to give but one or two instances among many—in the previous edition *Wheaton's case* (involving a discussion between the American and the Prussian Governments, in 1839, as to the exemption of public ministers from the local jurisdiction) occupied thirteen pages; in the present edition it has been reduced to half a page. Thirteen pages were also given to an account—practically a verbatim reprint—of diplomatic negotiations between the United States and the Prussian Government concerning the renewal of their treaty of 1785; now half a page is devoted to it. On the contrary, in the previous edition, International Arbitration occupied but three pages; in the present edition it has received thirteen pages. The previous edition contained little or nothing on many subjects, which are now (owing to the labours of the Second Hague Conference and the London Naval Conference) considered with comparative fulness. Moreover, the resulting Conventions have not been relegated

to an appendix, as was done before in the case of the Hague Conventions of 1899; they have, rather, been analysed out—often critically—and their constituent elements have been put in different places in the book, according to the general scheme and division of the subject-matter.

The preceding editors left Wheaton's text throughout intact; and their supplementary matter was printed in smaller type. Now, in view of modern requirements, the whole—both original text and editorial additions—has been subjected to revision, though Wheaton's fundamental conceptions have generally been left unaltered; and a uniform type, intermediate in size between that of Wheaton's own text and that of the previous editors, has been introduced. The reader will thus find the appearance of the page more pleasing. It may perhaps be thought a disadvantage to remove all distinction between the original author's writing and that of his editors; it seemed, however, impossible to keep on preserving it in the case of a growing, changing subject that has to be necessarily adapted to the exigencies of time and place.

The historical portions have not only been retained throughout, they have also been expanded here and there; so that the student may obtain a body of rules and principles as well as an outline of their modern development. The references to treatises and documents have been made more precise. There is a tendency in modern books on international law to disregard the work of earlier writers (such as Grotius, Bynkershoek, Pufendorf, Vattel, Martens, Klüber, Heffter, and many others), and to refer simply to each other. This appears to the present editor to be a mistake; it gives the elementary student an erroneous notion of the growth of the subject, and it does an in-



justice to the earlier writers, especially so when their views have been admirably expounded, and are now accepted as principles of this branch of jurisprudence. Accordingly the numerous references, given by Wheaton, to the earlier authors have been retained. What good purpose can it serve to refer only to present-day writers, when their conclusions are the same as those of their predecessors, and frequently are not so well expressed?

Examples of conduct in modern wars, as furnishing illustrations, have been added unsparingly; thus—to name but a few—there are thirty references to the American Civil War, thirty to the Franco-German War, thirty-five to the Russo-Japanese War, and fifty to the Great War of to-day. Many of the changes introduced during the present war have been referred to; they cannot, however, yet be considered as part of international law.

The number of cases has been increased by nearly three hundred, many of which being quite recent ones; and they have in general been dated. These comprise not only judicial causes, but also diplomatic and arbitration cases, as well as other international incidents, which are all of great importance in our subject.

The table of contents and the index have been enlarged, and so arranged as to facilitate reference to the subject-matter of the book. In spite of the large increase in matter, it was found possible to present the work in one volume, owing to the adoption of a more compact type, and the omission of several appendices.

Another new feature of this edition is the Introduction by Sir Frederick Pollock, to whom the editor owes a

debt of gratitude. The forcible observations of a writer so eminent in the sphere of jurisprudence and political science cannot but stimulate all readers.

In conclusion, it may be said that, by reason of the large quantity of new matter added—which amounts, indeed, to more than 200 pages—and the great number of alterations made, the present editor ought perhaps to be regarded as a co-author of this edition of the book, rather than as an editor in the usual sense of the term.

COLEMAN PHILLIPSON.

INNER TEMPLE,

*October, 1915.*



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## INTRODUCTION.



SOME men may think this a strangely chosen time to republish a nineteenth century classic of international law. We are in the midst of a general war in which the validity of all rule, convention and usage appears, at first sight, to be shaken to its foundation. The rulers of the Central Empires and the leaders of their armies have not only acted as if the laws and customs of civilized warfare, the faith of treaties, and the dictates of the commonest humanity, were subordinate to military convenience; they have not been ashamed to assert this damnable doctrine (for so the publicists of all other nations deem it) as a principle of deliberate conduct. True, they talk of necessity, but in the sense that the convenience of military advantage amounts to necessity whenever the officer commanding on the spot is of that opinion. Yet these same innovators are eager to seize any pretext for charging their adversaries with some breach, as often as not purely fictitious, of the rules from which they claim unlimited dispensing power for themselves. We have now learnt the simple and comprehensive reason for this attitude; it would seem incredible if it were not established by abundant German testimony. In the fixed belief of the German leaders and most of their people, Germany is not a country having equal

rights among equals, but the home of a superior race entitled to impose its own policy and methods on the rest of the world by the use of any requisite degree of force, and not bound to treat men of inferior races as human beings unless and until they behave as docile subjects. Germany has rights in virtue of a paramount mission to Prussianize the world. Germany's allies have rights because they are her allies. Neutrals have just what Germany chooses to allow them, and enemies have none. As for the 'ethical relationship' of German colonists to subject races, it is defined by the egregious Dr. Dernburg as 'an inflexible attitude.' Such is the law laid down by our new judges of Berlin. Until we have accomplished the task of making it impossible for them to force it on the world, is it worth while to go on repeating the formulas we thought sacred even in war time? If a colonel of Ulans taken at random, drunk or sober, is to be free to overrule everything hitherto accepted, to take private owners' goods against receipts in the name of Captain Koepenick, and to shoot the owners themselves on bare suspicion that some other man has fired on a German trooper, why trouble ourselves to pore over authorities at all? If treaties are scraps of paper, learned books and considered judgments are mere scraps of paper too.

But on reflection it seems that, when great Powers commit themselves to principles of anarchic tyranny, that is the very reason why those who still believe in the rule of law should reassert and republish their faith as the most dignified form of protest, and in the long run not the least effectual. Law does not cease to exist merely because it is broken, or even because, for a time, it may be broken on a large scale; neither does the

escape of some criminals abolish penal justice. No country is so well ordered that offences are not frequently committed, or that wilful and concerted resistance to the law never occurs. Concerning the law of nations, the wonder is not that it should be broken, but that, down to the present war, it should have been fairly well observed by most nations and ostensibly respected by all, in spite of lacking any defined sanction. What is new and shocking in the present situation is the open defiance of public law, the shameless assertion of mere arbitrary power under the sophistical pretence that the State, having no earthly superior, is subject to no moral rules: a position, be it remarked, far beyond anything that even Hobbes dared to maintain. Such defiance can be met, in the first instance, only by the one argument which the rebel Powers acknowledge, that of manifestly superior force. But there will as surely be a reaction in favour of law and order in the affairs of Europe as there has been, after periods of civil turmoil, in the affairs of particular nations; and then we shall do well to give some care to considering, with a view to better settlement for the future, the principles accepted and formulated by the wisdom of cool heads in bygone days of peace.

In Wheaton's Elements we have an exposition of such principles delivered on a more spacious historical scene and with more wealth of detailed illustration than can be found in most modern text-books. Wheaton stands for the opinions received or allowed among the best instructed publicists during the period following the Congress of Vienna, sometimes called the Forty Years' Peace; a period in the course of which there were many



military operations, and in the latter part of it formidable civil wars, but never a state of actual war between any two of the greater European Powers. It was a period favourable to disinterested treatment of international problems by learned writers, and especially favourable to their impartial treatment by Americans, who still accepted it as an axiom that their country was not to be involved in European controversies. For the purpose of comparing the former rules with recent variations, and judging how far any new departure is to be censured as lawless or tolerated as an endeavour to follow the spirit of the law when novel conditions have made literal obedience impracticable, it is plainly the safer course to look to the statements made by approved writers before the present questions arose. There is perhaps even stronger political than scientific justification for Dr. Phillipson's decision to retain Wheaton's references to the earlier treatises which in Wheaton's own time held authoritative rank.

It is needless to dwell here on Wheaton's general merits. They are, to begin with, those of a good scholarly lawyer of the first generation of American independence; but his combination of forensic, judicial and diplomatic experience gave him almost unique advantages in handling this subject. The time may come when it will be a seemly and pious work for some learned American to reprint Wheaton's text as a classic, with no more annotation than will serve to prevent it from actively misleading a reader who has not a current modern treatise at his elbow. But that time is not yet, and while the book is still in use as a practical manual Dr. Phillipson's method of frankly rewriting obsolete or inadequate sections appears the best.

Some readers may be discontented at not being able, in this edition, to see at a glance whether they have under their eyes Wheaton's own words or an editorial supplement. To this it may be answered that the dates and editorship of former issues are given in a note opposite the title-page, and with that aid it is no great feat of legal or literary discernment to make out to what recension any important passage belongs. Besides, the earlier editions have not ceased to be accessible to those who may be curious in such matters. The only alternative, as Dr. Phillipson has indicated, would have been to preserve or indeed multiply typographical distinctions which, for the reader who wants information and not literary history, are merely irritating. Still less is apology needed for the text or notes reflecting the confused and transitory state of present affairs. One footnote added, it seems, at the last moment, suggests an impending development of examples on the point of recalling ambassadors which will quite overshadow the petty tragi-comedy of Lord Sackville's case. At the time of passing these lines for the press there has arisen a curious and seemingly novel case as to the position of consular agents of one belligerent party, in territory occupied by but not belonging to the adverse party, who have abused their official position to promote hostile operations. The contention that in such circumstances they are to be exempt from even the mildest forms of military interference, or have an indefeasible claim to remain at their posts, appears at least adventurous.

After the war far-reaching measures will be needed to restore and maintain the public law of Europe. I venture to think they will be not less but more thorough than any one, as yet, is in a position to forecast, and to

hope that Dr. Phillipson may live to put forth another edition of this book which will exhibit the custom and ordinance of civilized nations at last clothed with fitting authority, and armed with power to assure the harmony of the world.

F. POLLOCK.

LINCOLN'S INN,

CHRISTMAS VACATION, 1915.

# ELEMENTS OF INTERNATIONAL LAW.

## PART FIRST.

### DEFINITION, SOURCES, AND SUBJECTS OF INTERNATIONAL LAW.

#### CHAPTER I.

##### DEFINITION AND SOURCES OF INTERNATIONAL LAW.

(THERE is no legislative or judicial authority, recognised by all nations, which determines the law that regulates the reciprocal relations of States.) Origin of  
International  
Law. The origin of this law must be sought in the principles of justice, applicable to those relations. While in every civil society or State there is always a legislative power which establishes, by express declaration, the civil law of that State, and a judicial power which interprets that law, and applies it to individual cases, in the great society of nations there is no legislative power, and consequently there are no express laws, except those which result from the conventions which States may make with one another. As nations acknowledge no superior, as they have not organised any common paramount authority, for the purpose of establishing by an express declaration their international law, and as they have not constituted any sort of Amphictyonic magistracy to interpret and apply that law, it is impossible that there should be a code of international law illustrated by judicial interpretations.

The inquiry must then be, what are the principles of justice which ought to regulate the mutual relations of nations, that is to say, from what authority is international law derived?



When the question is thus stated, every publicist will decide it according to his own views, and hence the fundamental differences which we remark in their writings.

Natural Law defined.

The leading object of Grotius, and of his immediate disciples and successors, in the science of which he was the principal founder (*a*), seems to have been, firstly, to lay down those rules of justice which would be binding on men living in a social state, independently of any positive laws of human institution; or, as is commonly expressed, living together in 'a state of nature'; and, secondly, to apply those rules under the name of Natural Law, to the mutual relations of separate communities living in a similar state with respect to each other.

With a view to the first of these objects, Grotius sets out in his work, on the laws of war and peace (*b*), with refuting the doctrine of those ancient sophists who wholly denied the reality of moral distinctions, and that of some modern theologians, who asserted that these distinctions are created entirely by the arbitrary and revealed will of God, in the same manner as certain political writers (such as Hobbes) afterwards referred them to the positive institution of the civil magistrate. For this purpose, Grotius labours to show that there is a law audible in the voice of conscience, enjoining some actions, and forbidding others, according to their respective suitableness or repugnance to the reasonable and sociable nature of man. "Natural law," says he, "is the dictate of right reason pronouncing that there is in some actions a moral obligation, and in other actions a moral deformity, arising from their respective suitableness or repugnance to the rational and social nature, and that, consequently, such actions are either forbidden or enjoined by God, the Author of nature. Actions which are the subject of this exertion of reason, are in themselves lawful or unlawful, and are, therefore, as such, necessarily commanded or prohibited by God" (*c*).

Natural Law identical with the law of God, or Divine Law.

The term Natural Law is here evidently used for those rules of justice which ought to govern the conduct of men, as moral and accountable beings, living in a social state, independently of positive human institutions, (or, as is commonly expressed, living in a state of nature,) and which may more properly be called the law of God, or the divine law, being the rule of conduct prescribed by Him to His rational creatures, and revealed by the light of reason, or the Sacred Scriptures.

(*a*) On Grotius, see Article by Sir W. Rattigan, in *Great Jurists of the World* (London, 1913), pp. 169 *seq.*; Article in *Fondateurs du droit inter-*

*national* (Paris, 1904), ed. A. Pillet.

(*b*) *De Jure Belli ac Pacis*.

(*c*) Grotius, *De Jur. Bel. ac Pac.*, lib. i. cap. 1, § x. 1, 2.

As independent communities acknowledge no common superior, they may be considered as living in a state of nature with respect to each other: and the obvious inference drawn by the disciples and successors of Grotius was, that the disputes arising among these independent communities must be determined by what they call the Law of Nature. This gave rise to a new and separate branch of the science, called the Law of Nations, 'Jus Gentium' (d).

Natural Law applied to the intercourse of States.

Grotius distinguished the law of nations from the natural law by the different nature of its origin and obligation, which he attributed to the general consent of nations. In the introduction to his great work, he says, "I have used in favour of this law, the testimony of philosophers, historians, poets, and even of orators; not that they are indiscriminately to be relied on as impartial authority; since they often bend to the prejudices of their respective sects, the nature of their argument, or the interest of their cause; but because where many minds of different ages and countries concur in the same sentiment, it must be referred to some general cause. In the subject now in question, this cause must be either a just deduction from the principles of natural justice, or universal consent. The first discovers to us the natural law, the second the law of nations. In order to distinguish these two branches of the same science, we must consider, not merely the terms which authors have used to define them, (for they often confound the terms 'natural law' and 'law of nations,') but the nature of the subject in question. For if a certain maxim which cannot be fairly inferred from admitted principles is, nevertheless, found to be everywhere observed, there is reason to conclude that it derives its origin from positive institution" (e). He had previously said, "As the laws of each particular State are designed to promote its advantage, the consent of all, or at least the greater number of States, may have produced certain laws between them. And, in fact, it appears that such laws have been established, tending to promote the utility, not of any particular State, but of the great body of these communities. This is what is termed the Law of Nations, when it is distinguished from Natural Law" (f).

Law of Nations distinguished from Natural Law, by Grotius.

(d) With respect to the 'jus gentium' as understood by the Romans, see Maine, *Ancient Law*, ed. Sir F. Pollock (1903), pp. 44 *seq.*; *International Law*, Lects. i. and ii.; C. Phillipson, *International Law and*

*Custom of Ancient Greece and Rome* (1911), vol. i. chap. iii.

(e) Grotius, *De Jur. Bel. ac Pac.*, Prolegom. 40.

(f) Prolegom. 17.

All the reasonings of Grotius rest on the distinction which he makes between the natural and the positive or voluntary Law of Nations. He derives the first element of the Law of Nations from a supposed condition of society, where men live together in what has been called a state of nature. That natural society has no other superior but God, no other code than the divine law engraved in the heart of man, and announced by the voice of conscience. Nations living together in such a state of mutual independence must necessarily be governed by this same law. Grotius, in demonstrating the accuracy of his somewhat obscure definition of Natural Law, has given proof of a vast erudition, as well as put us in possession of all the sources of his knowledge. He then bases the positive or voluntary Law of Nations on the consent of all nations, or of the greater part of them, to observe certain rules of conduct in their reciprocal relations. He has endeavoured to demonstrate the existence of these rules by invoking the same authorities, as in the case of his definition of Natural Law. We thus see on what fictions or hypotheses Grotius has founded the whole Law of Nations. But it is evident that his supposed state of nature has never existed. As to the general consent of nations of which he speaks, it can at most be considered a tacit consent, like the 'jus non scriptum quod consensus facit' of the Roman juriconsults. This consent can only be established by the disposition, more or less uniform, of nations to observe among themselves the rules of international justice, recognised by the publicists. Grotius would, undoubtedly, have done better had he sought the origin of the Natural Law of Nations in the principle of utility, vaguely indicated by Leibnitz (*g*), but clearly expressed and adopted by Cumberland (*h*), and admitted by almost all subsequent writers, as the test of international morality (*i*). But in the time that Grotius wrote, this principle which has so greatly contributed to dispel the mist with which the foundations of the science of International Law were obscured, was but very little understood. The principles and details of international morality, as distinguished from international law, are to be obtained not by applying to nations the rules which ought to govern the conduct of individuals, but by ascertaining what are the rules of international conduct which, on the whole, best promote the general happiness of mankind. The means of this

(*g*) Leibnitz, De usu Actorum Publicorum, § 13.

(*h*) Cumberland, De Legibus Naturæ, cap. v. § 1.

(*i*) Bentham, Principles of International Law; Works, ed. Bowring, Part VIII. p. 537.



inquiry are observation and meditation; the one furnishing us with facts, the other enabling us to discover the connection of these facts as causes and effects, and to predict the results which will follow, whenever similar causes are again put into operation (*k*).

Neither Hobbes nor Pufendorf entertains the same opinion as Grotius upon the origin and obligatory force of the positive Law of Nations. The former, in his work, *De Cive*, says, "The natural law may be divided 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; but since States, when they are once instituted, assume the personal qualities of individual men, 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" (*l*). To this opinion Pufendorf implicitly subscribes, declaring 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 power" (*m*).

After thus denying that there is any positive or voluntary law of nations founded on the consent of nations, and distinguished from the natural law of nations, Pufendorf proceeds to qualify this opinion by admitting that the usages and comity of civilized nations have introduced certain rules for mitigating the exercise of hostilities between them; that these rules are founded upon a general tacit consent; and that their obligation ceases by the express declaration of any party engaged in a 'just' war, that it will no longer be bound by them. There can be no doubt that any belligerent nation which chooses to withdraw itself from the obligation of the Law of Nations, in respect to the manner of carrying on war against another State, may do so at the risk of incurring the penalty of vindictive retaliation on the part of other nations, and of putting itself in general hostility with the civilized world. As a celebrated English civilian and Admiralty judge (Lord Stowell) has well observed, "a great part of the law of nations stands upon the usage and practice of nations. It is introduced, indeed, by general principles, but it travels with those general principles only to a certain extent; and if it stops there, you are not at liberty to go further, and say that mere

Law of Nature and Law of Nations asserted to be identical, by Hobbes and Pufendorf.

(*k*) Senior, *Edinburgh Review*, No. 156, pp. 310, 311.

(*l*) Hobbes, *De Cive*, cap. xiv. § 4. For an Article on Hobbes (by J. E. G. de Montmorency), see *Great Jurists*

of the World (London, 1913), pp. 195 *seq.*

(*m*) Pufendorf, *De Jure Naturæ et Gentium* (1672), lib. ii. cap. 3, § 23. For an Article on Pufendorf (by C. Phillipson), see *ibid.*, pp. 305 *seq.*



general speculations would bear you out in a further progress; thus, for instance, on mere general principles, it is lawful to destroy your enemy; and mere general principles make no great difference as to the manner by which this is to be effected; but the conventional law of mankind, which is evidenced in their practice, does make a distinction, and allows some, and prohibits other modes of destruction; and a belligerent is bound to confine himself to those modes which the common practice of mankind has employed, and to relinquish those which the same practice has not brought within the ordinary exercise of war, however sanctioned by its principles and purposes" (*n*).

The same remark may be made as to what Pufendorf says respecting the privileges of ambassadors, which Grotius supposes to depend upon the voluntary law of nations; whilst Pufendorf says they depend, either upon natural law, which gives to public ministers a sacred and inviolable character, or upon tacit consent, as evidenced in the usage of nations, conferring upon them certain privileges which may be withheld at the pleasure of the State where they reside. The distinction here made between those privileges of ambassadors, which depend upon natural law, and those which depend upon custom and usage, is wholly groundless; since both one and the other may be disregarded by any State which chooses to incur the risk of retaliation or hostility, these being the only sanctions by which the duties of international law can be enforced.

Still it is not the less true that the law of nations, founded upon usage, considers an ambassador, duly received in another State, as exempt from the local jurisdiction by the consent of that State, which consent cannot be withdrawn without incurring the risk of retaliation, or of provoking hostilities on the part of the sovereign by whom he is delegated. The same thing may be affirmed of all the usages which constitute the Law of Nations. They may be disregarded by those who choose to declare themselves absolved from the obligation of that law, and to incur the risk of retaliation from the party specially injured by its violation, or of the general hostility of mankind (*o*).

Law of Nations derived from reason and usage by Bynkershoek.

Bynkershoek (who wrote after Pufendorf, and before Wolf and Vattel,) derives the law of nations from reason and usage ('*ex ratione et usu*'), and founds usage on the evidence of treaties and ordinances ('*pacta et edicta*'), with the comparison of examples frequently recurring. In treating of the rights of neutral

(*n*) *The Flad Oyen* (1799), 1 C. Rob. 140.

(*o*) Wheaton, *History of the Law of Nations* (New York, 1845), p. 96.

navigation in time of war, he says, "Reason commands me to be equally friendly to two of my friends who are enemies to each other; and hence it follows that I am not to prefer either in war. Usage is shown by the constant, and, as it were, perpetual custom which sovereigns have observed of making treaties and ordinances upon this subject, for they have often made such regulations by treaties to be carried into effect in case of war, and by laws enacted after the commencement of hostilities. I have said 'by, as it were, a perpetual custom'; because one, or perhaps two treaties, which vary from the general usage, do not alter the law of nations" (p).

In treating of the question as to the competent judicature in cases affecting ambassadors, he says, "The ancient juriconsults assert, that the law of nations is that which is observed in accordance with the light of reason, between nations, if not among all, at least certainly among the greater part, and those the most civilized. According to my opinion, we may safely follow this definition, which establishes two distinct bases of this law; namely, reason and custom. But in whatever manner we may define the law of nations, and however we may argue upon it, we must come at last to this conclusion, that what reason dictates to nations, and what nations observe between each other, as a consequence of the collation of cases frequently recurring, is the only law of those who are not governed by any other—('unicum jus sit eorum, qui alio jure non reguntur'). If all men are men, that is to say, if they make use of their reason, it must counsel and command them certain things which they ought to observe as if by mutual consent, and which being afterwards established by usage, impose upon nations a reciprocal obligation; without which law, we can conceive neither of war, nor peace, nor alliances, nor embassies, nor commerce" (q). Again, he says, treating the same question: "The Roman and pontifical law can hardly furnish a light to guide our steps; the entire question must be determined by reason and the usage of nations. I have alleged whatever reason can adduce for or against the question; but we must now see what usage has approved, for that must prevail, since the law of nations is thence derived" (r). In a subsequent passage of the same treatise, he says, "It is nevertheless most true, that the States General of Holland alleged, in 1651, that, according to the

(p) Bynkershoek, *Questiones Juris Publici* (1737), lib. i. cap. 10. See the Article by C. Phillipson in *Great Jurists of the World*, pp. 390 *seq.*

(q) *De Foro Legatorum* (1727), cap. iii. § 10.

(r) *Ibid.*, cap. vii. § 8.

law of nations, an ambassador cannot be arrested, though guilty of a criminal offence; and equity requires that we should observe that rule, unless we have previously renounced it. The law of nations is only a presumption founded upon usage, and every such presumption ceases the moment the will of the party who is affected by it is expressed to the contrary. Huberus asserts that ambassadors cannot acquire or preserve their rights by prescription; but he confines this to the case of subjects who seek an asylum in the house of a foreign minister, against the will of their own sovereign. I hold the rule to be general as to every privilege of ambassadors, and that there is no one they can pretend to enjoy against the express declaration of the sovereign, because an express dissent excludes the supposition of a tacit consent, and there is no law of nations except between those who voluntarily submit to it by tacit convention" (s).

System of  
Wolf.

The public jurists of the school of Pufendorf had considered the science of international law as a branch of the science of ethics. They had considered it as the natural law of individuals applied to regulate the conduct of independent societies of men, called States. To Wolf belongs, according to Vattel, the credit of separating the law of nations from that part of natural jurisprudence which treats of the duties of individuals.

In the preface of his great work, he says: "Since such is the condition of mankind that the strict law of nature cannot always be applied to the government of a particular community, but it becomes necessary to resort to laws of positive institution more or less varying from the natural law, so in the great society of nations it becomes necessary to establish a law of positive institution more or less varying from the natural law of nations. As the common welfare of nations requires this mutation, they are not less bound to submit to the law which flows from it than they are bound to submit to the natural law itself, and the new law thus introduced, so far as it does not conflict with the natural law, ought to be considered as the common law of all nations. This law we have deemed proper to term, with Grotius, though in a somewhat stricter sense, the voluntary Law of Nations" (t).

Wolf afterwards says, that "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" (u).

(s) De Foro Legatorum, cap. xix.  
§ 6.

(t) Wolfius, Jus Gentium (1749),  
Pref. § 3.

(u) Wolfius, Proleg. § 25.



This presumed consent of nations to the voluntary law of nations he derives from the fiction of a great commonwealth of nations ('*civitas gentium maxima*') instituted by nature herself, and of which all the nations of the world are members. As each separate society of men is governed by its peculiar laws freely adopted by itself, so is the general society of nations governed by its appropriate laws freely adopted by the several members, on their entering the same. These laws he deduces from a modification of the natural law, so as to adapt it to the peculiar nature of that social union, which, according to him, makes it the duty of all nations to submit to the rules by which that union is governed, in the same manner as individuals are bound to submit to the laws of the particular community of which they are members. But he takes no pains to prove the existence of any such social union or universal republic of nations, or to show when and how all the human race became members of this union or citizens of this republic.

Wolf differs from Grotius, as to the origin of the voluntary law of nations, in two particulars:

1. Grotius considers it as a law of positive institution, and rests its obligation upon the general consent of nations, as evidenced in their practice. Wolf, on the other hand, considers it as a law which nature has imposed upon all mankind as a necessary consequence of their social union; and to which no one nation is at liberty to refuse its assent.

2. Grotius confounds the voluntary law of nations with the customary law of nations. Wolf maintains that it differs in this respect, that the voluntary law of nations is of universal obligation, whilst the customary law of nations merely prevails between particular nations, among whom it has been established from long usage and tacit consent.

It is from the work of Wolf that Vattel (*x*) has drawn the materials of his treatise on the law of nations. He, however, differs from that publicist in the manner of establishing the foundations of the voluntary law of nations. Wolf deduces the obligations of this law, as we have already seen, from the fiction of a great republic instituted by nature herself, and of which all the nations of the world are members. According to him the voluntary law of nations is, as it were, the civil law of that great republic. This idea does not satisfy Vattel. "I do not find," says he, "the fiction of such a republic either very just or sufficiently solid to

Differences of opinion between Grotius and Wolf on the origin of the voluntary Law of Nations.

System of Vattel.

(*x*) On Vattel, see an Article (by J. E. G. de Montmorency) in *Great Jurists of the World* (1913), pp. 477 *seq.*



deduce from it the rules of a universal law of nations, necessarily admitted among sovereign States. I do not recognise any other natural society between nations than that which nature has established between all men. It is the essence of all civil society ('civitatis'), that each member thereof should have given up a part of his rights to the body of the society, and that there should exist a supreme authority capable of commanding all the members, of giving to them laws, and of punishing those who refuse to obey. Nothing like this can be conceived or supposed to exist between nations. Each sovereign State pretends to be, and in fact is, independent of all others. Even according to Mr. Wolf, they must all be considered as so many free individuals, who live together in a state of nature and acknowledge no other law than that of nature itself, and its Divine Author" (y).

According to Vattel, the Law of Nations, in its origin, is nothing but 'the law of nature applied to nations.'

Having laid down this axiom, he qualifies it in the same manner, and almost in the identical terms of Wolf, by stating that the nature of the subject to which it is applied being different, the law which regulates the conduct of individuals must necessarily be modified in its application to the collective societies of men called nations or States. A State is a very different subject from a human individual, from whence it results that the obligations and rights, in the two cases, are very different. The same general rule, applied to two subjects, cannot produce the same decisions when the subjects themselves differ. There are, consequently, many cases in which the natural law does not furnish the same rule of decision between State and State as would be applicable between individual and individual. It is the art of accommodating this application to the different nature of the subjects in a just manner, according to right reason, which constitutes the law of nations a particular science.

This application of the natural law, to regulate the conduct of nations in their intercourse with each other, constitutes what both Wolf and Vattel term the 'necessary law of nations.' It is 'necessary,' because nations are absolutely bound to observe it. The precepts of the natural law are equally binding upon States as upon individuals, since States are composed of men, and since the natural law binds all men, in whatever relation they may stand to each other. This is the law which Grotius and his followers call the 'internal law of nations,' as it is obligatory

upon nations in point of conscience. Others term it the 'natural law of nations.' This law is immutable, as it consists in the application to States of the natural law, which is itself immutable, because founded on the nature of things, and especially on the nature of man.

This law being immutable, and the law which it imposes necessary and indispensable, nations can neither make any changes in it by their conventions, dispense with it in their own conduct, nor reciprocally release each other from the observance of it (*z*).

Vattel has himself anticipated one objection to his doctrine that States cannot change the necessary law of nations by their conventions with each other. This objection is, that it would be inconsistent with the liberty and independence of a nation to allow to others the right of determining whether its conduct was or was not conformable to the necessary law of nations. He obviates the objection by a distinction which pronounces treaties made in contravention of the necessary law of nations, to be invalid, according to the internal law, or that of conscience, at the same time that they may be valid by the external law; States being often obliged to acquiesce in such deviations from the former law in cases where they do not affect their perfect rights (*a*).

From this distinction of Vattel, flows what Wolf had denominated the voluntary law of nations, ('*jus gentium voluntarium*,') to which term his disciple assents, although he differs from Wolf as to the manner of establishing its obligation. He, however, agrees with Wolf in considering the voluntary law of nations as a positive law, derived from the presumed or tacit consent of nations to consider each other as perfectly free, independent, and equal, each being the judge of its own actions, and responsible to no superior but the Supreme Ruler of the universe.

Besides this voluntary law of nations, these writers enumerate two other species of international law. These are:—

1. The conventional law of nations, resulting from compacts between particular States. As a treaty binds only the contracting parties, it is evident that the conventional law of nations is not a universal, but a particular law.

2. The customary law of nations, resulting from usage between particular nations. This law is not universal, but binding upon those States only which have given their tacit consent to it.

Vattel concludes that these three species of international law,

(*z*) Droit des Gens, Préliminaires, §§ vi. vii. viii. ix.

(*a*) Droit des Gens, Préliminaires, § ix.

Voluntary,  
conventional,  
and customary  
law of  
nations.

the voluntary, the conventional, and the customary, compose together the positive law of nations. They proceed from the will of nations; or (in the words of Wolf) "the voluntary, from their presumed consent; the conventional, from their express consent; and the customary, from their tacit consent" (*b*).

It is almost superfluous to point out the confusion in this enumeration of the different species of international law, which might easily have been avoided by reserving the expression "voluntary law of nations," to designate the genus, including all the rules introduced by positive consent, for the regulation of international conduct, and divided into the two species of conventional law and customary law, the former being introduced by treaty, and the latter by usage; the former by express consent, and the latter by tacit consent between nations (*c*).

System of  
Heffter.

According to Heffter (*d*), one of the most distinguished public jurists of Germany in the nineteenth century, "the law of nations 'jus gentium,' in its most ancient and most extensive acceptation, as established by the Roman jurisprudence, is a law ('Recht') founded upon the general usage and tacit consent of nations. This law is applied, not merely to regulate the mutual relations of States, but also of individuals, so far as concerns their respective rights and duties, having everywhere the same character and the same effect, and the origin and peculiar form of which are not derived from the positive institutions of any particular State." According to this writer, the 'jus gentium' consists of two distinct branches:

1. Human rights in general, and those private relations which Sovereign States recognise in respect to individuals not subject to their authority.

2. The direct relations existing between those States themselves.

In the modern world, this latter branch has exclusively received the denomination of law of nations, 'Völkerrecht,' 'Droit des Gens,' 'Jus Gentium.' It may more properly be called external public law, to distinguish it from the internal public law of a particular State. The first part of the ancient 'jus gentium' has become confounded with the municipal law of each particular nation, without at the same time losing its original and essential character. This part of the science concerns, exclusively,

(*b*) Droit des Gens, Préliminaires,  
§ xxvii.; Wolf, Proleg. § xxv.

(*c*) Vattel, Droit des Gens, ed. de  
Pinheiro Ferreira, tom. iii. p. 22.

(*d*) Das Europäische Völkerrecht  
der Gegenwart (first published in  
1844).



certain rights of men in general, and those private relations which are considered as being under the protection of nations. It has been usually treated of under the denomination of 'private international law.'

This division of the subject into public and private international law is now very generally accepted. According to Sir Robert Phillimore, rights arising under the former class are called absolute, or rights *stricti juris*, "and their breach constitutes a *casus belli*, and justifies in the last resort a recourse to war," whereas private international law, or international comity, as it is sometimes called, confers no absolute rights. Its rules are founded upon convenience, and intended to facilitate the intercourse between the subjects of different States. "For a want of comity towards the individual subjects of a foreign State, reciprocity of treatment by the State whose subject has been injured, is, after remonstrance has been exhausted, the only legitimate remedy" (e).

Distinction  
between  
public and  
private inter-  
national law.

Heffter does not admit the term international law ('droit international') introduced half a century before he wrote and generally adopted by contemporary writers. According to him this term does not sufficiently express the idea of the 'jus gentium' of the Roman juriconsults. He considers the law of nations as a law common to all mankind, and which no people can refuse to acknowledge, and the protection of which may be claimed by all men and by all States. He places the foundation of this law on the incontestable principle that wherever there is a society, there must be a law obligatory on all its members; and he thence deduces the consequence that there must likewise be for the great society of nations an analogous law.

"Law in general ('Recht im Allgemeinen') is the external freedom of the moral person. This law may be sanctioned and guaranteed by a superior authority, or it may derive its force from self-protection. The 'jus gentium' is of the latter description. A nation associating itself with the general society of nations, thereby recognises a law common to all nations by which its international relations are to be regulated. It cannot violate this law, without exposing itself to the danger of incurring the enmity of other nations, and without exposing to hazard its own existence. The motive which induces each particular nation to observe this law depends upon its persuasion that other nations will observe towards it the same law. The 'jus gentium' is

(e) Phillimore, Int. Law, vol. i. § xvi.



founded upon reciprocity of will. It has neither law-giver nor supreme judge, since independent States acknowledge no superior human authority. Its organ and regulator is public opinion: its supreme tribunal is history, which forms at once the rampart of justice and the Nemesis by whom injustice is avenged. Its sanction, or the obligation of all men to respect it, results from the moral order of the universe, which will not suffer nations and individuals to be isolated from each other, but constantly tends to unite the whole family of mankind in one great harmonious society" (f).

There is no  
universal  
law of  
nations.

Is there a uniform law of nations? There certainly is not the same one for all the nations and States of the world. The public law, with certain exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin. This distinction between the European law of nations and that of the other races of mankind has long been remarked by the publicists. Grotius states that the 'jus gentium' acquires its obligatory force from the positive consent of all nations, or at least of several. "I say of several, for except the natural law, which is also called the 'jus gentium,' there is no other law which is common to all nations. It often happens, too, that what is the law of nations in one part of the world is not so in another, as we shall show in the proper place" (g). So also Bynkershoek, in the passage before cited, says that "the law of nations is that which is observed, in accordance with the light of reason, between nations, if not among all, at least certainly among the greater part, and those the most civilized" (h). Leibnitz speaks of the voluntary law as established by the tacit consent of nations. "Not," says he, "that it is necessarily the law of all nations and of all times, since the Europeans and the Indians frequently differ from each other concerning the ideas which they have formed of international law, and even among us it may be changed by the lapse of time, of which there are numerous examples. The basis of international law is natural law, which has been modified according to times and local circumstances" (i). Montesquieu, in his *Esprit des Loix*, says, that "every nation has a law of nations—even the Iroquois, who eat their prisoners, have

(f) Heffter, *Das Europäische Völkerrecht*, § 2.

The Jesuit theologian, Francisco Suarez, has anticipated this view of the moral obligation of the *jus gentium*. Suarez, *De Legibus et Deo Legislatore* (1612), lib. ii. cap. xix.

n. g.

(g) *De Jur. Bel. ac Pac.*, lib. i. cap. 1, § xiv. 4.

(h) Bynkershoek, *De Foro Legatorum*. *Uid. supra*.

(i) Leibnitz, *Cod. Jur. Gent. diplom. Préf.*

one. They send and receive ambassadors; they know the laws of war and peace; the evil is, that their law of nations is not founded upon true principles" (k).

There is then, according to these writers, no universal law of nations, such as Cicero describes in his treatise *De Republica*, binding upon the whole human race—which all mankind in all ages and countries, ancient and modern, savage and civilized, Christian and Pagan, have recognised in theory or in practice, have professed to obey, or have in fact obeyed (l).

A French writer has questioned the propriety of using the term 'droit des gens' (law of nations) as applicable to those rules of conduct which obtain between independent societies of men. He asserts "that there can be no 'droit' (right) where there is no 'loi' (law); and there is no law where there is no superior: without law, obligations, properly so called, cannot exist; there is only a moral obligation resulting from natural reason; such is the case between nation and nation. The word 'gens,' imitated from the Latin, does not signify in the French language either people or nation" (m).

The same writer has made it the subject of serious reproach to the English language that it applies the term 'law' to that system of rules which governs, or ought to govern, the conduct of nations in their mutual intercourse. His argument is, that law is a rule of conduct, deriving its obligation from sovereign authority, and binding only on those persons who are subject to that authority;—that nations, being independent of each other, acknowledge no common sovereign from whom they can receive the law;—that all the relative duties between nations result from right and wrong, from convention and usage, to neither of which can the term 'law' be properly applied;—that this system of rules had been called by the Roman lawyers the 'jus gentium,' and in all the languages of modern Europe, except the English language, the 'right of nations,' or the laws of war and peace (n).

Is international law true law?

The eminent legal reformer, Jeremy Bentham, had previously expressed the same doubt how far the rules of conduct which obtain between nations can with strict propriety be called 'laws' (o). And one of his disciples has justly observed, that

(k) *Esprit des Lois*, liv. i. ch. 3.

(l) *The Madonna Del Burso* (1802), 4 C. Rob. 172; *The Hurtige Hane* (1801), 3 C. Rob. 326.

(m) Rayneval, *Institutions du droit de la nature et des gens* (1811), liv. I. note 10, p. viii.

(n) *Droit des gens* (French).

*Diritto delle genti* (Italian). *Direito das Gentes* (Portuguese). *Völkerrecht* (German). *Volkenrecht* (Dutch). *Folkeret* (Danish). *Folkrätt* (Swedish). *Derecho des gentes* (Spanish).

(o) Bentham, *Morals and Legislation*, vol. ii. p. 255 (ed. 1823).

laws, properly so called, are commands proceeding from a determinate rational being, or a determinate body of rational beings, to which is annexed an eventual evil as the sanction. Such is the law of nature, more properly called the law of God, or the divine law; and such are political human laws, prescribed by political superiors to persons in a state of subjection to their authority. But laws imposed by general opinion are styled laws by an analogical extension of the term. Such are the laws of honour imposed by opinions current in the fashionable world, and enforced by appropriate sanction. Such, also, are the laws which regulate the conduct of independent political societies in their mutual relations, and which are called the law of nations, or international law. This law obtaining between nations is not positive law; for every positive law is prescribed by a given superior or sovereign to a person or persons in a state of subjection to its author. The rule concerning the conduct of sovereign States, considered as related to each other, is termed *law* by its analogy to positive law, being imposed upon nations or sovereigns, not by the positive command of a superior authority, but by opinions generally current among nations. The duties which it imposes are enforced 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 (*p*).

Though international law may not be regarded as *positive* law in the strict Austinian sense, it is none the less *law* in a wider sense, and possesses binding force. Here the distinction drawn by Richard Hooker may be recalled. "They who are thus accustomed to speak," he observes, "apply the name of law unto that only rule of working which superior authority imposeth; whereas we, somewhat more enlarging the sense thereof, term every kind of rule or canon, whereby actions are framed, a law" (*q*). It may be that some time in the future machinery may be devised—for example, an authoritative international tribunal, as well as international police—to safeguard and enforce the provisions of international law, which will then assume more or less a positive character, and will be supported by positive sanctions. As conditions are at present, however, it may nevertheless be said that the criterion of immediate enforceability by a determinate superior is not an indispensable factor to every class of binding rules. Moreover, international law is not to be identified with 'inter-

(*p*) Austin, Province of Jurisprudence determined, pp. 147, 207.

(*q*) Ecclesiastical Polity, Bk. I. chap. iii. 1.



national morality'; for whilst the former comprises rules that *must* be observed by States because they have consented to be bound by them, and because, if they do not observe them, the relationships between the members of the family of States will degenerate into chaos and confusion, international morality, on the other hand, implies such principles and rules as nations *ought* to observe in addition, so that the stricter legal relations may proceed not only smoothly, but amicably, honourably, and conscientiously. We may here recall the pronouncement of Lord Russell of Killowen, who, criticising Lord Coleridge's view (*r*) as being "based on too narrow a definition of law, a definition which relies too much on force as the governing idea," observed: "If the development of law is historically considered, it will be found to exclude that body of customary law which in early stages of society precedes law. As government becomes more frankly democratic, laws bear less and less the character of commands imposed by a coercive authority, and acquire more and more the character of customary law founded on consent. . . . I claim that the aggregate of the rules to which nations have agreed to conform in their conduct towards one another are properly to be designated 'International Law' (*s*).

This law governing the relationships between States has commonly been called the 'jus gentium' in the Latin, 'droit des gens' in the French, and law of nations in the English language. It was more accurately termed the 'jus inter gentes,' the law between or among nations, for the first time, by the Spanish Dominican theologian and jurist, Franciscus a Victoria (*t*); and afterwards the more appropriate character of this terminology was emphasised by Richard Zouch, an English civilian and writer on the science, distinguished in the celebrated controversy between the civil and common lawyers during the reign of Charles II., as to the extent of the Admiralty jurisdiction. He employed this term as being more pointed and more accurate to express the real scope and object of this law (*u*). An equivalent term in the French language was subsequently proposed by the Chancellor D'Aguesseau, as better adapted to express the idea properly annexed to that system of

(*r*) Expressed in *The Franconia (R. v. Keyn)* (1876), 2 Ex. D. 63.

(*s*) Address at Saratoga Springs, N. Y., 1896; *Law Quarterly Review*, Oct. 1896.

(*t*) (1480—1546). *Relectiones theologicæ* (Lyons, 1557). For an Article on him by C. Phillipson, see *Journal of Comparative Legislation*, July, 1915.

(*u*) Zouch, *Juris et judicii feccialis, sive Juris inter gentes*. (Oxford, 1650.) See the Article on Zouch by C. Phillipson in *Great Jurists of the World*, pp. 220 *seq.* At p. 224 this "terminological innovation" is referred to; but it was not meant to convey that Zouch was the first inventor of the phrase.

jurisprudence commonly called 'le droit des gens,' but which, according to him, ought properly to be termed 'le droit entre les gens' (*v*). The term 'international' law was afterwards (1789) proposed by Bentham as well adapted to express in our language, "in a more significant manner that branch of jurisprudence, which commonly goes under the name of 'law of nations,' a denomination so uncharacteristic, that were it not for the force of custom, it would rather seem to refer to internal or municipal jurisprudence" (*w*). The terms 'international law' and 'droit international' have now taken root in the English and French languages, and are constantly used in all discussions connected with the science. The expression 'law of nations' is still used by writers and publicists, not to indicate any distinction, but to refer to the identical body of law.

Opinion of  
Savigny.

According to Savigny, "there may exist between different nations the same community of ideas which contributes to form the positive unwritten law ('das positive Recht') of a particular nation. This community of ideas, founded upon a common origin and religious faith, constitutes international law as we see it existing among the Christian States of Europe, a law which was not unknown to the people of antiquity, and which we find among the Romans under the name of *jus feciale*. International law may therefore be considered as a positive law, but as an imperfect positive law, ('eine unvollendete Rechtsbildung,') both on account of the indeterminateness of its precepts, and because it lacks that solid basis on which rests the positive law of every particular nation, the political power of the State and a judicial authority competent to enforce the law. The progress of civilization, founded on Christianity, has gradually conducted us to observe a law analogous to this in our intercourse with all the nations of the globe, whatever may be their religious faith, and without reciprocity on their part" (*x*).

It may be remarked, in confirmation of this view, that the more recent intercourse between the Christian nations of Europe and America and the Mohammedan and Pagan nations of Asia and Africa indicates a disposition, on the part of the latter, to renounce their peculiar international usages and adopt those of Christendom. The rights of legation have been recognised by, and reciprocally extended to, non-Christian States. The inde-

(*v*) Œuvres de D'Aguesseau, tome ii. p. 337 (ed. 1773).

(*w*) Bentham, Principles of Morals and Legislation, vol. ii. p. 253.

(*x*) Savigny, System des heutigen römischen Rechts, Band I., Buch I., Kap. ii. § 11.

pendence and integrity of the Ottoman Empire have been long regarded as forming essential elements in the European balance of power, and, as such, became the objects of conventional stipulations between the Christian States of Europe and that Empire; thus by the Treaty of Paris, 1856, it was brought within the pale of the public law and system of Europe (*y*).

The same remark may be applied to the diplomatic transactions between the Chinese Empire and the Christian nations of Europe and America, in which the former has been compelled to abandon its inveterate anti-commercial and anti-social principles, to acknowledge the independence and equality of other nations in the mutual intercourse of war and peace, and to recognise the fundamental principles of international law.

¶The gradual process by which the Chinese Empire has been brought "to acknowledge the independence and equality of other nations" dates from the mission of Lord Macartney to Peking in 1792, occasioned by a long series of acts of oppression perpetrated by the Chinese on the merchants of the East India Company trading at Canton. A second mission under Lord Amherst in 1816 failed to reach the Emperor owing to the refusal of the British Ambassador to perform the kow-tow. In 1834 the British Government sent out a resident minister to Canton to superintend the foreign trade thrown open by the lapse of the East India Company's monopoly. The war of 1840, forced upon Great Britain by a persistent policy of outrage to her subjects, resulted in four treaty ports besides Canton being opened to commerce. But it was not until the ratification in 1860 of the Treaty of Tientsin of 1858, following upon the capture of Peking by the English and French troops, that regular diplomatic intercourse was established between China and the foreign Powers. By this instrument the Emperor of China agreed to the residence in his capital of a representative of the Queen of England with a proper establishment and freedom from the obligation to perform any ceremony derogatory to his position; provision was made for the establishment of a European consular service, and for the residence of a Chinese minister at the Court of St. James. A similar treaty was concluded with France, and in course of time with the United States, with the other European nations, and with Japan.

International  
status of non-  
Christian  
nations.

(*y*) Cf. Wheaton, *Hist. Law of Nations*, p. 533; Holland, *European Concert in the Eastern Question* (Oxford, 1885), p. 245.



Of the ability and capacity of China to form binding international engagements there can be no doubt, but how far she has even now entered within the pale of public law is another matter. She lacks certain attributes essential to regular and complete membership of the family of States, governed by, and enjoying the privileges of, the system of general international law. All jurisdiction civil and criminal over foreigners within the bounds of the Chinese Empire is carefully reserved to tribunals of their own nationality, and the refusal or inability of China to adopt the rules of war prescribed by the rules of civilized States for some time formed a grave if not an insuperable bar to her full recognition as a subject of international law. In the words of Professor Holland: "The Chinese have adopted only the rudimentary and inevitable conceptions of international law. They have shown themselves to be well versed in the ceremonial of embassy and the conduct of diplomacy. To a respect for the laws of war they have not yet attained." It is true that China was invited by the Czar to send representatives to the Hague Conference of 1899, and that she is a party to the Convention for securing the pacific regulation of international disputes and to some of the subsidiary conventions, including that for the application to maritime warfare of the principles of the Convention of Geneva. But the gross contempt for the comity of nations shown by the assault on the Peking Legations in the following year, and the murder of the German Minister and the Chancellor of the Japanese Legation, went far towards depriving her of what credit and status she had acquired. However, considering her rapid development of late, her increasing relationships with the West, her efforts to regularise her government, and to fall in line with the conceptions of international intercourse entertained by the civilized communities of the world, it may be said that, notwithstanding certain restrictions imposed upon her, she is now a member of the international circle. In 1907, too, China despatched representatives to the second Hague Conference.

Japan, prior to 1854, had succeeded in maintaining absolute political isolation as regards non-Asiatic powers. In that year Commodore Perry on behalf of the United States, and subsequently Admiral Stirling on behalf of Great Britain, concluded conventions for regulating the admission of ships bearing their respective flags into certain ports of the Empire of Japan. In 1858, a treaty of "peace, friendship and commerce" was concluded between Great Britain and Japan, and in the same year the consular jurisdiction over British subjects trading or residing in

the latter country was established. Similar treaties were concluded with the United States, with France and with Holland. Since the Revolution of 1868 the Powers owning the obligations of international law have, without exception, entered into diplomatic relations with Japan. In 1886 Japan notified her adherence to the Geneva Convention. In 1894, after prolonged negotiations, the European and American Governments agreed, largely on the initiative of Great Britain, to the abolition at the expiration of five years of the consular jurisdictions, and since 1899 all persons of whatever nationality within the confines of Japan have been subject to the Japanese tribunals; as a return for this all limitations imposed upon foreigners in respect to trade, travel and residence, have been removed. In the latter year Japan was invited to the Hague Conference, and her representatives signed the various conventions there adopted. In the Chinese war of 1894, with the grave exception of the Port Arthur massacre, Japan had striven scrupulously to comply with the highest civilized standards. Her soldiers were equally conspicuous for efficiency and humanity during the military operations which followed the Boxer rising in 1900. To her prompt despatch of a division of 21,000 splendidly equipped troops, the relief of the Legations may be largely attributed. In 1902 an offensive and defensive treaty of alliance was concluded between Great Britain and Japan (*z*).

In the Russo-Japanese war, 1904, Japan showed herself not only fully conversant with the rules of international law, but disposed throughout to apply them in a conscientious and enlightened manner (*a*). In 1907 she sent delegates to the second Hague Conference, and indeed was acknowledged as the eighth Great Power in the World Concert, inasmuch as she received the right of a summons for her chosen judge to participate in the judicial functions of the International Prize Court (*b*). Again, in 1909, she took part in the London Naval Conference. Thus, we may say that Japan now occupies a position in the community of States and in relation to international law equally with the leading Powers of the West.

(*z*) See Hall, *International Law* (5th ed.), pp. 41-2; Holland, *Studies in International Law*, p. 112; Hertslet, *Commercial Treaties*, ix. p. 977, x. pp. 468, 1075; Wharton, *Digest of International Law*, §§ 67, 68, 141a, 144, 158.

japonaise au point de vue de droit international (Paris, 1907); S. Takahashi, *International Law applied to the Russo-Japanese War* (London, 1908).

(*b*) E. A. Whittuck, *International Documents* (London, 1908).

(*a*) Cf. N. Ariga, *La guerre russo-*



Definition of international law.

International law, as understood among civilized nations, may be defined, from one point of view, as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations, subject to such definitions and modifications as may be established by general consent (c). In 1896 Lord Russell of Killowen (the Lord Chief Justice of England) gave this simple definition: the rules accepted by civilized States as determining their conduct towards each other; and as such it has been adopted judicially (d).

A distinction is sometimes drawn between the customary, unwritten, or 'common law' of nations, based on long-established usages and customs, and the written or conventional law, based on express international declarations, treaties, and conventions.

Sources and evidences of international law.

Writings of jurists.

The various sources and evidences of international law in these different branches are the following:—

1. Text writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent.

Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for the principles of reason, it may be affirmed that they are generally impartial in their judgment. They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles.

The authority of text-writers.

Jurists accustomed to the Common Law of England and America, where judicial decisions form a binding precedent, and are authoritative expositions of the law, are, as a rule, inclined towards resting international law on practice and precedent, and prefer to rely upon the decision of a court or the act of a government, rather than upon theory or the *dicta* of text-writers, however unanimous or eminent the writers may be. On the other hand, in France and other countries where the whole law is contained in a code, and where the decisions of the courts only settle the matter in dispute between the parties, and form no binding precedent, jurists place very great reliance on the theoretical speculations of text-writers, and frequently consider the rules they

(c) Madison, Examination of the British Doctrine which subjects to Capture a Neutral Trade not open in Time of Peace (London ed. 1806), p. 41.

(d) *West Rand Central Gold Mining Co. v. Rex*, (1905) 2 K. B. 407. Cf. *R. v. Keyn (The Franconia)* (1876), 2 Ex. D. at 154.



lay down as the highest authority. It is not too much to say, that the influence of speculative writers in England is comparatively small. In the days of Grotius, when his own works, and a few other treatises, were almost the only source from which anything on the subject could be derived, text-writers had the greatest reverence paid to their opinions. But now that precedents are to be found upon so many points, a text-writer who ignores them, and appeals to theory or to other text-writers instead of to facts, must not expect to receive any great attention in this country. "Writers on international law," says Lord Chief Justice Cockburn, "however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law.  $\langle$ To be binding, the law must have received the assent of the nations who are to be bound by it. This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage" (e).  $\rangle$

On the other hand, it has been pointed out that "the founders of international law, though they did not create a sanction, created a law-abiding sentiment. They diffused among sovereigns, and the literate classes in communities, a strong repugnance to the neglect or breach of certain rules regulating the relations and actions of States" (f). And it is very doubtful if the judgments of Sir Alexander Cockburn, and those who agreed with him in the *Franconia Case*, can be taken as correctly representing the law of England; for the opinion of the minority in that case has been since not only enacted, but declared by Parliament to have been always the law (g).  $\langle$ In America also, at any rate, international law is regarded as founded upon natural reason and justice, the opinions of writers of known wisdom, and the practice of civilized nations, and is to be respected as part of the law of the land (h).  $\rangle$  "In cases where the principal jurists agree, the presumption will be very great in favour of the solidity of their maxims; and no civilized nation that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law" (i). In *The Paquete Habana*, Mr. Justice Gray remarked that the works of jurists "are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law

(e) *R. v. Keyn (The Franconia)* (1876), 2 Ex. D. 202. Cf. *West Rand Central Gold Mining Co. v. Rex*, (1905) 2 K. B. 391, 401-2, 407, per Lord Alverstone, L. C. J.

273, 281, per Lord Coleridge, L. C. J.

(h) Wharton, Digest, § 8. See also Heffter, ed. 1883, note by Geffcken, § 2, p. 3.

(i) J. Kent, Commentary on International Law (1878), p. 19.

$\rightarrow$ (f) Maine, International Law, p. 51.

(g) *R. v. Dudley* (1834), 14 Q. B. D.

ought to be, but for trustworthy evidence of what the law really is" (*k*). With regard to private international law, the works of writers like Savigny in Germany, Story in the United States, and Westlake in England, have done much to establish a systematic branch of jurisprudence.

<sup>7</sup>Treaties. 2. Treaties of peace, alliance, and commerce declaring, modifying, or defining the pre-existing international law.

What has been called the positive or practical law of nations may also be inferred from treaties; for though one or two treaties, varying from the general usage and custom of nations, cannot alter the international law, yet an almost perpetual succession of treaties, establishing a particular rule, will go very far towards proving what that law is on a disputed point. Some of the most important modifications and improvements in the modern law of nations have thus originated in treaties (*l*).

"Treaties," says Madison, "may be considered under several relations to the law of nations, according to the several questions to be decided by them. 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; they may be considered explanatory of the law of nations on points where its meaning is otherwise obscure or unsettled, in which they are, first, a law between the parties themselves, and next, a sanction to the general law, according to the reasonableness of the explanation, and the number and character of the parties to it; lastly, treaties may be considered a voluntary or positive law of nations" (*m*).

Examples of treaties, which simply declare or emphasize the existence of certain rules, principles, or usages, are found in those of the Armed Neutralities of 1780 and 1800 (*n*) (though some of the rules contained therein were incompatible with what was considered by some to be established practice, followed by Great Britain). In the Treaty of Washington, 1871, the three rules laid down as a guide to the Court of Arbitration in considering the Alabama claims were maintained by the United States to be merely declaratory of previously existing law; the British Government, on the contrary, denied this contention, but in order that an amicable settlement might be reached, agreed to submit to

(*k*) *The Paquete Habana* (1899), 175 U. S. Rep. 677, 700. Cf. also *Hilton v. Guyot* (1894), 159 U. S. Rep. 113, 163-4, 214-5.

(*l*) Bynkershoek, *Quæst. Jur. Pub.* lib. i. cap. 10.

(*m*) Madison, *Examination of the British Doctrine, &c.*, p. 39.

(*n*) Cf. G. F. de Martens, *Recueil des principaux traités*, vol. i. pp. 193, 194; vol. ii. pp. 215-219.



the rules as though they had already been established. However, the contracting Powers engaged to accept the rules for the future as between themselves, and to bring them to the notice of other maritime Powers, with a view that they might also signify their adherence to them. But this was not done, owing to disagreements as to the interpretation of certain clauses, and to the discovery that some of the leading States were not disposed to accept the rules (o). Recent remarkable examples of treaties and conventions that express in a written form already existing customs and usages are furnished by several of the Conventions of the Hague Conferences, 1899 and 1907, and by the Declaration of London, 1909.

Examples of treaties laying down a voluntary or positive law of nations are those entered into at the International Congresses or Conferences, where new rules are established; thus, at the Hague Conferences and at the London Naval Conference, 1909, many new provisions were arrived at. Similar to these Conventions are the Declaration of Paris, 1856, Declaration of St. Petersburg, 1868, and the Geneva Conventions of 1864 and 1906.

Again, there is another class of treaties, less general in scope and applicable only to the two or three States that are the parties signatory thereto. Thus certain new rules may be laid down and as such are to be observed only in the relationships between the parties in question. An example is Franklin's Treaty of 1785 between the United States and Prussia, stipulating exemption from capture of private enemy property at sea.

3. Ordinances of particular States prescribing rules for the conduct of their commissioned cruisers and prize tribunals; also proclamations, decrees, and instructions issued to the various departments of government or to the people at large. Ordinances.

The marine ordinances of a State may be regarded not only as historical evidences of its practice with regard to the rights of maritime war, but also as showing the views of its jurists with respect to the rules generally recognized as conformable to the universal law of nations. The usage of nations, which constitutes the law of nations, has not yet established an impartial tribunal for determining the validity of maritime captures. Each belligerent State refers the jurisdiction over such cases to the courts of admiralty established under its own authority within its own territory, with a final resort to a supreme appellate tribunal, under the direct control of the executive government. The rule by

(o) Cf. J. B. Moore, *History and Digest of the International Arbitrations*, &c. (Washington, 1898), vol. i. pp. 666—670.



which the prize courts thus constituted are bound to proceed in adjudicating such cases, is not the municipal law of their own country, but the general law of nations, and the particular treaties by which their own country is bound to other States. They may be left to gather the general law of nations from its ordinary sources in the authority of institutional writers; or they may be furnished with a positive rule by their own sovereign, in the form of ordinances, framed according to what their compilers understood to be the just principles of international law.

The theory of these ordinances is well explained by Sir William Grant: "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. I say as understood in France, for although the law of nations ought to be the same in every country, yet as the tribunals which administer the law are wholly independent of each other, it is impossible that some differences shall not take place in the manner of interpreting and administering it in the different countries which acknowledge its authority. Whatever may have been since attempted, it was not, at the period now referred to, supposed that one State could make or alter the law of nations, but it was judged convenient to establish certain principles of decision, partly for the purpose of giving a uniform rule to their own courts, and partly for the purpose of apprising neutrals what that rule was." The French courts have well and properly understood the effect of the ordinances of Louis XIV. They have not taken them as positive rules binding upon neutrals; but they refer to them as establishing legitimate presumptions, from which they are warranted to draw the conclusion, which it is necessary for them to arrive at, before they are entitled to pronounce a sentence of condemnation (*p*).

The principles laid down in marine ordinances must not be assumed to have necessarily a universal application. "They furnish, however," says Sir R. Phillimore, "decisive evidence against any State which afterwards departs from the principles which it has thus deliberately invoked; and in every case thus clearly

Marine ordinances not necessarily universal.

(*p*) *Kindersley v. Chase* (1801), reported from the MS. in Marshall, *Insurance*, vol. i. 425. The commentary of Valin upon the marine ordinance of Louis XIV., published in 1760, contains a most valuable body of maritime law, from which the English writers and judges, especially Lord

Mansfield, have borrowed very freely, and which is often cited by Sir W. Scott (Lord Stowell) in his judgments in the High Court of Admiralty. Valin also published, in 1763, a separate *Traité des Prises*, which contains a complete collection of the French prize ordinances down to that period.

recognize the fact that a system of law exists, which ought to regulate and control the international relations of every State" (q). But since these ordinances are *ex parte* instruments, they ought not to be enforced if at variance with the established usage of nations, for no State has the right of laying down rules which shall bind other States that have not consented to them (r).

Courts of Admiralty are really municipal courts that pronounce judgments in conformity with the law of nations (s). It is the duty of the judge presiding in such courts "not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out, without distinction, to independent States, some happening to be neutral and some belligerent" (t). Where, however, the judge is confronted with orders, decrees, or regulations made by the sovereign authority of his State for the purpose of modifying the existing rules of international law, he is bound to obey them and give his decision accordingly. The records of the English and American Courts of Admiralty are peculiarly valuable, from their containing the judgments of such eminent men as Lord Stowell and Dr. Lushington, Kent, Story, and Chief Justice Marshall. The judgments pronounced by Sir Samuel Evans, the judge of the British Prize Court, in the great European War, 1914-1915, constitute worthy additions to these judicial records.

Courts of  
Admiralty.

Is international law necessarily part of the law of England? From the time of Blackstone (u), for about a century, it was consistently held in judicial decisions that the law of nations constituted part of the law of the land (x). In 1876 this view was to some extent weakened by a decision of the majority of the Court (seven judges out of thirteen) in *Reg. v. Keyn (The Franconia)*. But in 1905 the old doctrine was re-asserted by Lord Alverstone,

International  
law and  
municipal  
law.

(q) Phillimore, Commentaries upon International Law, vol. i. § 57.

(r) *Wolff v. Oxholm* (1817), 6 M. & S. 92; *The Nereide* (1815), 9 Cranch, 388; *The Zollverein* (1856), 2 Jur. N. S. 429; S. C., Swa. 96; *Cope v. Doherty* (1858), 4 K. & J. 390.

(s) Cf. *The Recovery* (1807), 6 C. Rob. 348.

(t) Per Lord Stowell, in *The Maria* (1799), 1 C. Rob. 350. Cf. Calvo, *Droit International*, vol. i. p. 111. But see *The Scotland* (1881), 105

U. S. 24; *The Gaetano and Maria* (1882), 7 P. D. 137, 143.

(u) Commentaries (4th ed. 1765), iv. 67.

(x) *Triquet v. Bath* (1764), 3 Burr. 1478; *Heathfield v. Chilton* (1767), 4 Burr. 2015; *The Maria* (1799), 1 C. Rob. 350; *The Recovery* (1807), 6 C. Rob. 348; *Wolff v. Oxholm* (1817), 6 M. & S. 92; *Emperor of Austria v. Day and Kossuth* (1861), 2 Giff. 623, 678.

who said: "It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to **decide** questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition has been recognized and acted upon by our own country, or that it is of such a nature and has been so widely and generally accepted that it can hardly be supposed that any civilized State would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognized, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be a part of international law by their frequent practical recognition in dealings between various nations" (*y*).

The same view has uniformly been held in the United States. Thus Chief Justice Marshall laid down that an Act of Congress should never be construed contrary to international law, if any other possible construction is available (*z*), and that international law is part of the law of the land (*a*). Similarly, half a century later it was declared that maritime law cannot be changed by any single nation, as it is of universal obligation and rests upon the common consent of civilized countries (*b*). In a later and much more important case, the Supreme Court of the United States observed in the course of its judgment: "International law is a part of our law, and must be ascertained and admitted by the courts of justice of appropriate jurisdiction. . . . For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the custom and usages of civilized nations. . . ." (*c*).

(*y*) *West Rand Central Gold Mining Co. v. Rex*, (1905) 2 K. B. 391. For an Article by the late Prof. Westlake on this question, in reference to the latter case, see *Law Quarterly Review*, vol. xxii. (1906), pp. 14—26; reprinted in his *Collected Papers* (1914), pp. 498 *seq.*

(*z*) *The Charming Betsey* (1804), 2

Cranch, 64, 118.

(*a*) *The Nereide* (1815), 9 Cranch, 383, 423.

(*b*) *The Scotia* (1871), 14 Wall. 170, 187.

(*c*) *The Paquete Habana* (1899), 175 U. S. Rep. 677; per Justice Gray, p. 700.



4. The adjudications of international or *quasi*-international tribunals, such as boards of arbitration, international commissions of inquiry, and courts of prize. Decisions of Courts.

Greater weight is justly attributable to the judgments of mixed tribunals, appointed by the joint consent of the two nations between whom they are to decide, than to those of Admiralty courts established by and dependent on the instructions of one nation only. Notable examples of such adjudications and decisions are seen in the settlement of the Alabama claims in 1872, the decision of Marshal MacMahon in the Delagoa Bay arbitration (1875) relating to the dispute between Great Britain and Portugal, the decisions of the West African Conference, 1884-5, in the investigation of the North Sea incident in 1906 by the North Sea International Commission of Inquiry, and in the various judgments pronounced by the Hague Court established in 1899. The twelfth Convention of the Hague Conference, 1907, provided for the creation of an International Prize Court, intended to serve as an appellate tribunal from the judgments delivered in national Prize Courts. If this project should ever be realised, the society of nations will, obviously, possess a court, which will become an important source of international law.

5. Another depository of international law is to be found in State papers and diplomatic correspondence representing the views of ministers and statesmen, as well as in the written opinions of official jurists that are given confidentially to their own Governments. Only a small portion of the controversies which arise between States become public. Before one State requires redress from another, for injuries sustained by itself, or its subjects, it generally acts as an individual would do in a similar situation. It consults its legal advisers—for example, the law officers of the Crown in Great Britain, the Attorneys-General in the United States—and is guided by their opinion as to the law of the case. Where that opinion has been adverse to the sovereign client, and has been acted on, and the State which submitted to be bound by it was more powerful than its opponent in the dispute, we may confidently assume that the law of nations, such as it was then supposed to be, has been correctly laid down. The archives of the department of foreign affairs of every country contain a collection of such documents, the publication of which would form a valuable addition to the existing materials of international law. An excellent instance of such publication is J. B. Moore's Digest Official legal opinions.

of International Law (*d*), which presents in a well-organized manner a rich harvest of documents contained in the archives of the American State Department.

The written opinions delivered by Sir Leoline Jenkins, Judge of the High Court 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 prize causes, were regarded as possessing great authority (*e*). They form a rich collection of precedents in the maritime law of nations, the value of which is enhanced by the circumstance that the greater part of these opinions were given when England was neutral, and was consequently interested in maintaining the right of neutral commerce and navigation. The decisions they contain are dictated by a spirit of impartiality and equity, which does the more honour to their author as they were addressed to a monarch who gave but little encouragement to those virtues, and as Jenkins himself was too much of a courtier to practise them, except in his judicial capacity (*f*). The opinions of American Attorneys-General are published. There has also been published a collection of some of the opinions of English law officers given at various times (*g*). Some of these relate to international law.

“Amongst the most interesting legal products of our day,” says Sir Henry Maine, “are the manuals of the usages of war which a great number of civilized States are now issuing to their officers in the field . . . perhaps the most singular feature of the manuals is the number of rules adopted in them, which have been literally borrowed from the *De Jure Belli et Pacis*” (*h*). The earliest of these manuals was issued for the use of its army by the United States Government towards the close of the war of Secession, and it has largely served as a model for its successors. A manual for the use of the British Army was said to have been drawn up by Lord Thring. In 1899 the signatories of the Hague Convention on the laws and customs of war undertook to make the provisions of that instrument part of the instructions furnished by them to their land forces. In the case of Great Britain these laws and customs have been, together with illustrations and inter-

(*d*) 8 vols. (Washington, 1906).

(*e*) Reprinted in Wynne's Life of that eminent civilian, 2 vols. fol. (London, 1724).

(*f*) Madison, Examination of the British Doctrine, &c., p. 113 (London

ed. 1806).

(*g*) W. Forsyth, Cases and Opinions on Constitutional Law (1869).

(*h*) International Law, pp. 27, 130, 168.

pretations, embodied in official manuals of land warfare (*i*). The German official manual, *Kriegsbrauch im Landkriege*, issued in 1902, has been in several quarters subjected to much criticism, because it puts a stern construction on many of the Hague rules, and incorporates doctrines that are inconsistent with the very spirit and intention of those rules.

6. The history of the wars, negotiations, treaties of peace, and other transactions relating to the public intercourse of nations, may conclude this enumeration of the sources of international law.

Records of international transactions.

(*i*) The one in force at present was drawn up by Col. Edmonds and Professor Oppenheim.



## CHAPTER II.

## NATIONS AND SOVEREIGN STATES.

Subjects of international law.

Definition of a State.

THE peculiar subjects of international law are Nations, and those political societies of men called States.

Cicero, and, after him, the modern public jurists, define a State to be a body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage by their combined strength (*a*).

This definition cannot be admitted as entirely accurate and complete, unless it be understood with the following limitations:—

1. It must be considered as excluding corporations, public or private, created by the State itself, under whose authority they exist, whatever may be the purposes for which the individuals composing such bodies politic may be associated.

Thus the great association of British merchants that had been incorporated, first, by the Crown, and afterwards by Parliament, for the purpose of carrying on trade with the East Indies, could not be considered as a State, even whilst it exercised the sovereign powers of war and peace in that quarter of the globe without the direct control of the Crown, and still less could it be so considered since it was subjected to that control. Those powers were exercised by the East India Company in subordination to the supreme power of the British Empire, the external sovereignty of which was represented by the company towards the native princes and people, whilst the British Government itself represented the company towards other foreign sovereigns and States (*b*).

(*a*) Cic., *De Rep.* i. 25. Cf. his *Philipp.* iv. 5, 6. Grotius, *De Jur. Bel. ac Pac.*, lib. i. cap. i. § xiv. 2. Vattel, *Prélim.* § 1, et liv. 1, ch. 1, § 1. Burlamaqui, *Droit naturel*, tom. ii. part 1, ch. 4. Heffter, *liv. 1*, § 16. *Texas v. White* (1868), 7 Wallace, 720.

(*b*) See *The Secretary of State for India v. Sahaba* (1859), 13 Moo. P. C. 22. The company's powers and authority were largely curtailed in 1834, and finally abolished in 1859. For the relation of the Empire of India to International Law, see Westlake,

Chapters on the Principles of International Law, chap. x.; in *Collected Papers* (1914), pp. 194 *seq.* Among existing bodies which hold a position in some measure analogous to that formerly held by the East India Company may be mentioned the North Borneo Company, incorporated by Royal Charter 1881; the British East Africa Company, 1888; the New Guinea Company of Berlin, 1885; and the German East Africa Company, 1888.

2. Nor can the denomination of a State be properly applied to voluntary associations of robbers or pirates, the outlaws of other societies, although they may be united together for the purpose of promoting their own mutual safety and advantage (c).

3. A State is also distinguishable from an unsettled horde of wandering savages not yet formed into a civil society. The legal idea of a State necessarily implies that of the habitual obedience of its members to those persons in whom the superiority is vested, and of a fixed abode, and definite territory belonging to the people by whom it is occupied. The number of inhabitants occupying such definite territory must, in order to enjoy sovereignty and international personality, be sufficiently large. What is the minimum number, or the maximum number, cannot, of course, be stated. Thus, these essential attributes are inherent in the British Empire with its population of over 400,000,000 and its area of 11,500,000 square miles, and also in as small a State as Monaco with a population of about 20,000 and an area of eight square miles. As to whether sovereignty is an indispensable requisite of a State there is a difference of opinion among jurists and publicists.

4. A State is also distinguishable from a Nation, since the former may be composed of different races of men, all subject to the same supreme authority. Thus the Austro-Hungarian, German, and Ottoman Empires, are each composed of a variety of nations and people. So, also, the same nation or people may be subject to several States, as is the case with the Poles, subject to the dominion of Austria, Germany, and Russia, respectively.

The Jews and the Gipsies are undoubtedly nations, but they cannot be said to form States. The idea of a nation implies community of race, which is generally shown by community of language, manners, and customs (d). A State, on the other hand, implies the union of a number of individuals in a fixed territory, and under one central authority. Austria-Hungary is a State, but as Prince Gortchakoff once sarcastically remarked, "it is a government, and not a nation."

Nations and States.

(c) \* \* \* "nec cœtus piratarum aut latronum civitas est, etiam si fortè æqualitatem quandam inter se servant, sine quâ nullus cœtus posset consistere." Grotius, De Jur. Bel. ac Pac., lib. iii. cap. iii. § ii. No. 1. Thus the Malay and Sooloo pirates of Borneo and the Eastern Archipelago were no

doubt united for their own mutual safety and advantage, but they did not form States. *The Serhassan Pirates*, 2 W. Rob. 354; *The Uleanon Pirates*, 6 Moo. P. C. 471. Nor did the Buccaneers of the seventeenth century.

(d) Calvo, Droit Int. vol. i. § 29.

Meaning of State in the American Constitution.

In the constitution of the United States, the term State most frequently expresses the combined idea of people, territory, and government. A State, in the ordinary sense of the constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such States, under a common constitution, which forms the distinct and greater political unit, designated by that constitution as the United States, and makes of the people and States composing it one people and one country (e).

Sovereign princes the objects of international law.

Sovereign princes may become the objects of international law, in respect to their personal rights, or rights of property, growing out of their personal relations with States foreign to those over whom they rule, or with the sovereigns or citizens of those foreign States. These relations give rise to that branch of the science which treats of the rights of sovereigns in this respect (f).

Individuals, or corporations, the objects of international law.

Private individuals, or public and private corporations, may in like manner, incidentally, become the objects of this law in regard to rights growing out of their international relations with foreign sovereigns and States, or their subjects and citizens. These relations give rise to that branch of the science which treats of what has been termed private international law, and especially of the conflict between the municipal laws of different States.

The terms sovereign and State used synonymously, or the former used metaphorically for the latter.

But the peculiar objects of international law are those direct relations which exist between nations and States; that is, the subjects of international law are, properly speaking, only States,—for they alone are vested with international personality. Wherever, indeed, the absolute or unlimited monarchical form of government prevails in any State, the person of the prince is necessarily identified with the State itself: ‘l’État c’est moi.’ Hence the public jurists frequently use the terms sovereign and State as synonymous. So also the term sovereign is sometimes used in a metaphorical sense merely to denote a State, whatever may be the form of its government, whether monarchical or republican, or mixed.

Sovereignty defined.

Sovereignty is the supreme power inherent in a State, by which that State is governed. According to the definition of Grotius,

(e) Per Chief Justice Chase, in *Texas v. White* (1868), 7 Wallace, 721.

(f) See *Duke of Brunswick v. King of Hanover* (1844), 2 H. of L. Cas. 1; *The Charkieh* (1873), L. R. 4 A. & E. 87; *The Parlement Belge* (1878),

5 P. D. 197; *Mighell v. Sultan of Johore*, L. R. (1894) 1 Q. B. 149; *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, L. R. (1898) 1 Ch. 190.



sovereignty is "the power whose acts are not subject to the control of another . . ." (*g*). The supreme power may be exercised either internally or externally.

Internal sovereignty is that which is inherent in the people of any State, or vested in its ruler, by its municipal constitution or fundamental laws. This is the object of what has been called internal public law, 'droit public interne,' but which may more properly be termed constitutional law. Internal  
sovereignty.

External sovereignty consists in the independence of one political society, in respect to all other political societies. It is by the exercise of this branch of sovereignty that the international relations of one political society are maintained, in peace and in war, with all other political societies. The law by which it is regulated has, therefore, been called external public law, 'droit public externe,' but may more properly be termed international law. External  
sovereignty.

The recognition of any State by other States, and its admission into the general society of nations, may depend, or may be made to depend, at the will of those other States, upon its internal constitution or form of government, or the choice it may make of its rulers. But whatever be its internal constitution, or form of government, or whoever may be its rulers, or even if it be distracted with anarchy, through a violent contest for the government between different parties among the people, the State still subsists in contemplation of law, until its sovereignty is completely extinguished by the final dissolution of the social tie, or by some other cause which puts an end to the being of the State.

Sovereignty is acquired by a State, either at the origin of the civil society of which it is composed, or when it separates itself from the community of which it previously formed a part, and on which it was dependent (*h*). Sovereignty,  
how acquired.

This principle applies as well to internal as to external sovereignty. But an important distinction is to be noticed, in this respect, between these two species of sovereignty. The internal sovereignty of a State does not, in any degree, depend upon its recognition by other States. A new State, springing into existence, does not require the recognition of other States to confirm its internal sovereignty. The existence of the State *de facto* is sufficient, in this respect, to establish its sovereignty *de jure*. It is a State because it exists.

Thus the internal sovereignty of the United States of America was complete from the time they declared themselves "free, sove-

(*g*) De Jure Belli ac Pacis, lib. i. (h) Klüber, Droit des Gens moderne  
c. 3, § 7. de l'Europe, § 23.

reign, and independent States," on the 4th of July, 1776. It was upon this principle that the Supreme Court determined, in 1808, that the several States composing the Union, so far 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 of 1782 contained a recognition of their independence, not a grant of it. From hence it resulted, that the laws of the several State governments were, from the date of the declaration of independence, the laws of sovereign States, and as such were obligatory upon the people of such State from the time they were enacted. It was added, however, that the Court did not mean to intimate the opinion, that even the law of any State of the Union, whose constitution of government had been recognised prior to the 4th of July, 1776, and which law had been enacted prior to that period, would not have been equally obligatory (*i*).

*De jure* and  
*de facto*  
governments.

"A *de jure* government is one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them. A *de facto* government is one which is really in possession of them, although the possession may be wrongful or precarious" (*k*).

There are several degrees of what is called *de facto* government. Such a government in its highest degree assumes a character very closely resembling that of a lawful government. This is when the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their place, and so becomes the actual government of a country. The distinguishing characteristic of such a government is, that adherents to it in war against the government *de jure* do not incur the penalties of treason; and, under certain limitations, obligations assumed by it on behalf of the country, or otherwise, will in general be respected by the government *de jure* when restored. The government of England under the Commonwealth is an example of such a *de facto* government.

There is another species of *de facto* government, and it is one which may be perhaps aptly called a government of paramount force. Its distinguishing characteristics are: (1) That its existence is maintained by active military power, within the territories, and against the rightful authority of an established and lawful

(*i*) *M'Ilvaine v. Coxe's Lessee* (1808), 4 Cranch, 212. Wharton, Digest, §§ 6, 150.

(*k*) Mountague Bernard, *Neutrality of Great Britain during American Civil War* (London, 1870), p. 103.

government; and (2) that while it exists, it must necessarily be obeyed in civil matters by private citizens who, by acts of obedience, rendered in submission to such force, do not become responsible, as wrong-doers, for those acts, though not warranted by the laws of the rightful government. The government of the Confederate States was one of this class. The rights and obligations of a belligerent were conceded to it in its military character, very soon after the war begun, from motives of humanity and expediency by the United States. The whole territory controlled by it was thereafter held to be enemy's territory, and the inhabitants of that territory were held in most respects for enemies. But it was never recognised as an independent Power (*l*).

The external Sovereignty of any State, on the other hand, may require recognition by other States in order to render it perfect and complete. So long, indeed, as the new State confines its action to its own citizens, and to the limits of its own territory, it may well dispense with such recognition. But if it desires to enter into that great society of nations, all the members of which recognise rights to which they are mutually entitled, and duties which they may be called upon reciprocally to fulfil, such recognition becomes essentially necessary to the complete participation of the new State in all the advantages of this society. Every other State is at liberty to grant, or refuse, this recognition, subject to the consequences of its own conduct in this respect: and until such recognition becomes universal on the part of the other States, the new State becomes entitled to the exercise of its external sovereignty as to those States only by whom that sovereignty has been recognised (*m*).

Recognition  
of sove-  
reignty.

The identity of a State consists in its having the same origin or commencement of existence; and its difference from all other States consists in its having a different origin or commencement of existence. A State, as to the individual members of which it is composed, is a fluctuating body; but in respect to the society, it is one and the same body, of which the existence is perpetually kept up by a constant succession of new members. This existence continues until it is interrupted by some change affecting the being of the State (*n*).

Identity of a  
State.

If this change be an internal revolution, merely altering the municipal constitution and form of government, the State remains

How affected  
by internal  
revolution.

(*l*) *Thorington v. Smith* (1868), 8 Wallace, 8—11.

(*m*) See *post*, p. 43.

(*n*) Grotius, *De Jur. Bel. ac Pac.*, lib. ii. cap. 9, § 3. Rutherford, *In-*

stitutes of Natural Law, b. ii. c. 10, §§ 12, 13. Heffter, *Das Europäische Völkerrecht*, § 24. *Texas v. White* (1868), 7 Wallace, 729.



the same; it neither loses any of its rights, nor is discharged from any of its obligations (*o*).

The habitual obedience of the members of any political society to a superior authority must have once existed in order to constitute a sovereign State. But the temporary suspension of that obedience and of that authority, in consequence of a civil war, does not necessarily extinguish the being of the State, although it may affect for a time its ordinary relations with other States.

Conduct of foreign States towards another nation involved in civil war.

Until the revolution is consummated, whilst the civil war involving a contest for the government continues, other States may remain indifferent spectators of the controversy, still continuing to treat the ancient government as sovereign, and the government *de facto* as a society entitled to the rights of war against its enemy; or may espouse the cause of the party which they believe to have justice on its side. In the first case, the foreign State fulfils all its obligations under the law of nations; and neither party has any right to complain, provided it maintains an impartial neutrality. In the latter, it becomes, of course, the enemy of the party against whom it declares itself, and the ally of the other; and as the positive law of nations makes no distinction, in this respect, between a just and an unjust war, the intervening State becomes entitled to all the rights of war against the opposite party (*p*).

Parties to civil war entitled to rights of war against each other.

If the foreign State professes neutrality, it is bound to allow impartially to both belligerent parties the free exercise of those rights which war gives to public enemies against each other; such as the right of blockade, and of capturing contraband and enemy's property (*q*). But the exercise of those rights, on the part of the revolting colony or province against the metropolitan country, may be modified by the obligation of treaties previously existing between that country and foreign States (*r*).

Identity of a State, how affected by external violence.

If, on the other hand, the change be effected by external violence, as by conquest confirmed by treaties of peace, its effects upon the being of the State are to be determined by the stipulations of those treaties. The conquered and ceded country may be a portion only, or the whole of the vanquished State. If the former, the original State still continues; if the latter, it ceases

(*o*) Grotius, lib. ii. cap. 9, § 8. Rutherford, b. ii. c. 10, § 14. Puffendorf, De Jur. Nat. et Gent., lib. viii. cap. 12, §§ 1—3.

(*p*) Vattel, Droit des Gens, liv. ii. ch. 4, § 56. Martens, Précis du Droit des Gens, liv. iii. ch. 2, §§ 79—82. Sir W. Harcourt, Letters of Historicus

(London, 1863), p. 29.

(*q*) *United States v. Palmer* (1818), 3 Wheaton, 610; *The Divina Pastora* (1819), 4 Wheaton, 63; *The Nuestra Señora de la Caridad*, 4 Wheaton, 502.

(*r*) See *post*, Part IV. ch. iv. p. 628, Rights of War as to Neutrals.

to exist. In either case, the conquered territory may be incorporated into the conquering State as a province, or it may be united to it as a co-ordinate State with equal sovereign rights.

Such a change in the being of a State may also be produced by the conjoint effect of internal revolution and foreign conquest, subsequently confirmed, or modified and adjusted by international compacts. Thus the House of Orange was expelled from the Seven United Provinces of the Netherlands, in 1797, in consequence of the French Revolution and the progress of the arms of France, and a democratic republic substituted in the place of the ancient Dutch constitution. At the same time the Belgic provinces, which had long been united to the Austrian monarchy as a co-ordinate State, were conquered by France, and annexed to the French republic by the treaties of Campo Formio and Lunéville. On the restoration of the Prince of Orange, in 1813, he assumed the title of Sovereign Prince, and afterwards King of the Netherlands; and by the treaties of Vienna, the former Seven United Provinces were united with the Austrian Low Countries into one State, under his sovereignty (s).

By the joint effect of internal and external violence confirmed by treaty.

Here is an example of two States incorporated into one, so as to form a new State, the independent existence of each of the former States entirely ceasing in respect to the other; whilst the rights and obligations of both still continue in respect to other foreign States, except so far as they may be affected by the compacts creating the new State.

In consequence of the revolution which took place in Belgium, in 1830, this country was again severed from Holland, and its independence as a separate kingdom acknowledged and guaranteed by the five great Powers of Europe,—Austria, France, Great Britain, Prussia, and Russia. Prince Leopold of Saxe-Coburg having been subsequently elected king of the Belgians by the national Congress, the terms and conditions of the separation were stipulated by the treaty concluded on the 15th of November, 1831, between those Powers and Belgium, which was declared by the conference of London to constitute the invariable basis of the separation, independence, neutrality, and state of territorial possession of Belgium, subject to such modifications as might be the result of direct negotiation between that kingdom and the Netherlands (t).

If the revolution in a State be effected by a province or colony shaking off its sovereignty, so long as the independence of the

Province or colony asserting its inde-

(s) Wheaton, Hist. Law of Nations, p. 492.

(t) Wheaton, Hist. Law of Nations, pp. 538—555.



pendence,  
how con-  
sidered by  
other foreign  
States.

new State is not acknowledged by other Powers, it may seem doubtful, in an international point of view, whether its sovereignty can be considered as complete, however it may be regarded by its own government and citizens. It has already been stated, that whilst the contest for the sovereignty continues, and the civil war rages, other nations may either remain passive, allowing to both contending parties all the rights which war gives to public enemies; or may acknowledge the independence of the new State, forming with it treaties of amity and commerce; or may join in alliance with one party against the other. In the first case, neither party has any right to complain so long as other nations maintain an impartial neutrality, and abide the event of the contest. The two last cases involve questions which seem to belong rather to the science of politics than of international law; but the practice of nations, if it does not furnish an invariable rule for the solution of these questions, will, at least, shed some light upon them. The memorable examples of the Swiss Cantons and of the Seven United Provinces of the Netherlands, which so long levied war, concluded peace, contracted alliances, and performed every other act of sovereignty, before their independence was finally acknowledged,—that of the first by the German empire, and that of the latter by Spain,—go far to show the general sense of mankind on this subject (*u*).

The acknowledgment of the independence of the United States of America by France, coupled with the assistance secretly rendered by the French court to the revolted colonies, was considered by Great Britain as an unjustifiable aggression, and, under the circumstances, it probably was so (*x*). But had the French court conducted itself with good faith, and maintained an impartial neutrality between the two belligerent parties, it may be doubted whether the treaty of commerce, or even the eventual alliance between France and the United States, could have furnished any just ground for a declaration of war against the former by the British Government. The more recent example of the acknowledgment of the independence of the Spanish American provinces by the United States, Great Britain, and other Powers, whilst the parent country still continued to withhold her assent, also concurs to illustrate the general understanding of nations, that where a revolted province or colony has declared and

(*u*) Motley, *Life and Death of John Barneveld* (1874), chap. i.

(*x*) Wheaton, *Hist. Law of Nations*, Pt. iii. § 12, pp. 220—294. Ch. de Martens, *Nouvelles Causes célèbres du*

*Droit des Gens*, tome i. pp. 370—498. It was the cause of war being declared by England. *Letters of Historicus*, p. 32.



shown its ability to maintain its independence, the recognition of its sovereignty by other foreign States is a question of policy, and prudence only.

This question must be determined by the sovereign legislative or executive power of these other States, and not by any subordinate authority, or by the private judgment of their individual subjects. Until the independence of the new State has been acknowledged, either by the foreign State where its sovereignty is drawn in question, or by the government of the country of which it was before a province, courts of justice and private individuals are bound to consider the ancient state of things as remaining unaltered (*y*).

Recognition of its independence by other foreign States.

On the outbreak of a rebellion or insurrection in any country, it is *primâ facie* the duty of foreign States to take no part in the matter, and to allow events to follow their own course. But the facts of the case frequently render it necessary for other nations to take cognizance of the existence of the insurrection. When countries are intimately connected with each other, through situation or commerce, a revolt of any magnitude in one materially affects the rights and interest of the others, and entails upon them the necessity of pursuing some definite course of conduct towards the disturbed State. This may be done either by recognising the insurgents as belligerents, or by acknowledging them to be independent. There is, however, a very material distinction between the state of facts which will call for the former, and that which will justify the latter mode of recognition.

Recognition of belligerency and independence.

When a rebellion has assumed such proportions that it may, without abuse of language, be called a war, and when it is carried on by some species of organized government or authority, in full possession of the territory where it claims to exercise authority, neutral States may then recognise such revolted government as a belligerent. This is simply the assertion of a fact, and ought in no case to give offence to the parent State. It is no violation of neutrality. It informs the subjects of the neutral officially that war exists, and that they must observe towards the combatants the duties that international law imposes. "The question," said Lord Russell, "for neutral nations to consider is, what is the character of the war, and whether it should be regarded as a war

Belligerency.

(*y*) *City of Berne v. Bank of England* (1804), 9 Vesey, 347; *The Manila*, Edwards, Ad. Rep. 1, App. iv. Note D; *Hoyt v. Gelston* (1818), 3 Wheaton, 324; *U. S. v. Palmer* (1818), 3 Wheaton, 634. *The Nueva Anna*, 6

*Wheaton*, 193; *Thompson v. Powles* (1828), 2 Simons, 194; *U. S. v. Wagner*, L. R. (1867) 2 Ch. 582; *Republic of Peru v. Peruvian Guano Co.* (1886), 36 Ch. D. 489, 497; *Republic of Peru v. Dreyfus* (1888), 38 Ch. D. 348, 359.

carried on between parties severally in a position to wage war, and to claim the rights and to perform the obligations attaching to belligerents?" (z). By a recognition of belligerency the neutral accepts and recognises within its jurisdiction the flag of the revolted government, the commissions it issues, and the decisions of prize courts sitting within its territory, not as being emanations and symbols of sovereignty, but as proceeding from an organized body of persons who, so far as waging war goes, are able to act as a sovereign State (a). When the struggle is carried on by sea as well as by land, the interests of neutral commerce render a recognition of belligerency absolutely necessary. Without it the struggle is not, in the eye of international law, a war, and if not a war, there is no obligation on the part of neutrals to respect any blockade, or to allow their merchant-vessels to be stopped and searched on the high seas by the cruisers of either party. Inevitable collisions would ensue, which would not improbably drag neutral nations into the conflict. Moreover, the higher considerations of humanity require a *de facto* war to be acknowledged as such. If the conflict continues entirely unrecognised as a war, every insurgent is liable to be executed as a rebel or traitor on land, and as a pirate on the sea. A recognition of belligerency is not simply a benefit conferred upon insurgents; it gives the parent State belligerent rights, which it would not otherwise possess, and relieves it from all responsibility for acts done in the revolted territory, or by the insurgent authorities (b).

The United States have loudly and continually asserted that the recognition of the belligerency of the Confederates by Great Britain was an unfriendly act; but the right to accord it is not, and cannot be, denied. "A nation," said the President, in his annual message to Congress in 1869, "is its own judge when to accord the rights of belligerency, either to a people struggling to free themselves from a government they believe to be oppressive, or to independent nations at war with each other" (c). The course pursued by the British Government is not only justified by having been followed by all the chief maritime States, but was, under the circumstances, the only proper course. Hostilities commenced

(z) Lord Russell to Lord Lyons, 6th May, 1861. Parl. Papers, N. America, 1873 (No. 2), p. 79.

(a) Mountague Bernard, *Neutrality of Great Britain during American Civil War*, p. 115. See also Bluntschli in *Revue de Droit International*, 1870, pp. 455, 456.

(b) Wheaton, ed. by R. H. Dana

(Boston, 1866), n. 15. Parl. Papers, N. America, 1873 (No. 2), p. 75. Parl. Papers, N. America, 1876 (No. 3), p. 19. Whiting, *War Powers under the U. S. Constitution* (43rd ed.), p. 333.

(c) Annual Message to Congress, 1869. See Parl. Papers, N. America, 1872 (No. 2), p. 17.



in April, 1861; on the 13th of April Fort Sumter had fallen, and on the 19th President Lincoln declared the ports of the seven provinces to be blockaded. No official copy of the proclamation of the blockade was received in England till the 10th of May, and Her Majesty's Proclamation of Neutrality, recognising the Confederates as belligerents, was not issued until the 14th of that month (*d*). When the intimate relation between the two countries is considered, it seems hardly possible to deny the propriety of this recognition. The rebellion "sprang forth suddenly from the parent brain, a Minerva in the full panoply of war," and the Supreme Court of the United States decided it was a war from the commencement of hostilities (*e*). The very fact of declaring a blockade was a virtual admission of the existence of a war; and after this, what objection could there be to foreign nations recognising it? (*f*).

A very different state of facts must exist before neutrals are justified in recognising an insurgent province as independent. "When a sovereign State, from exhaustion, or any other cause, has virtually and substantially abandoned the struggle for supremacy, it has no right to complain if a foreign State treat the independence of its former subjects as *de facto* established. When, on the other hand, the contest is not absolutely or permanently decided, a recognition of the inchoate independence of the insurgents by a foreign State, is a hostile act towards the sovereign State, which the latter is entitled to resent as a breach of neutrality and friendship" (*g*). It is to the facts of the case that foreign nations must look. The question with them ought to be, is there a *bonâ fide* contest going on? If it has virtually ceased, the recognition of the insurgents is then at their discretion. It was upon this principle that England and the other Powers acted, in recognising the independence of the South American Republics (*h*).

Recognition  
of independ-  
ence.

The action of some of the European Powers towards Greece in 1827, and Belgium in 1830, was not a simple recognition of inde-

Independence  
of Greece,  
Belgium, etc.

(*d*) See Sir A. Cockburn's Reasons for Dissenting from Geneva Award, Parl. Papers, 1873 (No. 2), pp. 73, 81. Report of Neutrality Laws Commission, 1869, p. 74. It is dated 13th May.

(*e*) *The Prize Causes* (1862), 2 Black. 669.

(*f*) As to recognition of belligerency, see further, Wharton, *Digest*, § 69; Moore, *Digest*, vol. i. §§ 59—71; Calvo, *Droit Int.*, vol. i. §§ 84—86;

A. Rougier, *Les guerres civiles et le droit des gens* (Paris, 1903).

(*g*) *Letters of Historicus* (Sir W. Harcourt), p. 9. See Phillimore, vol. ii. § xiii. Despatch of Canning, State Papers, vol. xii. pp. 913—4. *Speeches of Lord Lansdowne and Lord Liverpool*, Hansard, vol. x. p. 970.

(*h*) Cf. Moore, *Digest*, vol. i. §§ 28—37; F. L. Paxson, *The Independence of the South American Republics* (Philadelphia, 1903).



pendence, and does not come within the preceding rule. In both cases the Powers intervened to settle the disputes, and without this assistance the insurgents would not have succeeded. In the case of Greece, the intervention was based on the ground of humanity, and for the suppression of piracy and anarchy. In that of Belgium, the Powers, by their own act at the treaty of Vienna, had united that country to Holland; but finding the union incompatible, they intervened to dissolve it. Later cases of intervention exercised in the form of recognition of independence are those of Cuba in 1898, and Panama in 1903. In the former, the United States declared the people free and independent, without recognising the insurgent government (*i*). In the latter, the independence was formally recognised by the American Government a few days (November 13th, 1903) after the Panama revolutionists had asserted it (*k*).

Texas and  
Hungary.

The recognition of the independence of Texas by the United States, although it preceded that of other nations, did not take place until 1837, and all substantial struggle with Mexico was over early in 1836 (*l*). But in the case of the Hungarian revolt of 1849, the conduct of the United States, in investing an agent in Europe with power to declare the willingness of his government promptly to recognise the independence of Hungary in the event of her ability to maintain it, was unjustifiable towards Austria. The sympathy which the American people undoubtedly felt for the Hungarians should not have been thus expressed officially, more especially as the geographical situation of both countries prevented the United States being in any way concerned in the matter (*m*). Dana says that, "as a point of international law, the transaction has little significance"; and he adds that "the episode belongs rather to history, as indicating the policy and feeling of the United States" (*n*). This might be so if the American Union were an insignificant State; but it can scarcely be denied that if insurgents learn that the government of such a great Power as the United States gives them its full sympathy, and is prepared to recognise their independence at the earliest possible moment, this may give the rebellion a very different

(*i*) Cf. E. J. Benton, *International Law and Diplomacy of the Spanish-American War* (Baltimore, 1908), chap. iv.; Moore, *Digest*, vol. vi. §§ 40, 1909—1910.

(*k*) Cf. Moore, *Digest*, vol. iii. § 344.

(*l*) *Kennet v. Chambers* (1852), 14 Howard, 38. *Annuaire des deux*

*Mondes*, 1837, p. 745. Webster, *Works*, vol. vi. p. 414. Cf. Moore, *ibid.*; Paxson, *ibid.*

(*m*) *Letters of Historicus*, p. 5. President Taylor's Annual Message to Congress, 1849.

(*n*) Wheaton, ed. by Dana, n. 18, p. 47.

complexion, and is almost sure to strengthen the hands of the rebels, and make it more difficult for the parent State to maintain its sovereignty (*o*).

Recognition on the part of one or two States does not necessarily imply recognition of independence by other States; but in practice this has not infrequently happened, especially when it was some leading Power that had first accorded such recognition. Sometimes recognition is signified by a solemn treaty, declaration, or other act of the great Powers; for example, Roumania, Serbia, and Montenegro were recognised as independent States by the Treaty of Berlin, 1878. In 1881 Roumania was recognised as a monarchy; similarly Serbia in 1882. At the West African Conference, 1884-5, the Congo Free State was recognised as an independent State; but in September, 1908, it was annexed to Belgium.

The international effects produced by a change in the person of the sovereign, or in the form of government of any State may be considered:—

International effects of a change in the person of the sovereign, or in the internal constitution of the State.

I. As to its treaties of alliance and commerce.

II. Its public debts.

III. Its public domain, and private rights of property.

IV. As to wrongs or injuries done to the government or citizens of another State.

I. Treaties are divided by text writers into *personal* and *real*. The former relate exclusively to the persons of the contracting parties, such as family alliances and treaties guaranteeing the throne to a particular sovereign and his family. They expire, of course, on the death of the king or the extinction of his family. The latter relate solely to the subject-matters of the convention, independently of the persons of the contracting parties. They continue to bind the State, whatever intervening changes may take place in its internal constitution, or in the persons of its rulers. The State continues the same, notwithstanding such change, and consequently the treaty relating to national objects remains in force so long as the nation exists as an independent State. The only exception to this general rule, as to *real* treaties, is where the convention relates to the form of government itself, and is intended to prevent any such change in the internal constitution of the State (*p*).

Treaties.

(*o*) As to recognition of sovereignty, see further Wharton, Digest, §§ 70, 71; Moore, Digest, vol. i. §§ 30 *seq.*;

Letters of Historicus, No. iii.

(*p*) Vattel, Droit des Gens, liv. ii. ch. 12, §§ 183—197.

The correctness of this distinction between personal and real treaties, laid down by Vattel, has been questioned by more modern public jurists as not being logically deduced from acknowledged principles. Still it must be admitted that certain changes in the internal constitution of one of the contracting States, or in the person of its sovereign, may have the effect of annulling pre-existing treaties between their respective governments. The obligation of treaties, by whatever denomination they may be called, is founded, not merely upon the contract itself, but upon those mutual relations between the two States, which may have induced them to enter into certain engagements. Whether the treaty be termed real or personal, it will continue so long as these relations exist. The moment they cease to exist, by means of a change in the social organisation of one of the contracting parties, of such a nature and of such importance as would have prevented the other party from entering into the contract had he foreseen this change, the treaty ceases to be obligatory upon him.

Binding effect  
of treaties.

On the separation of Belgium and Holland, the United States deemed herself justified in withdrawing from an agreement to accept the King of the Netherlands as umpire on the north-east boundary question. When Texas joined the United States, France and England intimated that she did not thereby cease to be bound by her treaties with them (*q*); and a like intimation was given by Great Britain to France respecting Tunis, on the French occupation of that country (*r*).

The United States regarded her treaties with Algiers as terminated by the French conquest of 1831, her treaties with Hanover as terminated in consequence of incorporation with Prussia in 1866, those with Nassau as terminated for the same reason in 1846, and her treaties with the Two Sicilies as terminated by absorption of that kingdom into Italy (*s*).

Public debts.

II. As to public debts—whether due to or from the revolutionised State—a mere change in the form of government or in the person of the ruler, does not affect their obligation. The essential form of the State, that which constitutes it an independent community, remains the same; its accidental form only is changed. The debts being contracted in the name of the State, by its authorised agents, for its public use, the nation continues liable for them, notwithstanding the change in its internal constitution (*t*). The

(*q*) Wheaton, ed. by Dana, n. 17, p. 48; Lord Aberdeen to Mr. Eliot, 3rd Dec. 1845.

7 (1881); see p. 65, *infra*.

(*s*) Wharton, Digest, pp. 63, 64.

(*t*) Grotius, De Jur. Bel. ac Pac., lib. ii. cap. 9, § viii. 1—3. Pufen-

(*r*) Parl. Papers, Tunis, Nos. 3 and



new government succeeds to the fiscal rights, and is bound to fulfil the fiscal obligations of the former government.

It becomes entitled to the public domain and other property of the State, and is bound to pay its debts previously contracted (*u*).

Most treaties relating to the transfer of territory contain a clause providing for the payment of the debts of the territory ceded. Thus, when Holland and Belgium were united in 1814, it was provided that the new Kingdom of the Netherlands should be responsible for the debts of both countries (*x*). When Schleswig, Holstein, and Lauenburg were ceded by Denmark, in 1864, to Austria and Prussia, it was agreed between the parties that the debts of the Danish monarchy should be divided between Denmark and the ceded provinces, in proportion to the population of the two parts (*y*). On the acquisition by Italy of the Papal States, in 1864, and of Venice in 1866, she, in each case, took upon herself the debts of those provinces (*z*). In some cases territory has been transferred free from the general debt of the State it belonged to. This was the case when Saxe-Coburg ceded Lichtenburg to Prussia in 1834, and when Austria, Sardinia, and some of the other Italian States, rectified their boundaries in 1844 (*a*). On the cession of Alsace and Lorraine by France, in 1871, Germany refused to take upon herself any share of the French national debt (*b*). By the treaty of Berlin, 1878, the portions of Turkish territory given to Serbia and Montenegro were charged with a share of the Turkish debt. The portions given to Russia were not so charged, being taken as part payment of a war indemnity demanded by Russia from Turkey (*c*). After the war of 1898 the United States declined to assume any part of the Cuban debt, acting on the principle that, as incorporation of Cuba within the Union was not intended, they merely occupied the temporary position of a liquidator. Similarly, in 1905, after the Russo-Japanese war, Japan refused to saddle herself with any portion of the Russian debt

Payment of debts of territory ceded by treaty.

dorf, *De Jur. Nat. et Gent.*, lib. viii. cap. 12, §§ 1, 2, 3. But see M. Huber, *Die Staatensuccession* (Leipzig, 1898); and the Report of the commission appointed by the British Government to enquire into the various concessions granted by the Transvaal Government: *Parl. Papers, South Africa, 1901, Cd. 623, pp. 6—8*. The report of the Transvaal Concessions Commission declared that "a State which has annexed another is not legally bound by any contracts made by the State which has ceased to exist." But this declaration was modified by such important qualifications, that the principle 'res transit cum suo onere' was, substan-

tially, affirmed—namely, that the successor State is to take over along with the property of the extinct State its debts and obligations.

(*u*) Heffter, *Das Europäische Völkerrecht*, § 24. "Bona non intelliguntur nisi deducto aere alieno."

(*x*) Art. VI. of the Treaty. See Hertslet, *Map of Europe*, vol. i. p. 38.

(*y*) *Annual Reg.* 1864, p. 236.

(*z*) Hertslet, *Map of Europe*, pp. 1628, 1721.

(*a*) Hertslet, *Map of Europe*, vol. ii. pp. 948, 1052.

(*b*) Calvo, vol. iii. p. 244.

(*c*) *Parl. Papers, Turkey* (No. 44), 1878, and *Turkey* (No. 22), 1878.

in respect of the southern part of Sakhalien, which was ceded by Russia with "all public works and properties thereon" (*d*).

Public domain  
and private  
rights of  
property.

III. As to the public domain and private rights of property. If the revolution be successful, and the internal change in the constitution of the State is finally confirmed by the event of the contest, the public domain passes to the new government; but this mutation is not necessarily attended with any alteration whatever in private rights of property.

It may, however, be attended by such a change: it is competent for the national authority to work a transmutation, total or partial, of the property belonging to the vanquished party; and if actually confiscated, the fact must be taken for right. But to work such a transfer of proprietary rights, some positive and unequivocal act of confiscation is essential.

If, on the other hand, the revolution in the government of the State is followed by a restoration of the ancient order of things, both public and private property, not actually confiscated, revert to the original proprietor on the restoration of the legitimate government, as in the case of conquest they revert to the former owners, on the evacuation of the territory occupied by the public enemy. The national domain, not actually alienated by any intermediate act of the State, returns to the sovereign along with the sovereignty. Private property, temporarily sequestered, returns to the former owner, as in the case of such property recaptured from an enemy in war on the principle of the *jus postliminii*.

But if the national domain has been alienated, or the private property confiscated by some intervening act of the State, the question as to the validity of such transfer becomes more difficult of solution.

Even the lawful sovereign of a country may, or may not, by the particular municipal constitution of the State, have the power of alienating the public domain. The general presumption, in mere internal transactions with his own subjects, is that he is not so authorized (*e*). But in the case of international transactions, where foreigners and foreign governments are concerned, the authority is presumed to exist, and may be inferred from the general treaty-making power, unless there be some express limitation in the fundamental laws of the State. So, also, where foreign governments and their subjects treat with the actual head.

(*d*) Cf. S. Takahashi, *International Law applied to the Russo-Japanese War* (London, 1908), p. 775.

(*e*) Pufendorf, *De Jur. Nat. et Gent.*, lib. viii. cap. 12, §§ 1—3. Vattel, *Droit des Gens*, liv. i. chap. 21, §§ 260, 261.



of the State, or the government *de facto*, recognised by the acquiescence of the nation, for the acquisition of any portion of the public domain or of private confiscated property, the acts of such government must, on principle, be considered valid by the lawful sovereign on his restoration, although they were the acts of him who is considered by the restored sovereign as a usurper (*f*). On the other hand, it seems that such alienations of public or private property to the subjects of the State may be annulled or confirmed, as to their internal effects, at the will of the restored legitimate sovereign, guided by such motives of policy as may influence his counsels, reserving the legal rights of *bonæ fidei* purchasers under such alienation to be indemnified for ameliorations (*g*).

Where the price or equivalent of the property sold or exchanged has accrued to the actual use and profit of the State, the transfer may be confirmed, and the original proprietors indemnified out of the public treasury, as was done in respect to the lands of the emigrant French nobility, confiscated and sold during the revolution. So, also, the sales of the national domains situate in the German and Belgian provinces, united to France during the revolution, and again detached from the French territory by the treaties of Paris and Vienna in 1814 and 1815, or in the countries composing the Rhenish confederation in the kingdom of Italy, and the Papal States, were, in general, confirmed by these treaties, by the Germanic Diet, or by the acts of the respective restored sovereigns. But a long and intricate litigation ensued before the Germanic Diet, in respect to the alienation of the domains in the countries composing the kingdom of Westphalia. The Elector of Hesse Cassel and the Duke of Brunswick refused to confirm these alienations in respect to their territory, whilst Prussia, which had acknowledged the King of Westphalia, also acknowledged the validity of his acts in the countries annexed to the Prussian dominions by the treaties of Vienna (*h*).

“I apprehend it,” said Vice-Chancellor James, “to be clear public universal law, that any government which *de facto* succeeds to any other government, whether by revolution or restoration, conquest or reconquest, succeeds to all the public property, to everything in the nature of public property, and to all rights in respect of the public property of the displaced power, whatever

Opinion of  
James, V.-C.

(*f*) Grotius, De Jur. Bel. ac Pac., lib. ii. cap. 14, § 16.

(*g*) J. L. Klüber, Droit des Gens, sec. ii. ch. 1, § 258.

(*h*) Conversations Lexikon, Art. ‘Domainen-verkauf;’ Heffter, Das

Europäische Völkerrecht, § 188; Klüber, Öffentliches Recht des deutschen Bundes, § 169; Rotteck und Welcker, Staats-Lexikon, Art. ‘Domainen-kauffer.’



may be the nature or origin of the title of such displaced power. This right of succession is a right not paramount, but derived through the suppressed authority, and can only be enforced in the same way, and to the same extent, and subject to the same correlative obligations and rights, as if that authority had not been suppressed, and was itself seeking to enforce it" (i).

Wrongs and injuries.

IV. As to wrongs or injuries done to the government or citizens of another State;—it seems, that, on strict principle, the nation continues responsible to other States for the damages incurred for such wrongs or injuries, notwithstanding an intermediate change in the form of its government, or in the persons of its rulers. This principle was applied in all its rigour by the victorious allied Powers in their treaties of peace with France in 1814 and 1815. More recent examples of its practical application have occurred in the negotiations between the United States and France, Holland, and Naples, relating to the spoliations committed on American commerce under the government of Napoleon and the vassal States connected with the French Empire. The responsibility of the restored government of France for those acts of the preceding ruler was hardly denied by it, even during the reigns of the Bourbon kings of the elder branch, Louis XVIII. and Charles X.; and was expressly admitted by the government of Louis Philippe in the treaty of indemnities concluded with the United States in 1831.. The application of the same principle to the measures of confiscation adopted by Murat in the kingdom of Naples was contested by the restored government of that country; but the discussions which ensued were at last terminated, in the same manner, by a treaty of indemnities concluded between the American and Neapolitan governments.

Sovereign States defined.

A Sovereign State is generally defined to be any nation or people, whatever may be the form of its internal constitution, which governs itself independently of foreign Powers (k).

This definition, unless taken with great qualifications, cannot be admitted as entirely accurate. Some States are completely sovereign and independent, acknowledging no superior but the

(i) *U. S. v. McRae* (1869), L. R. 8 Eq. 75. Cf. *Terrett v. Taylor*, 9 Cranch, 50; *Kelly v. Harrison*, 2 Johnson's Cases, 29; *Calvin's Case* (1608), 7 Coke Rep. 27; *Strother v. Lucas* (1838), 12 Peters, 410; *King of the Two Sicilies v. Wilcox* (1851), 1 Simons, N. S. 302; *Republic of Peru v. Peruvian Guano Co.* (1886),

36 Ch. D. 489; *Republic of Peru v. Dreyfus* (1888), 38 Ch. D. 348; Wharton, Digest, §§ 5, 5a; Huber, *Die Staatensuccession* (1898); G. Gidel, *Des effets de l'annexion sur les concessions* (Paris, 1904); Moore, Digest, vol. i. §§ 92—99.

(k) Vattel, *Droit des Gens*, liv. i. chap. 1, § 4.

Supreme Ruler and Governor of the universe. The sovereignty of other States is limited and qualified in various degrees. "By a Sovereign State, we mean," says Bernard (*l*), "a community or number of persons permanently organised under a sovereign government of their own; and by a sovereign government we mean a government, however constituted, which exercises the power of making and enforcing law within a community, and is not itself subject to any superior government. These two factors, one positive, the other negative—the exercise of power, and the absence of superior control—compose the notion of sovereignty, and are essential to it."

All Sovereign States are equal in the eye of international law, whatever may be their relative power. The sovereignty of a particular State is not impaired by its occasional obedience to the commands of other States, or even the habitual influence exercised by them over its councils. It is only when this obedience, or this influence, assumes the form of express compact, that the sovereignty of the State, inferior in power, is legally affected by its connection with the other. Treaties of equal alliance, freely contracted between independent States, do not impair their sovereignty. Treaties of unequal alliance, guarantee, mediation, and protection, may have the effect of limiting and qualifying the sovereignty according to the stipulations of the treaties.

Equality of  
sovereign  
States.

States which are thus dependent on other States, in respect to the exercise of certain rights, essential to the perfect external sovereignty, have been termed semi-sovereign States (*m*). Semi-sovereign or dependent States are frequently divided into two classes, namely, international protectorates and States under suzerainty (or vassal States). Examples of present international protectorates are those of Great Britain over Egypt, and Zanzibar; of France over Tunis, Morocco, Annam; of United States (virtually) over Cuba. Examples of States under suzerainty are Egypt, which was under the suzerainty of Turkey (before the country was declared a British protectorate in December, 1914), and Crete, which was recognised by the Powers, in 1899, to be an autonomous State under the suzerainty of Turkey. Interesting instances of protectorates, from a historical point of view, which existed in the nineteenth century, are those of Austria, Prussia,

Semi-sove-  
reign States.

(*l*) Neutrality of Great Britain during American Civil War, p. 107; see Cobbett, Cases and Opinions on Int. Law (1909), vol. i. pp. 49 *seq.*

(*m*) Klüber, Droit des Gens moderne de l'Europe, § 24; Heffter, Das Europäische Völkerrecht, § 19.

and Russia over the city of Cracow (1815—1846), of Great Britain over the Ionian Islands (1815—1866).

City of  
Cracow  
(1815—1846).

The city of Cracow, in Poland, with its territory, was declared by the Congress of Vienna to be a perpetually free, independent, and neutral State, under the protection of Russia, Austria, and Prussia (*n*). By the final Act of the Congress of Vienna, Article 9, the three great Powers, Austria, Russia, and Prussia, mutually engaged to respect, and cause to be respected, at all times, the neutrality of the free city of Cracow and its territory; and they further declared that no armed force should ever be introduced into it under any pretext whatever. It was at the same time reciprocally understood and expressly stipulated that no asylum or protection should be granted in the free city or upon the territory of Cracow to fugitives from justice, or deserters from the dominions of any of the said high Powers, and that upon a demand of extradition being made by the competent authorities, such individuals should be arrested and delivered up without delay, under sufficient escort to the guard charged to receive them at the frontier (*o*). Some thirty years later, however, the city of Cracow was annexed to the Austrian Empire by a convention, entered into at Vienna, November 6, 1846, between Russia, Austria, and Prussia. The governments of Great Britain, France, and Sweden protested against this proceeding as a violation of the Federal Act of 1815 (*p*).

United States  
of the Ionian  
Islands  
(1815—1866).

By the convention concluded at Paris on the 5th of November, 1815, between Austria, Great Britain, Prussia, and Russia, the islands of Corfu, Cephalonia, Zante, St. Maura, Ithaca, Cerigo and Paxo, with their dependencies, were constituted a single, free, and independent State, under the denomination of the United States of the Ionian Islands, and placed under the immediate and exclusive protection of Great Britain. With the approval of the protecting Power, this State was to regulate its internal organization, under the control of a British Lord High Commissioner, who was to regulate the forms of convoking a legislative assembly, and direct its operations. In order to secure to the inhabitants of the United States of the Ionian Islands the advantages resulting from the high protection under which they were placed, as well as for the exercise of the rights incident to this protection, His Britannic Majesty was empowered to occupy and garrison their

(*n*) Acte du Congrès de Vienne du 9 Juin, 1815, Arts. 6, 9, 10.

(*o*) Martens, Nouveau Recueil, tome ii. p. 386. Klüber, Acten des Wiener

Congresses, Band V. § 138.

(*p*) Cf. Hertlet, Map of Europe, vol. ii. pp. 1065, 1073.



fortresses and places, and to command their military forces. A special convention with the government of the United States of the Ionian Islands was to regulate the maintenance of the fortresses, the payment of the British garrisons, their numbers in time of peace, and the relations between this armed force and the Ionian government. The merchant flag of the Ionian Islands was to bear, together with the colours and arms it bore previous to 1807, those which His Britannic Majesty might grant as a sign of the protection under which the United Ionian States were placed; and to give more weight to this protection, all the Ionian ports were declared, as to honorary and military rights, to be under the British jurisdiction; commercial agents only, or consuls charged only with the care of commercial relations, should be accredited to the United States of the Ionian Islands; and they should be subject to the same regulations to which consuls and commercial agents were subject in other independent States (*q*).

On comparing this act with the stipulations of the treaty of Vienna relating to the republic of Cracow, a material distinction will be perceived between the nature of the respective sovereignty granted to each of these two States. The "free, independent, and strictly neutral city of Cracow" was completely sovereign, though under the protection of Austria, Prussia, and Russia; whilst the Ionian Islands, although they formed "a single free and independent State," under the protection of Great Britain, were closely connected with the protecting Power both by the treaty itself and by the constitution framed in pursuance of its stipulations, in such a manner as materially to abridge both its internal and external sovereignty. In practice, the United States of the Ionian Islands were not only constantly obedient to the commands of the protecting Power, but they were governed as a British colony by a Lord High Commissioner named by the British crown, who exercised the entire executive, and participated in the legislative, power with the Senate and legislative Assembly, under the constitution of the State (*r*).

During the Crimean war two Ionian vessels were captured by British ships on a voyage to Taganrog, and their condemnation was demanded on the ground that Ionians were in the same position as British subjects as regards trade with the enemy. The Court held that the status of the Ionian Islands, and their relation

Status of  
Ionian  
citizens.

(*q*) Martens, Nouveau Recueil, tome ii. p. 663.

(*r*) Martens, Précis du Droit des Gens, liv. i. ch. 2, § 20. Note a, 3me édition.

to Great Britain, were regulated exclusively by the Treaty of Paris, 1815; that Great Britain had the power to make peace or war for them, but that the intention to place them in a state of war must be clearly expressed, as they were not necessarily placed in a belligerent condition by the fact that Great Britain was at war. The ships were therefore released, as the Ionians, being deemed neither British subjects nor allies, were entitled to trade with Russia during the war, England never having expressly declared the Islands to be at war with Russia (*s*). The Ionian Islands were ceded to Greece in 1864, and have since ceased to exist as a semi-sovereign State (*t*).

Other semi-sovereign States.

Besides the free city of Cracow and the United States of the Ionian Islands, several other semi-sovereign or dependent States were—and some are still—recognised by the public law of Europe.

The principalities of Moldavia, Wallachia, and Serbia, under the suzerainty of the Ottoman Porte and under the protectorate of Russia, as defined by the successive treaties between these two Powers, confirmed by the Treaty of Adrianople, 1829 (*u*).

Cession of Russian protectorate. Union of Moldavia and Wallachia.

The Russian protectorate over these provinces ceased in 1854, and the privileges accorded to them by the Sultan were thenceforward placed under the collective guarantee of the five great Powers (*x*). By a convention entered into in 1858, between Turkey and the Powers, Moldavia and Wallachia were placed under the suzerainty of the Sultan, but carried on their own administration freely, and exempt from any interference of the Sublime Porte, within the limits stipulated by the agreement of the guaranteeing Powers with the Suzerain Court. An annual tribute was paid to Turkey by each province. The executive power was vested in a Hospodar, and in the event of any of the immunities of the principalities being violated, the Hospodar was first to represent this to the Suzerain Power, and if not attended to, he might then communicate with the guaranteeing Powers. The Hospodar was represented at Constantinople by diplomatic agents ('Capou-Kiaga') accepted by the Porte (*y*). In 1861, Moldavia and Wallachia were formed into one Principality, called Roumania. In 1877, Roumania joined Russia in the war with Turkey, and at the end of this war she declared herself indepen-

(*s*) *The Ionian ships* (1855), 2 Spinks, 212. See also Forsyth, *Cases and Opinions*, p. 472.

(*t*) Hertslet, *Map of Europe*, vol. iii. p. 1610.

(*u*) Wheaton, *Hist. of the Law of*

*Nations*, pp. 556—560.

(*x*) Hertslet, *Map of Europe by Treaty*, vol. ii. p. 1225.

(*y*) *Convention of 19th Aug. 1858*. Hertslet, *Map of Europe by Treaty*, vol. ii. p. 1329.

dent of the Porte. This independence was recognised and confirmed by the Powers in the Treaty of Berlin, and Roumania is now no longer a semi-sovereign, but has become an independent State (*z*), and was declared a monarchy in 1881.

The history of Serbia has been very similar. After various abortive efforts she at length attained to complete independence, which the Powers confirmed at the same time as that of Roumania (*a*), and in 1882 the prince assumed the title of king. The Treaty of Berlin also declared Montenegro to be an independent State (*b*). Serbia and Montenegro.

A new semi-sovereign State was created by this Treaty, to which the name of Bulgaria was given. It was given a local government and a national militia, but was made tributary to the Sultan. The prince was to be elected by the people, but confirmed by the Porte with the assent of the Powers. The Sultan was not permitted to keep his army in the province (*c*). It is to be noted that in 1885 Bulgaria went to war with Serbia without consulting either Turkey or the Powers. The independence it had enjoyed was *de facto*, if not strictly *de jure*. However, in 1908 it declared its complete independence. Bulgaria.

The Principality of Monaco, which had been under the protectorate of France from 1641 until the French Revolution, was replaced under the same protection by the Treaty of Paris, 1814 (Article 3), for which was substituted that of Sardinia by the Treaty of Paris, 1815 (Article 1) (*d*). In 1861, the Prince of Monaco sold a portion of his territory to France, and the principality now consists of little more than the town of Monaco itself (*e*). It is now unprotected, and is a fully sovereign State. Monaco.

The republic of Polizza in Dalmatia, which was under the protectorate of Austria (*f*), is now absorbed into the Austro-Hungarian Empire. Polizza.

The small republic of San Marino (thirty-eight square miles) is a 'protected' sovereign State, which was formerly under the protection of the Holy See, but which is now under that of Italy (*g*). The mere fact of its being placed under the "exclusive protective friendship" of Italy does not make it a Protectorate, and does not in law impair its sovereignty. Republics of San Marino and Andorra.

(*z*) Treaty of Berlin, Art. xliii. Parl. Papers, Turkey, 1878, No. 44, p. 25.

(*a*) Art. xxxiv.

(*b*) Art. xxvi.

(*c*) Arts. i. to xii. See also as to this Treaty, *infra*, pp. 107 *et seq.*

(*d*) Martens, Nouveau Recueil, tom.

ii. pp. 5, 687.

(*e*) Hertslet, Map of Europe by Treaty, vol. ii. p. 1462.

(*f*) Martens, Précis du Droit des Gens, liv. i. ch. 2, § 20.

(*g*) Convention of 22nd March, 1862. See Hertslet, Map of Europe, vol. ii. p. 1508.



Andorra is a small independent republic (175 square miles) situate on the Pyrenean frontier, between France and Spain (*h*), and is under the joint suzerainty of France and the Spanish Bishop of Urgel. It can scarcely be described as a State.

**The Papacy.**

Until 1870 the Pope exercised the rights of temporal sovereignty, in addition to his supreme spiritual authority over the Roman Catholic Church; and as a temporal sovereign he was a member of the international community. In 1870, however, Rome was occupied by an Italian army, and was made the capital of the Kingdom of Italy. The Papal States disappeared and the temporal power of the Papacy came to an end. In 1871 the Italian Parliament enacted a statute, called the Law of Guarantees, which regulated the international status of the Pontiff. It ensures his inviolability, and secures his enjoyment of certain rights, privileges and immunities that attach ordinarily to the persons of political sovereigns. Certain States send diplomatic envoys to him, and receive representatives from him. Though these representatives are accorded many of the privileges of ambassadors, they are considered to be ecclesiastical and not international officials. He is empowered to make treaties, named concordats, with other States in reference to ecclesiastical affairs; but they are not treaties in the sense contemplated by international law. Possessing neither territory nor temporal subjects (even his houses are not his own and his attendants owe no allegiance to him as to a sovereign), he cannot enjoy international rights or be subject to international obligations. Thus, having no international personality, he is an object rather than a subject of the law of nations. Whatever rights the Italian statute has guaranteed him, it cannot invest him with international personality. However, it is impossible to consider him as an ordinary person in reference to international law, inasmuch as a large number of States have tacitly consented to regard the Pontiff as being endowed with many of the privileges of sovereignty. His status is, therefore, somewhat anomalous. As important evidence of the fact that the Holy See is not a member of the community of States, we may mention that its occupant was not invited to either of the Hague Peace Conferences of 1899 and 1907 (*i*).

(*h*) Hertslet, Map of Europe, vol. ii. p. 1510. State Papers, vol. xxx. p. 1217. An interesting historical account of San Marino and Andorra will be found in Calvo, ii. § 72.

(*i*) On the status of the Papacy, see E. Nys, *Droit international*, vol. ii. pp. 297—323; F. Despagnet, *Droit international public*, §§ 147—164; H. Bonfils, *Droit international*, §§ 370—396 (and the references there given).

The former Germanic Empire was composed of a great number of States, which, although enjoying what was called territorial superiority, ('Landeshoheit,') could not be considered as completely sovereign, on account of their subjection to the legislative and judicial power of the emperor and the empire. These were all absorbed in the sovereignty of the States composing the late Germanic Confederation, with the exception of the Lordship of Kniphausen, on the North Sea, which retained its former feudal relation to the Grand Duchy of Oldenburg, and might, therefore, have been considered as a semi-sovereign State (*lc*).

The former  
Germanic  
Empire.

Egypt had been held by the Ottoman Porte, during the dominion of the Mamelukes, rather as a vassal State than as a subject province. The attempts of Mehemet Ali, after the destruction of the Mamelukes, to convert his title as a prince-vassal into absolute independence of the Sultan, and even to extend his sway over other adjoining provinces of the empire (1831), produced the convention concluded at London the 15th July, 1840, between four of the great European Powers,—Austria, Great Britain, Prussia, and Russia,—to which the Ottoman Porte acceded by the firman of 1841. In consequence of the measures subsequently taken by the contracting parties for the execution of this treaty, the hereditary Pashalic of Egypt was finally vested by the Porte in Mehemet Ali, and his lineal descendants, on the payment of an annual tribute to the Sultan, as his suzerain. All the treaties and all the laws of the Ottoman Empire were to be applicable to Egypt, in the same manner as to other parts of the empire. But the Sultan consented that, on condition of the regular payment of this tribute, the Pasha should collect, in the name and as the delegate of the Sultan, the taxes and imposts legally established, it being, moreover, understood that the Pasha should defray all the expenses of the civil and military administration; and that the military and naval force maintained by him should always be considered as maintained for the service of the State (*l*).

Egypt.

The international position of Egypt prior to the British occupation was discussed by Sir R. Phillimore in the Admiralty Court (1873). After examining all the firmans of the Porte, and the other authorities on the subject, his lordship said that "the result of the historical inquiry as to the status of His Highness the Khedive is as follows: That in the firmans, whose

Status of  
Egypt.  
Before the  
British  
occupation.

(*k*) Heffter, Das Europäische Völkerrecht, § 19.

(*l*) Wheaton, Hist. Law of Nations, pp. 572—583.

authority upon this point appears to be paramount, Egypt is invariably spoken of as one of the provinces of the Ottoman Empire; that the Egyptian army is regulated as part of the military force of the Ottoman Empire; that the taxes are imposed and levied in the name of the Porte; that the treaties of the Porte are binding upon Egypt, and that she has no separate *jus legationis*; that the flag for both the army and the navy is the flag of the Porte. All these facts, according to the unanimous opinion of accredited writers, are inconsistent and incompatible with those conditions of sovereignty which are necessary to entitle a country to be ranked as one among the great community of States" (*m*). After the judgment in this case was delivered, the Khedive obtained from the Sultan a new firman, granting him some powers of sovereignty he did not before possess, (*e.g.*, to make non-political treaties and to maintain armed forces,) the absence of which was commented on by Sir R. Phillimore (*n*). A contingent of Egyptian troops was sent to serve with the Turkish Army in the Russian war of 1877.

In 1879 the then Khedive (Ismail) was deposed by an Imperial Iradé, and his son, Tewfik, was appointed in his room. Under the new Khedive the Dual Control of Great Britain and France, exercised through resident controllers, entitled to sit at the council of ministers, was revived. In 1881 disturbances and disorder, consequent upon a nationalist ferment, aided by military revolt, compelled Great Britain, after an offer of co-operation to France had been declined, and Turkey hesitating, to intervene, with armed forces, for the restoration of order and in support of Tewfik. By October the country was in possession of the British army of occupation,—the rebel soldiers having been defeated at Tel-el-Kebir,—and was under the *de facto* control of the Queen's Government. By a decree of the 18th January, 1883, the Dual Control was abolished. In 1884, Great Britain proposed that the country should be neutralized (*o*).

In August, 1885, Sir Henry Drummond Wolff was sent to Constantinople on a special mission having reference to the affairs of Egypt. It was the wish of Her Majesty's Government to recognise in its full significance the position which was secured to the Sultan as sovereign of Egypt by treaties and other instruments having a force under international law. But the general

(*m*) *The Charkieh* (1873), L. R. 4 1873.  
A. & E. 84.

(*n*) Phillimore, vol. iii., Introduction.  
Journal des Débats, 7th July,

(*o*) Holland, European Concert,  
chap. iv.



object of the mission was, in the first instance, to secure for this country the amount of influence which was necessary for its own imperial interests, and, subject to that condition, to provide a strong and efficient Egyptian government, as free as possible from foreign interference. Especial attention was drawn to the unsatisfactory position of Egyptian finance, upon which the facilities for foreign interference, furnished by the international obligations attaching to so many branches of Egyptian administration, depended (*p*). As a first result of this mission, by a convention, which was signed at Constantinople on the 24th October, 1885, and ratified on the 24th November in the same year, it was agreed, between Her Majesty and the Sultan, (1) that each of them respectively should send a High Commissioner to Egypt; (2) that the Ottoman High Commissioner should consult with the Khedive, or with a functionary designated by His Highness, upon the best means for tranquillizing the Soudan by pacific measures, the two to keep the English High Commissioner currently informed of the negotiations, and as the measures to be decided upon would form part of the general settlement of Egyptian affairs, such measures were to be adopted and placed in execution in agreement with the English High Commissioner; (3) that the two High Commissioners should re-organize, in concert with the Khedive, the Egyptian army; (4) and, in the same way, examine all branches of the Egyptian administration, and introduce the modifications they might consider necessary within the limits of the firmans; (5) that the international engagements contracted by the Khedive should be approved by the Ottoman Government in so far as they should not be contrary to the privileges granted by the firmans; (6) that so soon as the two High Commissioners should have established that the security of the frontiers and the good working and stability of the Egyptian government were assured, they should present a report to their respective Governments, who would then consult as to the conclusion of a convention regulating the withdrawal of the British troops from Egypt in a convenient period (*q*).

It has been observed that by this convention the legitimate sovereignty of the Sultan was recognised by Great Britain, and the *de facto* occupation by England was acknowledged and legalized by the recognition of the Imperial Ottoman Government;

(*p*) Lord Salisbury's Instructions to Sir H. D. Wolff. Parl. Paper, Egypt, No. 1 (1886). As to the latter point, see Holland, *loc. cit.*

(*q*) Parl. Papers, Egypt, No. 1 (1886). Hertslet, Map of Europe by Treaty, vol. iii. p. 3274.

Anglo-Turkish Convention, Oct. 1885.

while the forces of both were to be utilized for the purposes of a permanent settlement (*r*).

On the conclusion of this convention, Sir Henry Drummond Wolff was appointed British High Commissioner. A Commissioner was appointed on behalf of the Sultan; and the two proceeded to Egypt. After satisfying himself as to what—taking into consideration the peculiar features of the Egyptian question, and the policy of Her Majesty's Government, who disclaimed all idea of annexing Egypt, but were anxious to preserve the rights of the Sultan, and the interests of other countries, and, in concert with Europe, to secure, except as regards the transit of troops in regulated numbers, the territorial inviolability of Egypt—was really required for the permanent safety and prosperity of the country, the British Commissioner returned to Constantinople, in his character of Envoy Extraordinary, and resumed negotiations with a view to the conclusion of an ulterior convention, by which these ends might be secured. Some delay was caused by changes of government in England, and in other ways, but on the 22nd May, 1887, a convention was signed at Constantinople, between Great Britain and Turkey, by which it was agreed that at the expiration of three years from the date of the convention, the British troops should be withdrawn from Egypt, unless the appearance of danger in the interior or from without should render necessary the adjournment of the evacuation, when the British troops were to withdraw immediately after the disappearance of this danger. On the withdrawal of the British troops, Egypt was to enjoy the advantages of the principle of territorial immunity ('*sûreté territoriale*'), and on the ratification of the present convention the Great Powers were to be invited to sign an Act recognising and guaranteeing the inviolability of Egyptian territory; under which Act no Power should have the right, in any circumstance, to land troops on Egyptian territory, except in the event of obstruction in the Suez Canal, when the passage of 1,000 men at one time might be effected by the most rapid means and route. But the Ottoman Government might land troops to repel apprehended invasion, or in case of internal disorder; and a similar right was reserved to the British Government. If at the expiration of the three years stipulated in the convention for the withdrawal of the British troops, one of the Great Mediterranean Powers should not have accepted it, this was to be considered as an appearance of danger from without justifying the postpone-

Anglo-  
Turkish  
Convention,  
May, 1887.

(*r*) Sir H. D. Wolff to Lord Salisbury. Parl. Papers, Egypt, No. 66.

ment of evacuation. The adhesion of the signatories of the Berlin Treaty, and subsequently of other Governments having arrangements with the Khedivate, was to be invited (*s*). The Sultan, under pressure from other Powers, failed to ratify the convention within the stipulated period of one month, or within an extended period allowed by Great Britain, and it consequently fell through (*t*). The legality of the British occupation was therefore remitted to the convention of 1885.

In July, 1887, in the course of negotiations with reference to the Suez Canal Convention, M. Waddington gave expression to the hope of the French Government that the whole of Egypt might some day be neutralized (*u*); and this was a solution of the question which would, apparently, have met with the approval of the Powers. But as Great Britain insisted on the reservation of a right of re-occupation in certain contingencies, and of a right of regulated transit for any Great Power in case the canal was blocked, there were obvious difficulties in the way of an arrangement with France, for the latter country, which had a hold on Egyptian affairs through the Mixed Administrations, and whose traditional interest was strengthened by the part taken by Frenchmen in the construction of the Suez Canal, hitherto declined to assent to neutralization except on the condition that Egypt should be a forbidden land to all European troops (*x*).

In a cause, instituted in 1885, decided in the Privy Council in 1888, on appeal from Her Majesty's Supreme Consular Court at Constantinople, Egypt was regarded as part of the Ottoman dominions. "Cairo," it was said, "is in no sense British soil; it is the possession of a foreign government, and subject to the sovereignty of the Porte" (*y*), and in the Order of Council establishing Consular Courts of August 8, 1899, Egypt was expressly mentioned as being included in the "dominions of the Sublime Ottoman Porte" (*z*). But while no legal act affected the titular sovereignty of the Porte, the course of events had the effect of gradually weakening the tie. The pacification of the Soudan was carried out (1898) without any reference to the Sultan, and its administration, after the overthrow of the Khalifa, was organized on the basis of an agreement made between the British and Egyptian Governments in January, 1899; nor was the Sultan's

*Abd-ul-Messih v. Farra.*

(*s*) Parl. Papers, Egypt, No. 7 (1887).

(*t*) The Times, 28 June, 1887; 4 July, 1887.

(*u*) Parl. Papers, Egypt, No. 1 (1888).

(*x*) Parl. Papers, Egypt, No. 7 (1887).

(*y*) *Abd-ul-Messih v. Farra* (1887), 13 App. C. 431, 438, per Lord Watson, delivering the judgment of the Judicial Committee.

(*z*) London Gazette, Aug. 11, 1899.



co-operation invited in the organization of the army and the various departments of the public service. On the other hand, the attempt made in June, 1893, by the Khedive, Abbas Hilmi, to assert his freedom from foreign control was repressed by Lord Cromer in a manner which emphasised his dependence on the protecting Power, and he was made to understand that no changes in the personnel of the Administration would be permitted without a previous agreement with the Agent of Great Britain, whose very title proclaimed his anomalous position (*a*).

Anglo-French  
Agreement,  
1904.

Before Great Britain entered into the occupation of Egypt she undertook to withdraw from the country as soon as she had placed its finances on a sound basis and had established a satisfactory native administration. But subsequent events showed that the moment for withdrawal must, for the sake of the country, be indefinitely postponed (*b*). Hence it was necessary to strengthen and regularize the British position in Egypt. This was accomplished by the Anglo-French Agreement of April, 1904, whereby France abandoned her demand for the retirement of Great Britain (*c*); and other Powers afterwards recognised the occupation. Theoretically, Turkey remained the suzerain, but practically Great Britain became more and more the guiding and controlling power. In accordance with the capitulations, justice in Egypt continued to be administered under European control. All these circumstances contributed to impart to the country an anomalous international status.

Egypt a fully  
constituted  
British  
Protectorate.

This anomalous position came to an end during the Great War of 1914-1915. On December 17, 1914, the following official announcement was made: "His Britannic Majesty's Principal Secretary of State for Foreign Affairs gives notice that, in view of the state of war arising out of the action of Turkey, Egypt is placed under the protection of His Majesty, and will henceforth constitute a British Protectorate. The suzerainty of Turkey over Egypt is thus terminated, and His Majesty's Government will adopt all measures necessary for the defence of Egypt and the protection of its inhabitants and interests. The King has been pleased to approve the appointment of Lieutenant-Colonel Sir Arthur H. McMahon to be His Majesty's High Commissioner for Egypt."

(*a*) For a French view of the then English occupation, see J. Cocheris, *Situation de l'Égypte et du Soudan juridique et politique* (Paris, 1903).

(*b*) Cf. the debate in the House of

Commons, Aug. 10, 1882, Hansard, 3rd series, vol. cclxxiii.; Lord Salisbury's speech at the Mansion House, Nov. 9, 1898.

(*c*) See *infra*, Appendix D.

On the day following this announcement the French Government notified their recognition of the British Protectorate over Egypt, and the British Government notified their adherence to the Franco-Moorish Treaty of March 30, 1912 (*d*).

At the same time the following notice was issued by the British authorities: "In view of the action of His Highness Abbas Hilmi Pasha, lately Khedive of Egypt, who has adhered to the King's enemies, His Majesty's Government have seen fit to depose him from the Khedivate, and that high dignity has been offered, with the title of Sultan of Egypt, to His Highness Prince Hussein Kamel Pasha, eldest living Prince of the family of Mehemet Ali, and has been accepted by him." In a communication from the Acting High Commissioner in Egypt to Prince Hussein, it was pointed out (after reciting the circumstances in which Turkey joined Germany against Great Britain) that the British Government regarded themselves as trustees for the inhabitants of Egypt, that they would defend its territory against all aggression, that with the disappearance of Ottoman suzerainty would also vanish the limitations that had before been imposed on the number and organization of the new Sultan's army and on his power to grant distinctions of honour, that foreign relationships would be conducted through His Majesty's representative in Cairo, that in internal administration the governed would as far as possible be associated in the task of government, individual liberty would be secured, education promoted, religious convictions respected, and that the anomalous system of capitulations would be revised at the end of the war.

Since the treaty of June 12, 1901, by which Cuba was made over to the Cuban people, it has occupied a position with respect to the United States which seems to bring it within the category of international Protectorates. It may manage its own internal and external affairs, but it is precluded from entering into any such treaty with a foreign Power as may endanger its independence; and it undertakes to contract no debt for which the current revenue will not suffice, and to concede to the United States the right of intervention to preserve Cuban independence, to maintain a government adequate for the protection of life, property and individual liberty, and the right to use its harbours as naval stations (*e*). In 1906, when a revolution broke out on the island

Position of  
Cuba.

(*d*) See further, Phillipson, *International Law and the Great War* (London, 1915), chap. xvi.

(*e*) *Annual Register*, 1901; fifty-sixth Congress, c. 803; *Statutes at Large*, vol. xxxi. p. 897. Cf. Moore, *Digest*, vol. vi. § 910.

and the then President resigned his office, the United States intervened, entered into military occupation of the country, appointed a provisional governor, and removed various abuses. As soon as the administration of the newly-elected President was firmly established, the American governor and troops were withdrawn (1909). There is little doubt that the United States will take over the island if its self-government should prove a failure. Already in 1906 President Roosevelt issued a warning to that effect (*f*). As conditions are at present, there does not appear to be unanimity of opinion as to the precise international status of the republic of Cuba. Some hold that it is a fully sovereign State (*g*), others that it is a semi-sovereign State (*h*).

Tributary and  
vassal States.

Tributary States, and States having a feudal relation to each other, are still considered as sovereign, so far as their sovereignty is not affected by this relation. Thus, it is evident that the tribute, formerly paid by the principal maritime Powers of Europe to the Barbary States, did not at all affect the sovereignty and independence of the former. So also the King of Naples had been a nominal vassal of the Papal See, ever since the eleventh century; but this feudal dependence, abolished in 1818, was never considered as impairing the sovereignty of the Kingdom of Naples (*i*).

Former  
relations  
between the  
Ottoman  
Porte and the  
Barbary  
States.

The political relations between the Ottoman Porte and the Barbary States were of a very anomalous character. Their occasional obedience to the commands of the Sultan, accompanied with the irregular payment of tribute, did not prevent them from being considered by the Christian Powers of Europe and America as independent States, with whom the international relations of war and peace were maintained, on the same footing as with other Mohammedan sovereignties. During the Middle Ages, and especially in the time of the Crusades, they were considered as pirates—"Bugia ed Algieri, infami nidi di corsari," as Tasso calls them. But they have long since acquired the character of lawful powers, possessing all those attributes which distinguish a lawful State from a mere association of robbers (*k*). "The Algerines, Tripolitans, Tunisians, and those of Salee," says

(*f*) Foreign Relations of the United States, 1906, Part I. p. xlv.

(*g*) Cf. E. J. Benton, International Law and Diplomacy of the Spanish-American War (Baltimore, 1908), pp. 290—291.

(*h*) Cf. A. Whitecomb, La situation

internationale de Cuba (Paris, 1905), chap. v.

(*i*) R. Ward, Hist. of the Law of Nations (London, 1795), vol. ii. p. 69.

(*k*) Sir L. Jenkins, Works, vol. ii. p. 791. *The Helena* (1801), 4 C. Rob. 5.



Bynkershoek, "are not pirates, but regular organised societies, who have a fixed territory and an established government, with whom we are alternately at peace and at war, as with other nations, and who, therefore, are entitled to the same rights as other independent States. The European sovereigns often enter into treaties with them, and the States-General have done it in several instances. Cicero defines a regular enemy to be: 'Qui habet rempublicam, curiam, ærarium, consensum et concordiam civium, rationem aliquam, si res ita tulisset, pacis et fœderis.' (Philip. 4, c. 14.) All these things are to be found among the barbarians of Africa; for they pay the same regard to treaties of peace and alliance that other nations do, who generally attend more to their convenience than to their engagements. And if they should not observe the faith of treaties with the most scrupulous respect, it cannot be well required of them; for it would be required in vain of other sovereigns. Nay, if they should even act with more injustice than other nations do, they should not, on that account, as Huberus very properly observes, (De Jure Civitat. l. iii. c. 5, § 4, n. ult.) lose the rights and privileges of sovereign States" (l).

Algiers was conquered by France in 1831. Tunis has been occupied by the same Power since 1881, and is administered by French officials under a convention concluded with the Bey in 1883. The Sublime Porte protested against this occupation, as it had previously against the virtual protectorate assumed by France for some years before. But the French Government refused to recognise a claim which had had no effective assertion for two centuries. Thus Tunis is now considered to be an international protectorate under the protection of France. The Tunisian occupation gave rise to an apprehension of French designs on Tripoli, and led to a diplomatic correspondence, in which the British Foreign Secretary (Lord Granville) asserted Tripoli to be an integral part of the dominions of the Sultan of Turkey, and this proposition was assented to on the part of France as indisputable (m). In September, 1911, a quarrel having broken out between Italy and Turkey, the former Power invaded Tripoli, and in November issued a decree of annexation, which was ratified by the Italian Chamber in February, 1912. The war continued, however, till October, when the Treaty of Ouchy was signed,

Present  
position of  
Barbary  
States.

(l) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. xvii.

(m) Parl. Papers, Tunis, Nos. 1—8 (1881); Annual Register, 1882, 1883.

It is by no means clear that Tunis is not legally under the sovereignty of the Sultan. Parl. Papers, *supra*; Calvo, ii. § 75.

whereby Italian sovereignty was established in Tripoli. This change was accepted by the Great Powers.

North  
American  
Indians.

The political relation of the North American Indians towards the United States is that of semi-sovereign nations, under the exclusive protectorate of another Power. Some of these savage tribes have wholly extinguished their national fire, and submitted themselves to the laws of the States within whose territorial limits they reside; others have acknowledged, by treaty, that they hold their national existence at the will of the State; others retain a limited sovereignty, and the absolute proprietorship of the soil. The latter is the case with the tribes to the west of Georgia (*n*).

Thus, the Supreme Court of the United States determined, in 1831, that, though the Cherokee nation of Indians, dwelling within the jurisdictional limits of Georgia, was not a "foreign State" in the sense in which that term is used in the Constitution, nor entitled, as such, to proceed in that Court against the State of Georgia, yet the Cherokees constituted 'a State,' or a distinct political society, capable of managing its own affairs, and governing itself, and that they had uniformly been treated as such since the first settlement of the country. The numerous treaties made with them by the United States recognise them as a people capable of maintaining the relations of peace and war, and responsible in their political capacity. Their relation to the United States was nevertheless peculiar. They were a domestic dependent nation; their relation to the United States resembled that of a ward to his guardian; and they had an unquestionable right to the lands they occupied, until that right should be extinguished by a voluntary cession to the American Government (*o*).

The same decision was repeated by the Supreme Court, in another case, in 1832. In this case, the Court declared that the British crown had never attempted, previous to the Revolution, to interfere with the national affairs of the Indians, further than to keep out the agents of foreign Powers, who might seduce them into foreign alliances. The British Government purchased the alliance and dependence of the Indian nations by subsidies, and purchased their lands, when they were willing to sell, at the price they were willing to take, but it never coerced a surrender

(*n*) *Fletcher v. Peck*, 6 Cranch, 146.

(*o*) *The Cherokee Nation v. The State of Georgia* (1831), 5 Peters, 1. See also *The State of Georgia v. Stanton*, 6 Wallace, 71; *The Cherokee Trust*

*Funds*, 117 U. S. 288, 308, where the history of the Cherokees is traced in the course of the judgment of the Court; *Worcester v. State of Georgia* (1832), 6 Pet. 515.

of them. The British crown considered them as nations, competent to maintain the relations of peace and war, and of governing themselves under its protection. The United States, who succeeded to the rights of the British crown, in respect to the Indians, did the same, and no more; and the protection stipulated to be afforded to the Indians, and claimed by them, was understood by all parties as only binding the Indians to the United States, as dependent allies. A weak power does not surrender its independence and right to self-government by associating with a stronger and taking its protection. This was the settled doctrine of the Law of Nations, and the Supreme Court therefore concluded and adjudged, that the Cherokee nation was a distinct community, occupying its own territory, with boundaries accurately described, within which the laws of Georgia could not rightfully have any force, and into which the citizens of that State had no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties, and with the Acts of Congress (*p*).

More recent cases have established that the Indians residing within the limits of the United States are subject to their authority and form a dependent political community. The Federal power can govern Indians by Act of Congress, the States having no control so long as Indians retain their tribal organization, and do not separate themselves from their tribe (*q*). An Act of Congress, March 3rd, 1871, declared: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognised as an independent nation, tribe, or Power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3rd, 1871, shall be hereby invalidated or impaired" (*r*). Since this Act was passed, agreements with Indian tribes have been made, subject to the approval of Congress (*s*). The Indians are, however, protected in the territories retained by them. Thus, every person who makes a settlement on any lands secured or granted by treaty with the United States to any Indian tribe, is liable to a penalty of 1,000

Present status  
of the  
Indians.

(*p*) Kent, Comment. on American Law, vol. iii. p. 383 (12th ed.).

(*q*) *U. S. v. Rogers* (1846), 4 Howard, 572; *Mackey v. Coxe* (1855), 18 Howard, 104; *Holden v. Joy*, 17 Wallace, 211; *U. S. v. Holliday*, 3 Wallace, 407; Abbott, National Digest, vol. iii. tit. Indians; *Crow Dog, In re*, 109 U. S. 556; *The Cherokee Trust*

*Funds*, 117 U. S. 288; *U. S. v. Kagama* (1886), 118 U. S. 375; *The Cherokee Nation v. Southern Kansas Rail. Co.* (1890), 135 U. S. 641; *Talton v. Mayes* (1896), 163 U. S. 372.

(*r*) U. S. Revised Statutes, Title Indians, xxviii. ch. 2, sect. 2079.

(*s*) Moore, Digest, vol. i. p. 37.



dollars (*t*). No one but an Indian may trade in their territory without a licence (*u*), and even hunting there is prohibited (*x*). For purposes, also, of private international law, American Courts regard Indians, and white men naturalised within an Indian tribe, residing on Indian reserves, as members of alien nationalities (*y*).

Relations of  
China and  
certain  
Asiatic  
kingdoms.

Korea was regarded by the Chinese Government until quite recently as a vassal kingdom of that empire, though the claim was from time to time repudiated by the Korean king. On the outbreak of the Chino-Japanese war in 1894, Korea renounced the Chinese suzerainty, and in January, 1895, formally declared herself independent. In October, 1897, the king of Korea proclaimed himself emperor (*z*). In 1904, Japan and Korea concluded a treaty, by which Japan engaged to guarantee the integrity of the latter country, reserving to herself a right to occupy it in case of necessity; and Korea agreed to appoint her diplomatic and financial advisers on the recommendation of Japan, and to make treaties with foreign Powers only with the latter's approval. A further treaty between the two parties, November, 1905, established a Japanese protectorate over Korea, in that Japan acquired the right to control Korean foreign relationships, and appointed a Japanese Resident-General to direct diplomatic affairs. In 1910, however, Japan annexed Korea.

By the treaty of 9th June, 1885, between France and China, the foreign intercourse of Annam was to be through France, but the question of Chinese suzerainty was left unsettled (*a*). Annam is therefore a French international protectorate.

By the Anglo-Chinese Convention, signed at Peking on the 24th July, 1886, England agreed that the highest authority in Burmah shall send to Peking the customary decennial missions to present articles of local produce, the members of the mission to be of Burmese race; but China agreed, that in all matters whatsoever appertaining to the authority and rule which England is now exercising in Burmah, England shall be free to do whatever she deems fit and proper (*b*). The Chinese claim to suzerainty in Tibet was fully recognised by Great Britain in the convention for carrying out the frontier delimitation of that country (*c*).

(*t*) U. S. Revised Statutes, ch. iii. sect. 2118; *Worcester v. State of Georgia* (1832), 6 Peters, 515; *Clark v. Smith*, 13 Peters, 195; *Latimer v. Poteet*, 14 Peters, 4; *U. S. v. Joseph*, 4 Otto, 614.

(*u*) *Ibid.* ch. iv. sect. 2133.

(*x*) *Ibid.* sect. 2137. See also the cases of *Holden v. Joy*, 17 Wallace, 211; *U. S. v. Cook*, 19 Wallace, 591;

Wharton, Digest, § 208; Calvo, Bk. II. § 69.

(*y*) Wharton, *loc. cit.*; *Nafire v. U. S.*, 164 U. S. 657.

(*z*) Annual Register, 1895, 1897.

(*a*) Annual Register, 1886, p. 334.

(*b*) Hertlet, *Com. Treaties*, xviii. p. 299; and see *ibid.* xix. 163, xx. 233.

(*c*) *Ibid.* xviii. 288.

In British India there are more than 600 Native States, whose rulers are known as Protected Princes. Of their precise relations to the suzerain Power it is not easy to give a satisfactory definition, nor are they regulated by any uniform code of rules. The Protected Princes are strictly precluded from forming any connection or engagement either among themselves or with foreign Powers. In the words of Sir William Lee-Warner, "They cannot enter into a treaty of extradition with their neighbours without the intervention of the British authority; they cannot receive commercial agents; they are even unable to allow Europeans or Americans to enter their service without the consent of the paramount Power; they have no direct intercourse with the consular agents or representatives of foreign nations accredited to the government of India; and they cannot receive from foreign sovereigns decorations or orders except under the regulations prescribed for British subjects." But they are not subject to legislation by the Governor-General in Council or by the Legislative Councils of the Presidency in which they are situated, nor is the law of British India administered within their borders. They enjoy and exercise under the sanction of the British Government the functions and attributes of internal sovereignty, but they are bound to receive the Resident or Agent appointed by the Viceroy. The Indian Government has formally declared that the principles of international law have no bearing upon the relations between itself and the Native States under the suzerainty of the king. Whether this declaration is rigidly correct or is completely followed in practice may perhaps be doubted, but it is clear that the Native Princes of India have no international status in the sense in which it is used in this volume (*d*). But for purposes other than those involving public international relationships, and more especially with regard to matters falling within the sphere of private international jurisprudence, these Native States of India are considered separate political communities possessing an independent civil, criminal, and fiscal jurisdiction (*e*).

Status of the  
Indian  
Protected  
Princes.

States may be single, or may be united together under a common sovereign prince, or by a federal compact.

Single or  
united States.

(*d*) See Lee-Warner, *The Protected Princes of India* (1894); the quotation in the text is at p. 245 (a second edition of this work was published in 1910 under the title, *The Native States of India*); Westlake, *Chapters on the Principles of International Law* (1894) (reprinted in his *Collected*

*Papers*, 1914); *ibid.* pp. 620 *seq.*, a paper on the Native States of India, as a review of Lee-Warner's second edition; Notification published by the Government of India, Aug. 21, 1891.

(*e*) *Sirdar Gurdial Singh v. The Rajah of Faridkote*, (1894) App. C. 670.



'Personal' union under the same sovereign.

1. If this union under a common sovereign is not an incorporate union, that is to say, if it is only 'personal' in the reigning sovereign; or even if it is 'real,' yet if the different component parts are united with a perfect equality of rights, the sovereignty of each State remains unimpaired (*f*).

Thus, the kingdom of Hanover was formerly held by the king of the United Kingdom of Great Britain and Ireland, separately from his insular dominions (1714-1837). Hanover and the United Kingdom were subject to the same prince, without any dependence on each other, both kingdoms retaining their respective national rights of sovereignty. It was thus that the king of Prussia was, down to 1857, also sovereign prince of Neuchâtel, one of the Swiss Cantons; which did not, on that account, cease to maintain its relations with the Confederation, nor was it united with the Prussian monarchy (*g*).

Other historical examples of personal unions are that between Spain and the Holy Roman Empire in the reign of Charles V.; and that between the Netherlands and Luxemburg between 1815 and 1890.

Such a form of union existed also between Belgium and the Congo Free State (1885-1908). With the annexation of the latter by Belgium, September, 1908, the last example of a personal union disappeared. It may be said, however, that a personal union is not, strictly speaking, a union at all, as it simply comes into existence when the same monarch happens to be the sovereign in more than one State at the same time.

'Real' union under the same sovereign.

A *real* union, on the contrary, consists of several States forming together a single international person. The constituent members retain their respective constitutions and internal sovereignty, and may also enjoy, to a certain extent, international personality. Thus, the kingdoms of Sweden and Norway were united from 1814 to 1905 under one crowned head, each kingdom retaining its separate constitution, laws, and civil administration, the external sovereignty of each being represented by the king. Further, each State retained its own naval and commercial flag,—a fact which rendered the union imperfect. After their separation was effected by the Treaty of Karlstad, 1905, the independence of Norway was guaranteed by Great Britain, France, Germany, and Russia in 1907 and 1908.

(*f*) Grotius, *De Jur. Bel. ac Pac.*, lib. ii. cap. 9, §§ 8, 9. Klüber, *Droit des Gens moderne de l'Europe*, Part I. cap. 1, § 27. Heffter, *Das Europäische Völkerrecht*, § 20.

(*g*) This sovereignty was renounced

by the King of Prussia in 1857, and Neuchâtel has since formed part of the Swiss Confederation, on the same footing as the other cantons. See Hertslet, *Map of Europe*, vol. ii. p. 1317.



The union of the different States composing the Austrian monarchy is a 'real' union, at all events since the year 1867 (*h*). The hereditary dominions of the House of Austria, the kingdoms of Hungary and Bohemia, the Lombardo-Venetian kingdom, and other States, are all indissolubly united under the same sceptre, but with distinct fundamental laws, and other political institutions.

It appears to be an intelligible distinction between such a union as that of the Austrian States, and other unions which are merely 'personal' under the same crowned head, that, in the case of a 'real' union, though the separate sovereignty of each State may still subsist internally, in respect to its co-ordinate States, and in respect to the imperial crown; yet the sovereignty of each is merged in the general sovereignty of the empire, as to their international relations with foreign Powers. The political unity of the States which compose the Austrian Empire forms what the German publicists call a community of States ('Gesamtstaat'); a community which reposes on historical antecedents. It is connected with the natural progress of things, in the same way as the empire was formed, by an agglomeration of various nationalities, which defended, as long as possible, their ancient constitutions, and only yielded, finally, to the overwhelming influence of superior force.

Since the Ausgleich or Compromise of the year 1867, the Austro-Hungarian monarchy, as it is now called, forms a bipartite State, consisting of a German, or "Cisleithan" monarchy, and a Magyar, or "Transleithan" kingdom, the former officially designated as Austria, and the latter as Hungary. Each of the two countries has its own parliament, ministers, and government, while the connecting ties between them are comprised in the person of the hereditary sovereign, in a common army, navy, and diplomacy, and in a controlling body known as the delegations. The delegations form a parliament of 120 members, one-half of whom are chosen by, and represent, the legislature of Austria, and the other half that of Hungary, the Upper House of each returning 20, and the Lower House 40 delegates. On subjects affecting the common affairs, the delegations have a decisive vote, and their resolutions require neither the confirmation nor the approbation of the representative assemblies in which they have their source. The jurisdiction of the delegations is limited to foreign affairs and war

Constitution  
of the Austro-  
Hungarian  
monarchy.

(*h*) As to whether the Pragmatic Sanction of 1723 established a real or simply a personal union between

Austria and Hungary, there is a difference of opinion.

and the finance involved therein, and their final vote on these points is binding upon the whole empire. A commercial union also subsists between the two countries, which has, however, to be renewed every ten years and is dependent on identical acts of the two legislatures (*i*).

Incorporate  
union.

2. An 'incorporate' union is such as that which subsists between Scotland and England, and between Great Britain and Ireland; forming out of the three kingdoms an empire, united under one crown and one legislature, although each may have distinct laws and a separate administration. The sovereignty, internal and external, of each original kingdom is completely merged in the United Kingdom, thus formed by their successive unions.

Union  
between  
Russia and  
Poland.

3. The union established by the Congress of Vienna, between the empire of Russia and the kingdom of Poland, is of a more anomalous character. By the final act of the Congress (1815), the duchy of Warsaw, with the exception of the provinces and districts otherwise disposed of, was reunited to the Russian Empire; and it was stipulated that it should be irrevocably connected with that empire by its constitution, to be possessed by his Majesty the Emperor of all the Russias, his heirs and successors in perpetuity, with the title of King of Poland; his Majesty reserving the right to give to this State, enjoying a distinct administration, such interior extension as he should judge proper; and that the Poles, subject respectively to Russia, Austria, and Prussia, should obtain a representation and national institutions, regulated according to that mode of political existence which each government, to whom they belong, should think useful and proper to grant (*k*).

Charter  
accorded by  
the Emperor  
Alexander to  
the kingdom  
of Poland, in  
1815.

In pursuance of these stipulations, the Emperor Alexander granted a constitutional charter to the kingdom of Poland, on 15th (27th) November, 1815. By the provisions of this charter, the kingdom of Poland was declared to be united to the Russian Empire by its constitution; the sovereign authority in Poland was to be exercised only in conformity to it; the coronation of the King of Poland was to take place in the Polish capital, where he was bound to take an oath to observe the charter. The Polish nation was to have a perpetual representation, composed of the king and the two chambers forming the Diet; in which body the legislative power was to be vested, including that of taxation. A

(*i*) Cf. The Statesman's Year Book, 1915, pp. 669 *seq.* See G. Drage, Austria-Hungary (1909).

(*k*) Hertslet, Map of Europe, vol. i. p. 216.

distinct Polish national army and coinage, and distinct military orders were to be preserved in the kingdom.

In consequence of the revolution and reconquest of Poland by Russia, a manifesto was issued by the Emperor Nicholas, on the 14th (26th) of February, 1832, by which the kingdom of Poland was declared to be perpetually united ('réuni') to the Russian Empire, and to form an integral part thereof; the coronation of the emperors of Russia and kings of Poland hereafter to take place at Moscow, by one and the same act; the Diet to be abolished, and the army of the empire and of the kingdom to form one army, without distinction of Russian or Polish troops; Poland to be separately administered by a Governor-General and Council of Administration, appointed by the emperor, and to preserve its civil and criminal code, subject to alteration and revision by laws and ordinances prepared in the Polish Council of State, and subsequently examined and confirmed in the Section of the Council of State of the Russian Empire, called 'The Section for the affairs of Poland'; consultative Provincial States to be established in the different Polish provinces, to deliberate upon such affairs concerning the general interest of the kingdom of Poland as might be submitted to their consideration; the Assemblies of the Nobles, Communal Assemblies, and Council of the Waiwodes to be continued as formerly. Great Britain and France protested against this measure of the Russian Government, as an infraction of the spirit if not of the letter of the treaties of Vienna (*l*).

Manifesto of the Emperor Nicholas, 1832.

Russian Poland had its separate government till 1864, when it was finally deprived of its administrative independence. In 1868, by an Imperial decree the government of Poland was entirely incorporated with that of Russia.

4. Sovereign States permanently united together by a federal compact, form either a system of confederated States (properly so called), or a supreme federal government, which has been sometimes called a 'compositive State' (*m*).

Federal union.

In the first case, the several States are connected together by a compact, which does not essentially differ from an ordinary treaty of equal alliance. Consequently the internal sovereignty of each member of the union remains unimpaired; the resolutions of the federal body (acting through a Diet or Congress) being enforced, not as laws directly binding on the private individual subjects,

Confederated States, each retaining its own sovereignty ('Staatenbund').

(*l*) Wheaton, History of the Law of Nations, p. 434. Hertslet, Map of Europe, vol. iii. p. 1685, note.

(*m*) These two species of federal

compacts are very appropriately expressed in the German language, by the respective terms of 'Staatenbund' and 'Bundesstaat.'



but through the agency of each separate government, adopting them, and giving them the force of law within its own jurisdiction. Hence it follows, that each confederated individual State, and the federal body for the affairs of common interest, may become, each in its appropriate sphere, the object of distinct diplomatic relations with other nations. Some historical examples of this kind of Confederacy are the United Netherlands (1580-1795), the United States of America under the Articles of Confederation (1781-1789), the Swiss Confederacy (before 1798 and 1815-1848), the Germanic Confederation (1815-1866), the confederacy between Honduras, San Salvador and Nicaragua (1896-1898).

Supreme  
federal  
government or  
compositive  
State ('Bun-  
desstaat').

In the second case, the federal government created by the act of union is sovereign and supreme, within the sphere of the powers granted to it by that act; and the government acts not only upon the States which are members of the confederation, but directly on the citizens. The sovereignty, both internal and external, of each several State is impaired by the powers thus granted to the federal government, and the limitations thus imposed on the several State governments. The compositive State, which results from this league, is alone a sovereign Power. Existing instances of federal unions are the United States of America since 1789, Switzerland since 1848, (the united States of) Mexico since 1857, (the united States of) Argentina since 1860, the German Empire since 1871, (the united States of) Brazil since 1891, Venezuela since 1893 (*n*).

Germanic  
Confedera-  
tion (1815—  
1866).

Germany, as it was constituted under the name of the Germanic Confederation, presented the example of a system of sovereign States, united by an equal and permanent Confederation. All the sovereign princes and free cities of Germany, including the Emperor of Austria and the King of Prussia, in respect to their possessions which formerly belonged to the Germanic Empire, the King of Denmark for the duchy of Holstein, and the King of the Netherlands for the grand duchy of Luxemburg, were united in a perpetual league, under the name of the Germanic Confederation, established by the Federal Act of 1815, and completed and developed by several subsequent decrees.

The object of this union was declared to be the preservation of the external and internal security of Germany, the independence and inviolability of the confederated States. All the members

(*n*) Cf. L. Le Fur, *État fédéral et confédération d'États* (Paris, 1896); of Federal Government (Boston, 1891).  
A. B. Hart, *Introduction to the Study*

of the Confederation, as such, were entitled to equal rights. New States might be admitted into the union by the unanimous consent of the members (*o*). The affairs of the union were confided to a Federative Diet, which sat at Frankfort-on-the-Main, in which the respective States were represented by their ministers with a voting power proportionate to the importance of each State. Austria presided in the Diet, but each State had a right to propose any measure for deliberation. The Diet was formed into what was called a 'General Assembly' ('Plenum'), for the decision of certain specific questions. Every question to be submitted to the general assembly of the Diet was first discussed in the ordinary assembly, where it was decided by a majority of votes. But in the general assembly ('in pleno') two-thirds of all the votes were necessary to a decision. The ordinary assembly determined what subjects were to be submitted to the general assembly. But all questions concerning the adoption or alteration of the fundamental laws of the Confederation, or organic regulations establishing permanent institutions, as means of carrying into effect the declared objects of the union, or the admission of new members or concerning the affairs of religion, were submitted to the general assembly; and, in all these cases, absolute unanimity was necessary to a final decision (*p*). The Diet had power to establish fundamental laws for the Confederation, and organic regulations as to its foreign, military, and internal relations (*q*). All the States guaranteed to each other the possession of their respective dominions within the union, and engaged to defend, not only entire Germany, but each individual State, in case of attack. When war was declared by the Confederation, no State could negotiate separately with the enemy, nor conclude peace or an armistice, without the consent of the rest. Each member of the Confederation might contract alliances with other foreign States, provided they were not directed against the security of the Confederation, or the individual States of which it was composed. No State could make war upon another member of the union, but all the States were bound to submit their differences to the decision of the Diet. This body was to endeavour to settle them by mediation; and if unsuccessful, and a juridical sentence became necessary, resort was to be had to an arbitral tribunal, ('Austrägal Instanz,') to which the litigating parties were bound to submit without appeal (*r*).

(*o*) Acte final du Congrès de Vienne, Art. 53, 54, 55. Deutsche Bundesacte, vom 8 Juni, 1815, Art. 1. Wiener Schluss-Acte, vom 15 Mai, 1820, Art. 1, 6.

(*p*) Acte final, Art. 58. Wiener Schluss-Acte, Art. 12—15.

(*q*) Acte final, Art. 62.

(*r*) Acte final, Art. 63.

In case of rebellion or insurrection, or imminent danger thereof in one or more States of the Confederation, the Diet might interfere to suppress such insurrection or rebellion, as threatening the general safety of the Confederation. The decrees of the Diet were executed by the local governments of the particular States of the Confederation, on application to them by the Diet for that purpose, excepting in those cases where the Diet interfered to suppress an insurrection or rebellion in one or more of the States; and even in these instances, the execution was to be enforced, so far as practicable, in concert with the local government against whose subjects it was directed (*s*). The Diet had also power to regulate the commercial intercourse between the different States, and the free navigation of the rivers belonging to the Confederation, as secured by the Treaty of Vienna (*t*).

Of the internal sovereignty of the States of the Germanic Confederation.

Notwithstanding the great mass of powers thus given to the Diet, and the numerous restraints imposed upon the exercise of internal sovereignty, by the individual States of which the union was composed, it does not appear that the Germanic Confederation could be distinguished in this respect from an ordinary equal alliance between independent sovereigns, except by its permanence, and by the greater number and complication of the objects it was intended to embrace. In respect to their internal sovereignty, the several States of the Confederation did not form, by their union, one compositive State, nor were they subject to a common sovereign. Though what were called the fundamental *laws* of the Confederation were framed by the Diet, which had also power to make organic regulations respecting its federal relations, these regulations were not, in general, enforced as laws directly binding on the private individual subjects, but only through the agency of each separate Government adopting them, and giving them the force of laws within its own local jurisdiction. All the members of the Confederation, as such, were equal in rights; and the occasional obedience of the Diet, and through it of the several States, to the commands of the two great preponderating members of the Confederation, Austria and Prussia, or even the habitual influence exercised by them over its councils, and over the councils of its several States, did not, in legal contemplation, impair their internal sovereignty, or change the legal character of their union.

Of the external sovereignty of these States.

In respect to the exercise by the confederated States of their external sovereignty, we have already seen that the power of

(*s*) Wiener Schluss-Acte, Art. 32.

(*t*) Bundesacte, Art. 19. Acte final, Art. 108—117.



contracting alliances with other States, foreign to the Confederation, was expressly reserved to all the confederated States, with the proviso that such alliances were not directed against the security of the Confederation itself, or that of the several States of which it was composed. Each State also retained its rights of legation, both with respect to foreign Powers and to its co-States (*u*). Although the diplomatic relations of the Confederation with the five great European Powers, parties to the Final Act of the Congress of Vienna, 1815, were habitually maintained by permanent legations from those Powers to the Diet at Frankfort, yet the Confederation itself was not habitually represented by public ministers at the courts of these, or any other foreign Powers; whilst each confederated State habitually sent to, and received such minister from other sovereign States, both within and without the Confederation. It was only on extraordinary occasions, such, for example, as the case of a negotiation for the conclusion of a peace or armistice, that the Diet appointed plenipotentiaries to treat with foreign Powers (*x*).

Such of the confederated States as had possessions without the limits of the Confederation, retained the authority of declaring and carrying on war against any Power foreign to the Confederation, independently of the Confederation itself, which remained neutral in such a war, unless the Diet should recognise the existence of a danger threatening the federal territory. The sovereign members of the Confederation, having possessions without the limits thereof, were the Emperor of Austria, the King of Prussia, the King of the Netherlands, and the King of Denmark. Whenever, therefore, any one of these sovereigns undertook a war in his character of a European Power, the Confederation, whose relations and obligations were unaffected by such war, remained a stranger thereto; in other words, it remained neutral, even if the war was defensive on the part of the confederated sovereign as to his possessions without the Confederation, unless the Diet recognised the existence of a danger threatening the federal territory (*y*).

In other cases of disputes, arising between any State of the Confederation and foreign Powers, and the former asked the intervention of the Diet, the Confederation might interfere as an ally, or as a mediator; might examine the respective complaints and

States with domains beyond the Confederation.

(*u*) Klüber, Öffentliches Recht des Deutschen Bundes, §§ 461, 463.

(*x*) Klüber, § 148, § 152 a. Wiener Schluss-Acte, § 49.

(*y*) Wiener Schluss-Acte, Art. 46, 47. Klüber, Öffentliches Recht des Deutschen Bundes, § 152 f.

pretensions of the contending parties. If the result of the investigation was, that the co-State was not in the right, the Diet would make the most serious representations to induce it to renounce its pretensions, would refuse its interference, and, in case of necessity, would take all proper means for the preservation of peace. If, on the contrary, the preliminary examination proved that the confederated State was in the right, the Diet would employ its good offices to obtain for it complete satisfaction and security (*z*).

The Germanic Confederation a system of confederated States.

It follows, that not only the internal but the external sovereignty of the several States composing the Germanic Confederation, remained unimpaired, except so far as it might be affected by the express provisions of the fundamental laws authorizing the federal body to represent their external sovereignty. In other respects, the several confederated States remained independent of each other, and of all States foreign to the Confederation. Their union constituted what the German public jurists call a 'Staatenbund,' a league of States, as contradistinguished from a 'Bundesstaat,' that is to say, a union of States under a supreme Federal Government (*a*).

German unity.

The growing power of the Germanic Confederation, and the desire of establishing German unity, gave rise to the project of creating an empire that should embrace the whole German race. In 1848, a congress assembled at Frankfort for the purpose of discussing this scheme, but nothing was then effected. Since that date the idea has been frequently revived, but the rivalry of Austria and Prussia, and the ambition and jealousy of the minor States long prevented its being carried out.

North German Confederation.

The war of 1864 entered into by Austria and Prussia against Denmark, tended materially to promote German unity; and the subsequent war of 1866, between Austria and Prussia, resulted in the dissolution of the Germanic Confederation, and the establishment of the North German Confederation. Austria was thereby excluded from participating in the affairs of Germany (*b*), and Prussia placed at the head of a national movement. This Confederation consisted of the kingdoms of Prussia and Saxony,

(*z*) Wiener Schluss-Acte, Art. 35—49. Klüber, § 462.

(*a*) Klüber, §§ 103a, 176, 248, 460, 461, 462. Heffter, Das Europäische Völkerrecht, § 21.

The Treaty of Paris, 1814, Art. 6, declares: "Les états de l'Allemagne seront indépendans et unis par un lien fédératif."

The Final Act of the Congress of Vienna, 1815, Art. 54, declares:—"Le

but de cette Confédération est le maintien de la sûreté extérieure et intérieure de l'Allemagne, de l'indépendance et de l'inviolabilité de ses états confédérés."

For further details respecting the Germanic Constitution, see Wheaton, History of the Law of Nations, pp. 455 *et seq.*

(*b*) Hertslet, Map of Europe by Treaty, vol. iii. p. 1699.



the Grand Duchies of Mecklenburg-Schwerin, Mecklenburg-Strelitz, Oldenburg, and Saxe-Weimar, the Duchies of Anhalt, Saxe-Meiningen, Saxe-Coburg, and Saxe-Altenburg, some smaller States, and the free cities of Hamburg, Bremen, and Lübeck (*c*). These States agreed to enter into a perpetual confederation for the defence of the Federal territory, and of the rights prevailing therein, as well as for fostering the welfare of the German people.

After the war of 1870-71 with France, the idea of unity received its fullest development. The kingdoms of Bavaria and Würtemberg, and the Grand Duchies of Baden and Hesse, were united to the North German Confederation, and the whole received the name of the German Empire (*d*). Within this Confederate territory the empire exercises the right of legislation according to the tenor of the Constitution, and with the effect that the imperial laws take precedence of the laws of the States (*e*). Legislation is carried on by a Council of the Confederation ('Bundesrat'), and an Imperial Diet ('Reichstag') (*f*). The Council consists of the representatives of the members of the Confederation, amongst whom the votes are divided in such manner that Prussia has, with the former votes of Hanover, Electoral Hesse, Holstein, Nassau and Frankfort, seventeen votes, Bavaria six, Saxony four, Würtemberg four, Baden three, Hesse three, Alsace-Lorraine three, Mecklenburg-Schwerin two, Brunswick two, and seventeen smaller States, one each (*g*). The totality of such votes can only be given in one sense, and there are sixty-one votes in all.

The Presidency of the Confederation belongs to the King of Prussia, who bears the name of German Emperor, and who represents the empire internationally, declares war, makes peace, enters into treaties, and receives ambassadors. The consent of the Council is necessary for declaring war, unless the territory of the empire is actually attacked (*h*). The Imperial Diet is elected by universal and direct election (*i*), and its proceedings are public (*k*). The army and navy of the whole empire are single forces under the command of the Emperor (*l*).

Thus, Germany has now become a 'compositive' State, and the independence of its various members is merged in the sovereignty of the empire; though the regnant heads of the several States retain their personal position as Sovereigns.

(*c*) State Papers, vol. lvii. p. 296.  
Hertslet, Map of Europe by Treaty,  
vol. iii. p. 1807.

(*d*) Hertslet, Map of Europe, vol. iii.  
p. 1930.

(*e*) Art. ii. of the Constitution of  
the German Empire.

(*f*) Art. v.

(*g*) Art. vi.

(*h*) Art. xi.

(*i*) Art. xx.

(*k*) Art. xxii.

(*l*) Arts. liiii. and lxiii.

The German  
Empire since  
the war with  
France.



The Zollverein.

One of the drawbacks to the Germanic Confederation of 1815 was the preservation by each State of its own custom-houses and imposts. This was found to interfere so materially with the development of trade, that the Diet endeavoured to frame some legislative scheme for regulating the whole customs duties of the union, and for abolishing internal custom-houses within its territories. The Diet failed in its attempt, but the idea was gradually carried out by independent action on the part of several of the States. In 1827, Bavaria and Würtemberg signed a treaty suppressing the custom-houses between themselves, adopting a uniform tariff of duties, and dividing the receipts proportionally (*m*). This was the first treaty of the kind, and was soon followed by others with the same object, *e.g.*, by Prussia with Anhalt and Hesse-Darmstadt, and by Saxony with Hesse-Cassel, Brunswick, Nassau, and some smaller States.

The customs association to which Prussia belonged was called the 'Zollverein,' and by the year 1855, the exertions of that State had absorbed into this league the whole of Germany, except Austria, the two Mecklenburg Duchies, Holstein, and the Hanse Towns (*n*). In 1867, the Zollverein was re-constituted by a treaty which came into force on the 1st of January, 1868, and was to continue till the 31st of December, 1877. In 1868, the Mecklenburg Duchies and Lübeck joined the league, which, as Austria had then been excluded from the affairs of Germany, embraced all the German Empire except the free towns of Hamburg and Bremen. The constitution of the German Empire of 1871 expressly kept in force the treaty of July, 1867, and confirmed the right of Hamburg and Bremen to remain as free ports outside the customs frontier, until they should apply to be admitted therein (*o*). This application was made in 1888, and Hamburg and Bremen entered into the Zollverein in October of that year (*p*). Since 1906 this customs union embraces practically the whole of the States of Germany and the Grand Duchy of Luxemburg, as well as the Austrian communes of Jungholz and Mittelberg.

United States of America.

The constitution of the United States of America is of a very different nature from that of the Germanic Confederation. It is not merely a league of sovereign States for their common defence

(*m*) Martens, *Nouveau Recueil*, vol. vii. p. 167. *State Papers*, vol. xiv. p. 803.

(*n*) Calvo, vol. i. § 63, p. 166.

(*o*) Arts. xl. and xxxiv. See Herts-

let, *Map of Europe*, vol. iii. pp. 1939, 1941. *Statesman's Manual*, 1877, tit. Germany.

(*p*) *Annual Register*, 1888.

against external and internal violence, but a supreme federal government, or composite State, acting not only upon the sovereign members of the Union, but directly upon all its citizens in their individual and corporate capacities. It was established, as the constitutional act expressly declares, by "the people of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to them and their posterity" (q). This constitution, and the laws made in pursuance thereof, and treaties made under the authority of the United States, are declared to be the supreme law of the land; and that the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

The legislative power of the Union is vested in a Congress, consisting of a Senate, the members of which are chosen by the local legislatures of the several States, and a House of Representatives, elected by the people in each State. This Congress has power to levy taxes and duties, to pay the debts, and provide for the common defence and general welfare of the Union; to borrow money on the credit of the United States; to regulate commerce with foreign nations, among the several States, and with the Indian tribes; to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcy throughout the Union; to coin money, and fix the standard of weights and measures; to establish post-offices and post-roads; to secure to authors and inventors the exclusive right to their writings and discoveries; to punish piracies and felonies on the high seas, and offences against the law of nations; to declare war, grant letters of marque and reprisal, and regulate captures by sea and land; to raise and support armies; to provide and maintain a navy; to make rules for the government of the land and naval forces; to exercise exclusive civil and criminal legislation over the district where the seat of the federal government is established, and over all forts, magazines, arsenals, and dockyards belonging to the Union, and to make all laws necessary and proper to carry into execution all these and the other powers vested in the federal government by the constitution.

Legislative  
power of the  
union.

(q) The form of government is based on the Constitution of Sept. 17, 1787. To this ten amendments were added in 1791; an eleventh in 1798;

a twelfth in 1804; a thirteenth in 1865; a fourteenth in 1868; a fifteenth in 1870; a sixteenth and a seventeenth in 1913.

Executive  
power.

To give effect to this mass of sovereign authorities, the executive power is vested in a President of the United States, chosen by electors appointed in each State in such manner as the legislature thereof may direct. The judicial power extends to all cases in law and equity arising under the constitution, laws, and treaties of the Union, and is vested in a Supreme Court, and such inferior tribunals as Congress may establish. The federal judiciary exercises under this grant of power the authority to examine the laws passed by Congress and the several State legislatures, and, in cases proper for judicial determination, to decide on the constitutional validity of such laws. The judicial power also extends to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens, or subjects (*r*).

Legislation in  
the United  
States.

Dana considers the language of this Article of the Constitution likely to mislead foreign readers. He denies the existence of any tribunal which has special and direct power to decide questions of constitutional law. The Supreme Court is the court of final resort, from whose decision there is no appeal; but, like all other courts, it only decides the questions of law that litigants bring before it. The American Constitution is a code of positive law; and is, moreover, the law having the highest authority in the Union. Acts of Congress do not correspond to English Acts of Parliament. The latter are supreme; and the only business of an English Court, when an Act comes before it, is to fix upon it the interpretation which the legislature is supposed to have intended. In America, a litigant may appeal to the Supreme Court against an Act of Congress, and the Court may declare whether the Act is constitutional or not. If the Court pronounces an Act to be unconstitutional, it remains on the statute book, but is inoperative, unless the Court at a subsequent time reverses its own decision (*s*).

Story, in his Commentary on the Constitution, says, "In measures exclusively of a political, legislative, or executive character, it is plain that, as the supreme authority as to these questions belongs to the legislative and executive departments, they cannot

(*r*) Const., Art. iii. § 2.

(*s*) Wheaton, ed. by Dana, note 31, p. 79.



be re-examined elsewhere. But where the question is of a different nature, and capable of judicial inquiry and decision, there it admits of a very different consideration. It is in such cases that there is a final and common arbiter provided by the Constitution itself, to whose decisions all others are subordinate; and that arbiter is the supreme judicial authority of the Courts of the Union. No mode is provided by which any superior tribunal can re-examine what the Supreme Court has itself decided" (*t*).

In 1866, an application was made to the Supreme Court to restrain the President from carrying into effect an Act of Congress alleged to be unconstitutional; but the Court decided that such a proceeding was not within their jurisdiction. In 1895, the Supreme Court decided that the income tax imposed by the Tariff Act of the previous year was unconstitutional, and the amounts already paid under it were refunded. This decision involved a loss to the revenue estimated at 30,000,000*l.* per annum (*u*).

The treaty-making power is vested exclusively in the President and Senate; all treaties negotiated with foreign States being subject to their ratification. No State of the Union can enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in the payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; grant any title of nobility; lay any duties on imports or exports, except such as are necessary to execute its local inspection laws, the produce of which must be paid into the national treasury; and such laws are subject to the revision and control of Congress. Nor can any State, without the consent of Congress, lay any tonnage duty; keep troops or ships of war in time of peace; enter into any agreement or compact with another State or with a foreign Power; or engage in war unless actually invaded, or in such imminent danger as does not admit of delay. The Union guarantees to every State a republican form of government, and engages to protect each of them against invasion, and, on application of the legislature, or of the executive, when the legislature cannot be convened, against domestic violence.

Treaty-making power.

It is not within the province of this work to determine how far the internal sovereignty of the respective States composing the

The American union is a supreme

(*t*) J. Story, Commentaries on the Constitution of the United States, vol. i. p. 266 (4th ed. Boston, 1873).

(*u*) *State of Mississippi v. Johnson*, 4 Wallace, 475; *Pollock v. Farmer's*

*Loan and Trust Co.*, 158 U. S. Rep. 601. A full account of the American judicial system will be found in Bryce, *The American Commonwealth*, chaps. 22 and 42 (Revised ed. 1910).

federal  
government.

Union is impaired or modified by these constitutional provisions. But since all those powers, by which the international relations of these States are maintained with foreign States, in peace and in war, are expressly conferred by the constitution on the federal government, whilst the exercise of these powers by the several States is expressly prohibited, it is evident that the external sovereignty of the nation is exclusively vested in the Union. The independence of the respective States, in this respect, is merged in the sovereignty of the federal government, which thus becomes what the German public jurists call a 'Bundesstaat.'

Swiss Con-  
federation.

The Swiss Confederation, as remodelled by the federal pact of 1815, consists of a union between the then twenty-two Cantons of Switzerland; the object of which is declared to be the preservation of their freedom, independence, and security against foreign attack, and of domestic order and tranquillity. The several Cantons guarantee to each other their respective constitutions and territorial possessions. The Confederation has a common army and treasury, supported by levies of men and contributions of money, in certain fixed proportions, among the different Cantons. In addition to these contributions, the military expenses of the Confederation are defrayed by duties on the importation of foreign merchandise, collected by the frontier Cantons, according to the tariff established by the Diet, and paid into the common treasury. The Diet consists of one deputy from every Canton, each having one vote, and assembles every year, alternately, at Berne, Zürich, and Lucerne, which are called the directing Cantons (the 'Vororte'). The Diet has the exclusive power of declaring war, and concluding treaties of peace, alliance, and commerce, with foreign States. A majority of three-fourths of the votes is essential to the validity of these acts; for all other purposes, a majority is sufficient. Each Canton may conclude separate military capitulations and treaties, relating to economical matters and objects of police, with foreign Powers; provided they do not contravene the federal pact, nor the constitutional rights of the other Cantons. The Diet provides for the internal and external security of the Confederation; directs the operations, and appoints the commanders of the federal army, and names the ministers deputed to other foreign States. The direction of affairs, when the Diet is not in session, is confided to the directing Canton ('Vorort'), which is empowered to act during the recess. The character of directing Canton alternates every two years, between Zürich, Berne, and Lucerne. The Diet may delegate to the



directing Canton, or 'Vorort,' special full powers, under extraordinary circumstances, to be exercised when the Diet is not in session; adding, when it thinks fit, federal representatives, to assist the 'Vorort' in the direction of the affairs of the Confederation. In case of internal or external danger, each Canton has a right to require the aid of the other Cantons; in which case, notice is to be immediately given to the 'Vorort,' in order that the Diet may be assembled, to provide the necessary measures of security (*x*).

The compact, by which the sovereign Cantons of Switzerland are thus united, forms a federal body, which, in some respects, resembles the Germanic Confederation, whilst in others it more nearly approximates to the American Constitution. Each Canton retains its original sovereignty unimpaired, for all domestic purposes, even more completely than the German States; but the power of making war, and of concluding treaties of peace, alliance, and commerce, with foreign States, being exclusively vested in the federal Diet, all the foreign relations of the country necessarily fall under the cognizance of that body. In this respect, the present Swiss Confederation differs materially from that which existed before the French Revolution of 1789, which was, in effect, a mere treaty of alliance for the common defence against external hostility, but which did not prevent the several Cantons from making separate treaties with each other, and with foreign Powers (*y*).

Since the French Revolution of 1830, various changes have taken place in the local constitutions of the different Cantons, tending to give them a more democratic character; and several attempts were made to revise the federal pact, so as to give it more of the character of a supreme federal government, or 'Bundesstaat,' in respect to the internal relations of the Confederation. Those attempts proved abortive; and Switzerland remained subject to the federal pact of 1815, except that three of the original Cantons,—Basle, Unterwalden, and Appenzel,—were dismembered, so as to increase the whole number of Cantons to twenty-five. But as each division of these three original Cantons was entitled to half a vote only in the Diet, the total number of votes remained twenty-two, as under the original federal pact (*z*).

In 1848, the Swiss Constitution was remodelled, but the essential principles of the pact of 1815 were maintained. The Cantons

Constitution of the Swiss Confederation compared with those of the Germanic Confederation and of the United States.

Abortive attempts, since 1830, to change the federal pact of 1815.

Changes in the Swiss Constitution

(*x*) Martens, *Nouveau Recueil*, tom. viii. p. 173.

(*y*) Merlin, *Répertoire*, tit. *Ministre*

*Public*.

(*z*) Wheaton, *Hist. Law of Nations*, pp. 494—496.



in 1848 and  
1874.

retained their sovereignty, except where it was limited by the constitution; they exercised all rights that were not conferred on the Federal Government. All political alliances between the Cantons were forbidden; but they were entitled to enter into conventions among themselves for regulating matters appertaining to legislation, the administration of justice, &c., subject to the approval of the federal authority. The Federal Council represented the Cantons in their relation to foreign States. The rights of declaring war, of making peace, and of entering into treaties were vested, as before, exclusively in the Federal Government. The supreme authority of the Union was vested in a Federal Assembly, consisting of two houses—a national council ('Nationalrat') elected directly by the people, and a council of States ('Ständerat') composed of two deputies from each Canton (forty-four in all). The Federal Council or executive ('Bundesrat') was composed of seven persons elected by the Federal Assembly from all the citizens eligible for the National Council, but no two members of it were to come from the same Canton. They retained their office for three years, and from among them a President was annually to be chosen, but they were precluded from sitting in either House of the Federal Legislature. This body constituted the executive authority of the Confederation (*a*). In 1874 the Swiss Constitution was again revised, and some serious changes were made. The power of the Federal Government was greatly strengthened, and the maintenance and control of the army was conferred upon it (*b*). Switzerland has now ceased to be a system of confederated States ('Staatenbund'), and has become a 'compositive' State ('Bundesstaat') (*c*).

(*a*) See Calvo, liv. ii. § 55.

(*b*) Annual Reg. 1874, p. 288.

(*c*) Cf. J. M. Vincent, Government in Switzerland (London, 1900).

Calvo, *loc. cit.*

## PART SECOND.

### ABSOLUTE INTERNATIONAL RIGHTS OF STATES.

#### CHAPTER I.

##### RIGHT OF SELF-PRESERVATION AND INDEPENDENCE.

THE rights which sovereign States enjoy with regard to one another may be divided into rights of two sorts: primitive or primary, or absolute rights; conditional, or hypothetical rights (a). Rights of sovereign States, with respect to one another.

Every State has certain sovereign rights, to which it is entitled as an independent moral being; in other words, because it is a State. These rights are called the absolute international rights of States, because they are not limited to particular circumstances.

The rights to which sovereign States are entitled, under particular circumstances, in their relations with others, may be termed their conditional international rights; and they cease with the circumstances which gave rise to them. They are consequences of a quality of a sovereign State, but consequences which are not permanent, and which are only produced under particular circumstances. Thus war, for example, confers on belligerent or neutral States certain rights, which cease with the existence of the war.

Of the absolute international rights of States, one of the most essential and important, and that which lies at the foundation of all the rest, is the right of self-preservation. Right of self-preservation. It is not only a right with respect to other States, but a duty with respect to its own members, and the most solemn and important which the State owes to them. (This right necessarily involves all other incidental rights, which are essential as means to give effect to the principal end.

(a) Klüber, *Droit des Gens moderne de l'Europe*, § 36.

Right of self-defence modified by the equal rights of other States, or by treaty.

Among these is the right of self-defence. (This again involves the right to require the military service of all its people, to levy troops and maintain a naval force, to build fortifications, and to impose and collect taxes for all these purposes.) It is evident that the exercise of these absolute sovereign rights can be controlled only by the equal corresponding rights of other States, or by special compacts freely entered into with others, to modify the exercise of these rights.

(In the exercise of these means of defence, no independent State can be restricted by any foreign Power. But another nation may, by virtue of its own right of self-preservation, if it sees in these preparations an occasion for alarm, or if it anticipates any possible danger of aggression, demand explanations; and good faith, as well as sound policy, requires that these inquiries, when they are reasonable and made with good intentions, should be satisfactorily answered (b).

Thus, the absolute right to erect fortifications within the territory of the State has sometimes been modified by treaties, where the erection of such fortifications has been deemed to threaten the safety of other communities, or where such a concession has been extorted in the pride of victory, by a Power strong enough to dictate the conditions of peace to its enemy. Thus, by the Treaty of Utrecht, between Great Britain and France, confirmed by that of Aix-la-Chapelle, in 1748, and of Paris, in 1763, the French Government engaged to demolish the fortifications of Dunkirk. This stipulation, so humiliating to France, was effaced in the treaty of peace concluded between the two countries, in 1783, after the war of the American Revolution. By the treaty signed at Paris, in 1815, between the Allied Powers and France, it was stipulated that the fortifications of Huningen, within the French territory, which had been constantly a subject of uneasiness to the city of Basle, in the Helvetic Confederation, should be demolished, and should never be renewed or replaced by other fortifications, at a distance of not less than three leagues from the city of Basle (c). After the separation of Belgium and Holland in 1831, the Powers agreed that as the neutrality of Belgium had been guaranteed, she ought to change the system of military defence which had been adopted for the Kingdom of the Netherlands, and the Belgian fortresses of Menin, Ath, Mons, Philippeville and Marienberg were accordingly selected for demolition (d). In 1856

(b) Heffter, § 40.

(c) Martens, *Recueil des Traités*, tom. ii. p. 469.

(d) Protocol of 17th April, 1831. See Hertzslet, *Map of Europe*, vol. ii. pp. 856, 882.



Russia agreed that the Aland Islands in the Baltic should not be fortified, and that no military or naval establishment should be maintained there (e). Russia and Turkey also agreed at the Peace of Paris, 1856, not to maintain any military-maritime arsenals on the coast of the Black Sea, but this clause of the treaty was abrogated in 1871 (f).

*detin*  
*Case* ((In pursuance of the fundamental right of self-defence, certain extra-territorial acts involving a breach of international law and a disregard of the rights of other States may sometimes be resorted to on the ground of urgent necessity.)) Thus in 1807 England seized the Danish fleet in order to prevent its falling into the hands of Napoleon,—a proceeding which has been condemned by continental writers, but defended by Anglo-American. In 1837, during the Canadian insurrection, the American steamer, the Caroline, which was intended to be used for an attack on British territory, was seized by Canadian forces and set adrift over the Niagara Falls. Before the expedition against the vessel had started it was thought that she would be found moored in British territory, but afterwards it was found she had shifted to the American side of the Niagara River; none the less, she was seized. In the negotiations between the two Governments (which lasted five years), the United States complained of the violation of its territory, whereupon Great Britain replied that the American Government had permitted within its territory the making of hostile preparations, and that its subjects had supported the insurrection. Daniel Webster, then Secretary of State, held that in order to justify the act of the Canadian authorities England must show a “necessity of self-defence, instant, overwhelming, and leaving no choice of means and no moment for deliberation,” and also that the said authorities “did nothing unreasonable or excessive, since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it.” These conditions were accepted by Lord Ashburton as being applicable to the question at issue, and were shown to have been fulfilled. The British Government, however, expressed its regret for what had occurred and for not making an apology earlier; and so the matter was settled amicably (g). Again, during the Cuban insurrection against Spain (1873), the Virginus, a vessel belonging to Cuban insurgents and employed in furtherance of

Self-defence  
and extra-  
territorial  
acts.

(e) *Ibid.* vol. ii. p. 1272.

(f) Art. xiii. See Hertslet, vol. ii. p. 1256; vol. iii. p. 1920.

(g) Cf. Parl. Papers (1843), vol. lxi.; J. B. Moore, *International Arbitrations* (Washington, 1898), vol. iii. pp. 2419 *seq.*

the rebellion, was captured, flying the American flag, by a Spanish warship. She was taken to Santiago de Cuba, a number of her officers, crew, and other persons on board (including Americans, Englishmen, and Cubans) were court-martialled, condemned to death as pirates and executed. The charge of piracy was groundless, and the execution of the prisoners unjustifiable. Spain afterwards paid compensation to the United States and to Great Britain. On the other hand, the seizure of the vessel (which was handed over to the United States) appears to have been regarded as justified on the ground of self-defence (*h*). Similarly, by reason of the necessity of self-preservation, the Japanese forces invaded Korea and Manchuria at the outbreak of the Russo-Japanese war (1904). In the Great War (1914) the German Government also appealed to necessity to justify the invasion of Belgium in anticipation of the threatened attack by France. But the facts and documents so far available by no means support the German contention (*i*).

Right of intervention or interference.

The right of every independent State to increase its national dominions, wealth, population, and power, by all innocent and lawful means—such as the pacific acquisition of new territory, the discovery and settlement of new countries, the extension of its navigation and fisheries, the improvement of its revenues, arts, agriculture, and commerce, the increase of its military and naval force—is an incontrovertible right of sovereignty, generally recognised by the usage and opinion of nations. It can be limited in its exercise only by the equal correspondent rights of other States, growing out of the same primeval right of self-preservation. Where the exercise of this right, by any of these means, directly affects the security of others—as where it immediately interferes with the actual exercise of the sovereign rights of other States—there is no difficulty in assigning its precise limits. But where it merely involves a supposed contingent danger to the safety of others, arising out of the undue aggrandisement of a particular State, or the disturbance of what has been called the balance of power, questions of the greatest difficulty arise, which belong rather to the science of politics than of public law.

The occasions on which the right of forcible interference has been exercised in order to prevent the undue aggrandisement of a

(*h*) Cf. Parl. Papers (1874), vol. lxxvi.; Moore, Digest, vol. ii. pp. 895 seq., 967 seq., 980 seq.; Cobbett, Cases, vol. i. pp. 165 seq.

(*i*) Cf. Phillipson, International Law and the Great War (1915), chap. ii.



particular State, by such innocent and lawful means as those above mentioned, are comparatively few, and cannot be justified in any case, except in that where an excessive augmentation of its military and naval forces may give just ground of alarm to its neighbours. The internal development of the resources of a country, or its acquisition of colonies and dependencies at a distance from Europe, has never been considered a just motive for such interference. It seems to be felt with respect to the latter, that distant colonies and dependencies generally weaken, and always render more vulnerable the metropolitan State. And with respect to the former, although the wealth and population of a country are the most effectual means by which its power can be augmented, such an augmentation is too gradual to excite alarm. To which it must be added that the injustice and mischief of admitting that nations have a right to use force for the express purpose of retarding the civilization and diminishing the prosperity of their inoffensive neighbours, are too revolting to allow such a right to be inserted in the international code. Interferences, therefore, to preserve the balance of power, have been generally confined to prevent a sovereign, already powerful, from incorporating conquered provinces into his territory, or increasing his dominions by marriage or inheritance, or exercising a dictatorial influence over the councils and conduct of other independent States (*k*).

Sir W. Harcourt says of intervention: "It is a high and summary procedure which may sometimes snatch a remedy beyond the reach of law. Nevertheless it must be admitted that in the case of intervention, as in that of revolution, its essence is illegality, and its justification is its success. Of all things at once the most unjustifiable and the most impolitic is an unsuccessful intervention" (*l*). Chateaubriand, in a speech in the French Chamber on the Spanish war of 1823, asserted that "no Government has a right to interfere in the affairs of another Government, except in the case where the security and immediate interests of the first Government are compromised" (*m*). It seems impossible to lay down any distinct rules with regard to intervention. We may say, however, that as sovereign States are independent and equal from the point of view of international law, and are

Legal aspect  
of inter-  
vention.

(*k*) Senior, Edinb. Rev. No. 156, Art. 1, p. 329.

(*l*) Letters of Historicus, p. 41.

(*m*) See Halleck, International Law (ed. Sir G. S. Baker, 1908), vol. i. pp. 104, 105; Alison, Hist. of Europe,

ch. 12, § 41; Moniteur, 15th Feb. 1823; Manning, Law of Nations, p. 98; Amari, Nouvel exposé du principe de non-intervention, in Revue de Droit Int. 1873, p. 352.

Legal  
- 2006  
definition



therefore entitled to work out their development in their own way, a fundamental principle that follows as a corollary is that of non-interference in the affairs of other sovereigns; that is to say, in the absence of a specific right conferred by convention or necessarily arising from the dominant principle of self-preservation. But having regard to international practice, as well as to theoretical principles, we must admit that—not to mention earlier periods—during the nineteenth century there were numerous instances of forcible intervention on other grounds than those just mentioned, for example, in the interests of humanity, or with a view to safeguarding the balance of power (though this object may be more or less connected with the principle of self-preservation). As has already been observed, the subject belongs to politics rather than to public law. (It cannot be distinctly stated what combination of circumstances menaces the security of any State, or tends to disturb the balance of power, and what does not.) Statesmen must be guided by the knowledge they possess of the intentions of other countries, and by what they deem necessary for the security of their own, and in the present condition of Europe there seems little probability of any rules regarding intervention being attended to, even if they could be satisfactorily drawn up (n).

Equilibrium  
of forces.

Each member of the great society of nations being entirely independent of every other, and living in what has been called a state of nature in respect to others, acknowledging no common sovereign, arbiter, or judge; the law which prevails between nations being deficient in those external sanctions by which the laws of civil society are enforced among individuals; and the performance of the duties of international law being compelled by moral sanctions only, by fear on the part of nations of provoking general hostility, and incurring its probable evils in case they should violate this law; an apprehension of the possible consequences of the undue aggrandisement of any one nation upon the independence and the safety of others, has induced the States of modern Europe to observe, with systematic vigilance, every material disturbance in the equilibrium of their respective forces.

Earlier wars.

This preventive policy has been the pretext of the most bloody and destructive wars waged in modern times, some of which have certainly originated in well-founded apprehensions of peril to the independence of weaker States, but the greater part have been founded upon insufficient reasons, disguising the real motives by which princes and cabinets have been influenced. Wherever the

(n) See Calvo, vol. i. bk. iii.

spirit of encroachment has really threatened the general security, it has commonly broken out in such overt acts as not only plainly indicated the ambitious purpose, but also furnished substantive grounds in themselves sufficient to justify a resort to arms by other nations. Such were the grounds of the confederacies created, and the wars undertaken to check the aggrandisement of Spain and the house of Austria, under Charles V. and his successors;— an object finally accomplished by the treaty of Westphalia, which so long constituted the written public law of Europe. The long and violent struggle between the religious parties engendered by the Reformation in Germany, spread throughout Europe, and became closely connected with political interests and ambition. The great Catholic and Protestant Powers mutually protected the adherents of their own faith in the bosom of rival States. The repeated interference of Austria and Spain in favour of the Catholic faction in France, Germany, and England, and of the Protestant Powers to protect their persecuted brethren in Germany, France, and the Netherlands, gave a peculiar colouring to the political transactions of the age. This was still more heightened by the conduct of Catholic France under the ministry of Cardinal Richelieu, in sustaining, by a singular refinement of policy, the Protestant princes and people of Germany against the house of Austria, while she was persecuting with unrelenting severity her own subjects of the reformed faith. The balance of power adjusted by the peace of Westphalia was once more disturbed by the ambition of Louis XIV., which compelled the Protestant States of Europe to unite with the house of Austria against the encroachments of France herself, and induced the allies to patronise the English Revolution of 1688, whilst the French monarch interfered to support the pretensions of the Stuarts. ¶ These great transactions furnished numerous examples of interference by the European States in the affairs of each other, where the interest and security of the interfering Powers were supposed to be seriously affected by the domestic transactions of other nations, which can hardly be referred to any fixed and definite principle of international law, or furnish a general rule fit to be observed in other apparently analogous cases (o).

*interference  
as previous  
measures*

The same remarks will apply to the more recent, but not less important events growing out of the French Revolution. They furnish a strong admonition against attempting to reduce to a rule, and to incorporate into the code of nations, a principle so

Wars of the  
French  
Revolution.

X (o) Wheaton, Hist. Law of Nations, Pt. I. §§ 2, 3, pp. 80—88.



indefinite and so peculiarly liable to abuse, in its practical application. The successive coalitions formed by the great European monarchies against France subsequent to her first revolution of 1789, were avowedly designed to check the progress of her revolutionary principles and the extension of her military power. Such was the principle of intervention in the internal affairs of France, avowed by the Allied Courts, and by the publicists who sustained their cause. France, on her side, relying on the independence of nations, contended for non-intervention as a right. The efforts of these coalitions ultimately resulted in the formation of an alliance, intended to be permanent, between the four great Powers of Russia, Austria, Prussia, and Great Britain, to which France subsequently acceded, at the Congress of Aix-la-Chapelle, in 1818, constituting a sort of superintending authority in these Powers over the international affairs of Europe, the precise extent and objects of which were never very accurately defined. As interpreted by those of the contracting Powers, who were also the original parties to the compact called the Holy Alliance, this union was intended to form a perpetual system of intervention among the European States, adapted to prevent any such change in the internal forms of their respective governments, as might endanger the existence of the monarchical institutions which had been re-established under the legitimate dynasties of their respective reigning houses. (This general right of interference was sometimes defined so as to be applicable to every case of popular revolution, where the change in the form of government did not proceed from the voluntary concession of the reigning sovereign, or was not confirmed by his sanction, given under such circumstances as to remove all doubt of his having freely consented. At other times, it was extended to every revolutionary movement pronounced by these Powers to endanger, in its consequences, immediate or remote, the social order of Europe, or the particular safety of neighbouring States.)

The events which followed the Congress of Aix-la-Chapelle prove the inefficacy of all the attempts that have been made to establish a general and invariable principle on the subject of intervention. It is, in fact, impossible to lay down an absolute rule on this subject; and every rule that wants that quality must necessarily be vague, and subject to the abuses to which human passions will give rise, in its practical application.

The measures adopted by Austria, Russia, and Prussia, at the Congress of Troppau and Laybach, in respect to the Neapolitan Revolution of 1820, were founded upon principles adapted to give

Alliance of  
the five great  
European  
Powers.

Right of  
Interference

Congress of  
Troppau and  
of Laybach.



the great Powers of the European continent a perpetual pretext for interfering in the internal concerns of its different States. The British Government expressly dissented from these principles, not only upon the ground of their being, if reciprocally acted on, contrary to the fundamental laws of Great Britain, but such as could not safely be admitted as part of a system of international law.

(1) In the circular despatch, addressed on this occasion to all its diplomatic agents, it was stated that, though 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, it regarded the assumption of such a right as only to be justified by the strongest necessity, and to be limited and regulated thereby; and did not admit that it could receive a general and indiscriminate application to all revolutionary movements, without reference to their immediate bearing upon some particular State or States, or that it could be made, prospectively, the basis of an alliance. The British Government regarded its exercise as an exception to general principles of the greatest value and importance, and as one that only properly grows out of the special circumstances of the case; but it at the same time considered, that exceptions of this description never can, without the utmost danger, be so far reduced to rule, as to be incorporated into the ordinary diplomacy of States, or into the institutes of the law of nations (p).

The British Government also declined to be a party to the proceedings of the Congress held at Verona, in 1822, which ultimately led to an armed interference by France, under the sanction of Austria, Russia, and Prussia, in the internal affairs of Spain, and the overthrow of the Spanish Constitution of the Cortes. The British Government disclaimed for itself, and denied to other Powers, the right of requiring any changes in the internal institutions of independent States, with the menace of hostile attack in case of refusal. It did not consider the Spanish Revolution as affording a case of that direct and imminent danger to the safety and interest of other States, which might justify a forcible interference. The original alliance between Great Britain and the other principal European Powers, was specifically designed for the re-conquest and liberation of the European continent from the military dominion of France; and having subverted that domi-

Congress of  
Verona.

(p) Lord Castlereagh's Circular Despatch, Jan. 19, 1821, Annual Register, vol. lxii. Part II. p. 737.

nion, it took the state of possession, as established by the peace, under the joint protection of the alliance. It never was, however, intended as a union for the government of the world, or for the superintendence of the internal affairs of other States. No proof had been produced to the British Government of any design, on the part of Spain, to invade the territory of France; of any attempt to introduce disaffection among her soldiery; or of any project to undermine her political institutions; and, so long as the struggles and disturbances of Spain should be confined within the circle of her own territory, they could not be admitted by the British Government to afford any plea for foreign interference.

Q If the end of the eighteenth and the beginning of the nineteenth century saw all Europe combined against France, it was not on account of the internal changes which France thought necessary for her own political and civil reformation; but because she attempted to propagate, first, her principles, and afterwards her dominion, by the sword (q). )

War between  
Spain and her  
American  
colonies.

Both Great Britain and the United States, on the same occasion, protested against the right of the Allied Powers to interfere, by forcible means, in the contest between Spain and her revolted American Colonies. The British Government declared its determination to remain strictly neutral, should the war be unhappily prolonged; but that the junction of any foreign Power, in an enterprise of Spain against the colonies, would be viewed by it as constituting an entirely new question, and one upon which it must take such decision as the interests of Great Britain might require. It declared that it could not enter into any stipulation, binding itself either to refuse or delay its recognition of the independence of the colonies, nor wait indefinitely for an accommodation between Spain and the colonies, and that it would consider any foreign interference, by force or menace, in the dispute between them, as a motive for recognising the latter without delay (r).

Attitude of  
the United  
States.

“The United States Government declared that it should consider any attempt, on the part of the allied European Powers, to extend their peculiar political system to the American continent, as dangerous to the peace and safety of the United States.” ) With

(q) Confidential Minute of Lord Castlereagh on the Affairs of Spain, communicated to the Allied Courts in May, 1822. Annual Register, vol. lxxv., Public Documents, p. 94. Mr. Secretary Canning's Letter to Sir C. Stuart, 28th Jan. 1823, p. 114. Same to the

Same, 31st March, 1823, p. 141.

(r) Memorandum of Conference between Mr. Secretary Canning and Prince Polignac, 9th October, 1823, Annual Register, vol. lxxvi., Public Documents, p. 99.



the existing colonies or dependencies of any European Power they had not interfered, and should not interfere; but with respect to the Governments, whose independence they had recognised, they could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, in any other light than as a manifestation of an unfriendly disposition towards the United States. They had declared their neutrality in the war between Spain and those new Governments, at the time of their recognition; and to this neutrality they should continue to adhere, provided no change should occur, which, in their judgment, should make a corresponding change, on the part of the United States, indispensable to their own security. The late events in Spain and Portugal showed that Europe was still unsettled. Of this important fact no stronger proof could be adduced than that the Allied Powers should have thought it proper, on any principle satisfactory to themselves, to have interposed by force in the internal concerns of Spain. To what extent such interpositions might be carried, on the same principle, was a question on which all independent Powers, whose governments differed from theirs, were interested,—even those most remote,—and none more so than the United States.

The policy of the American Government, in regard to Europe, adopted at an early stage of the war which had so long agitated that quarter of the globe, nevertheless remained the same. This policy was, not to interfere in the internal concerns of any of the European Powers; to consider the government, *de facto*, as the legitimate government for them; 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, with regard to the American continents, circumstances were widely different. It was impossible that the Allied Powers should extend their political system to any portion of these continents, without endangering the peace and happiness of the United States. It was therefore impossible that the latter should behold such interposition in any form with indifference (s).

This policy of the United States has acquired the name of the "Monroe doctrine," from its having received its most explicit enunciation in President Monroe's seventh annual message to Con-

The Monroe doctrine.

(s) President Monroe's Message to Congress, 2nd December, 1823. Annual Register, vol. lxx., Public Documents, p. 193.



gress, Dec. 2, 1823. "In the wars of the European Powers," said the President, "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 preparations for our defence. With the movements in this hemisphere we are of necessity more intimately connected, and by causes which must be obvious to all enlightened and impartial observers. The political system of the Allied Powers is essentially different in this respect from that of America. This difference proceeds from that which exists in their respective governments. . . . We owe it, therefore, to candour 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" (t). This formula must be now regarded as a permanent part of the foreign policy of the United States, but it still exists only as a "doctrine," and has not been incorporated into any legislative enactment or into any convention (u).

Later developments of the Monroe doctrine have carried it to a length, and have produced results which were scarcely foreseen by its founder. President Monroe, it is true, went so far in an earlier part of the same message to assert, 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" (x). In a letter written by Jefferson to Monroe, Oct. 24, 1823, the former thus formulated the American policy: "Our first maxim should be, never to entangle ourselves in the broils of Europe. Our second, never to suffer Europe to intermeddle in cis-Atlantic affairs." This was extended by President Grant, who in 1870 declared that for the future "no territory on this continent shall be regarded as a subject of transfer to an European Power." That the United States came to claim the right of leadership and, to a certain extent, of superintendence in American affairs relative to non-American countries was emphasized in the report (July, 1870) of Mr. Fish, the Secretary of State, to President Grant. "The United States," it was said, "by the priority of their inde-

(t) President's Annual Message to Congress, 2nd Dec. 1823. Cf. J. D. Richardson, Messages and Papers of the Presidents of the United States, 10 vols. (Washington, 1896), vol. ii.

p. 218. Calvo, Droit International, Bk. III. §§ 143, 144.

(u) Calvo, *loc. cit.*; Wharton, Digest, §§ 45, 57.

(x) Richardson, *loc. cit.* p. 209.

pendence, 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 them duties of right and of honour regarding American questions, whether those questions affect emancipated colonies, or colonies still subject to European dominion." With the exception of the last statement respecting European rights in the existing colonies in America, the accuracy of this pronouncement may be accepted. It does not, of course, imply that the United States has any right to intervene in the internal affairs of the States on the American continent beyond the grounds of intervention stated above, or to interfere with their independence.

Secretary Olney, in his despatch of July 20th, 1895, laid it down as an axiom that "any permanent political union between a European and American State was unnatural and inexpedient." As Lord Salisbury hinted in his reply, this general condemnation would apply to the connection between Canada, between the West Indian Islands, Honduras, Guiana, and Great Britain, a Power which actually possesses more territory upon the continent of North America than does the United States itself. Finally, in the course of the protracted negotiations arising out of the boundary dispute between Great Britain and Venezuela, President Cleveland gave a startling illustration of the lengths to which the Monroe doctrine might be pushed. In his message of December 17th, 1895, he claimed for the United States the right to "take measures to determine with sufficient certainty for its justification what is the true divisional line between Venezuela and British Guiana"; for this purpose a Commission, consisting solely of United States representatives, was to take evidence and report, and on receipt of the report it would be the duty of the United States "to resist by every means in its power, as a wilful aggression upon its rights and interests, the appropriation to Great Britain of any lands or the exercise of governmental jurisdiction over any territory which after investigation we have determined of right to belong to Venezuela." The tone of the message naturally excited much resentment in Great Britain, and was regretted by a large section of public opinion in the United States. Happily, an accommodating spirit was manifested on both sides, and in the



closing days of 1896 an Arbitration Treaty was concluded, whose award, made in October, 1899, set the disputed boundary finally at rest (*y*).

In accordance with the principle upon which the Monroe doctrine is based the United States has persistently refused to incur international obligations outside its own hemisphere. It authorized the attendance of its delegate at the West African Conference at Berlin, 1885, but declined to ratify the General Act, which would have imposed upon its Government a duty in respect of the territorial integrity and neutrality of distant regions where it has no established interests or control of any kind. And in ratifying the General Act of the Brussels Conference for the suppression of the slave trade, in 1892, the United States representative caused it to be recorded that his Government disclaimed any intention to indicate any interest whatever in the possessions or protectorates established or claimed in Africa by the other Powers (*z*). Since, however, its annexation of Hawaii in 1898, and the cession to it of the Philippine Islands by Spain in the same year, it has become increasingly difficult for the United States to retain its policy of isolation. Its commercial interests in China have forced it into taking joint action with the other great Powers; its forces were represented both in the garrison of the Peking Legations and in the subsequent military occupation.

It is generally admitted that the United States exercises a certain political hegemony on the American continent. But neither this position nor the insistence on the Monroe doctrine would necessarily mean that the United States Government would intervene to prevent a transatlantic Power from exacting just reparation from an American State. Thus the United States, while it intervened in 1865 between France and Mexico, and in 1896 between Great Britain and Venezuela, held aloof in 1901 when Great Britain, Germany and Italy sought to make Venezuela fulfil her international obligations. It was in reference to the latter occasion that President Roosevelt observed in the course of his message, Dec. 3: "We do not guarantee any State against punishment if it misconducts itself, provided that punishment does not take the form of the acquisition of territory by any non-American Power" (*a*).

During the course of the Great War, it was reported that the

(*y*) For the application of the Monroe doctrine to the projected Panama and Nicaraguan canals, see *post*, pp. 324 *seq.*

(*z*) Wharton, *Digest*, § 51; Hertslet, *Map of Africa by Treaty*, No. 22.

(*a*) Moore, *Digest*, vol. vi. p. 590.



South American Republics of Ecuador and Colombia were not observing the obligation of neutrality, in that they allowed Germany to make use of their wireless stations as intelligence centres for her naval forces. Accordingly Great Britain and France asked the United States to bring pressure to bear on the Republics in question in order to secure the proper observance of their duties of neutrality; otherwise the Allies would be compelled to take their own steps to bring the Republics to a sense of their responsibility (b). It was felt in America that the action of the Allies in giving the United States Government an opportunity of using its good offices in South America amounted to a most generous acceptance of the Monroe doctrine. However, as the United States Government had no direct stake and was not closely concerned, it was thought that there would be no objection to the landing of British and French forces in Ecuador and Colombia for the purpose of destroying the wireless installations and taking similar punitive measures, so long as no territory there was to be permanently occupied.

Great Britain had limited herself to protesting against the interference of the French Government in the internal affairs of Spain, and had refrained from interposing by force, to prevent the invasion of the peninsula by France. The constitution of the Cortes was overturned, and Ferdinand VII. restored to absolute power. These events were followed by the death of John VI., King of Portugal, in 1825. The constitution of Brazil had provided that its crown should never be united on the same head with that of Portugal; and Don Pedro resigned the latter to his infant daughter, Donna Maria, appointing a regency to govern the kingdom during her minority, and at the same time, granting a constitutional charter to the European dominions of the House of Braganza. The Spanish Government, restored to the plenitude of its absolute authority, and dreading the example of the peaceable establishment of a constitutional government in a neighbouring kingdom, countenanced the pretensions of Don Miguel to the Portuguese crown, and supported the efforts of his partisans to overthrow the regency and the charter. Hostile inroads into the territory of Portugal were concerted in Spain, and executed with the connivance of the Spanish authorities, by Portuguese troops, belonging to the party of the Pretender, who had deserted into Spain, and were received and succoured by the Spanish authorities

British  
interference  
in the affairs  
of Portugal  
in 1825.

(b) *The Times*, Nov. 14, 1914, p. 8.

*to help  
 solicit  
 by the  
 attached  
 for  
 hard work.*

on the frontiers. Under these circumstances, the British Government received an application from the regency of Portugal, claiming, in virtue of the ancient treaties of alliance and friendship subsisting between the two crowns, the military aid of Great Britain against the hostile aggression of Spain. In acceding to that application, and sending a corps of British troops for the defence of Portugal, it was stated by the British minister that the Portuguese Constitution was admitted to have proceeded from a legitimate source, and it was recommended to Englishmen by the ready acceptance which it had met with from all orders of the Portuguese people. But it would not be for the British nation to force it on the people of Portugal, if they were unwilling to receive it; or if any schism should exist among the Portuguese themselves, as to its fitness and congeniality to the wants and wishes of the nation. They went to Portugal in the discharge of a sacred obligation, contracted under ancient and modern treaties. When there, nothing would be done by them to enforce the establishment of the constitution; but they must take care that nothing was done by others to prevent it from being fairly carried into effect. The hostile aggression of Spain, in countenancing and aiding the party opposed to the Portuguese Constitution, was in direct violation of repeated solemn assurances of the Spanish cabinet to the British Government, engaging to abstain from such interference. The sole object of Great Britain was to obtain the faithful execution of those engagements. The former case of the invasion of Spain by France, having for its object to overturn the Spanish Constitution, was essentially different in its circumstances. France had given to Great Britain cause of war, by that aggression upon the independence of Spain. The British Government might lawfully have interfered, on grounds of political expediency; but they were not bound to interfere, as they were now bound to interfere on behalf of Portugal, by the obligations of treaty. War might have been their free choice, if they had deemed it politic, in the case of Spain; interference on behalf of Portugal was their duty, unless they were prepared to abandon the principles of national faith and national honour (c).

*no legal  
 weight*

Interference  
 of the  
 Christian  
 Powers of  
 Europe, in  
 favour of the  
 Greeks.

The interference of the Christian Powers of Europe, in favour of the Greeks, who, after enduring ages of cruel oppression, had shaken off the Ottoman yoke, affords a further illustration of the principles of international law authorizing such an interference, not only where the interests and safety of other Powers are im-

(c) Canning's Speech in the House of Commons, 11th December, 1826, Annual Register, vol. lxxviii. p. 192.



diately affected by the internal transactions of a particular State, but where the general interests of humanity are infringed by the excesses of a barbarous and despotic government. These principles are fully recognised in the treaty for the pacification of Greece, concluded at London, on the 6th of July, 1827, between France, Great Britain, and Russia. The preamble of this treaty sets forth, 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 subjects of the high contracting parties to considerable losses, but, besides, render necessary burdensome measures of protection and repression.” It then states that the British and French Governments, having received a pressing request from the Greeks to interpose their mediation with the Porte, and being, as well as the Emperor of Russia, animated by the desire of stopping the effusion of blood, and of arresting the evils of all kinds which might arise from the continuance of such a state of things, had resolved to unite their efforts, and to regulate the operations thereof by a formal treaty, with the view of re-establishing peace between the contending parties, by means of an arrangement, which was called for as much by humanity as by the interest of the repose of Europe. The treaty then provides (Article 1) that the three contracting parties should offer their mediation to the Porte, by a joint declaration of their ambassadors at Constantinople; and that there should be made, at the same time, to the two contending parties, the demand of an immediate armistice, as a preliminary condition indispensable to opening any negotiation. Article 2 provides the terms of the arrangement to be made, as to the civil and political condition of Greece, in consequence of the principles of a previous understanding between Great Britain and Russia. By the 3rd Article it was agreed, that the details of this arrangement, and the limits of the territory to be included under it, should be settled in a separate negotiation between the high contracting Powers and the two contending parties. To this public treaty an additional and secret Article was added, stipulating that the high contracting parties would take immediate measures for establishing commercial relations with the Greeks, by sending to them and receiving from them consular agents, so long as there should exist among them authorities capable of maintaining such relations. That if, within the term of one month, the Porte did not accept the pro-

Intervention  
on moral and  
humanitarian  
grounds.



posed armistice, or if the Greeks refused to execute it, the high contracting parties should declare to that one of the two contending parties that should wish to continue hostilities, or to both, (if it should become necessary, that the contracting Powers intended to exert all the means, which circumstances might suggest to their prudence, to give immediate effect to the armistice, by preventing, as far as might be in their power, all collision between the contending parties.) The secret Article concluded by declaring, that if these measures did not suffice to induce the Ottoman Porte to adopt the propositions made by the high contracting Powers, or if, on the other hand, the Greeks should renounce the conditions stipulated in their favour, the contracting parties would nevertheless continue to prosecute the work of pacification on the basis agreed upon between them; and, in consequence, they authorized, from that time forward, their representatives in London to discuss and determine the ulterior measures to which it might become necessary to resort.)

The Greeks accepted the proffered mediation of the three Powers, which the Turks rejected, and instructions were given to the commanders of the allied squadrons to compel the cessation of hostilities. This was effected by the result of the battle of Navarino, with the occupation of the Morea by French troops; and the independence of the Greek State was ultimately recognized by the Ottoman Porte, under the mediation of the contracting Powers. (If, as some writers supposed, the Turks belonged to a family or set of nations which was not bound by the general international law of Christendom, they had still no right to complain of the measures which the Christian Powers thought proper to adopt for the protection of their religious brethren, oppressed by the Mohammedan rule.) In a ruder age, the nations of Europe, impelled by a generous and enthusiastic feeling of sympathy, inundated the plains of Asia to recover the Holy Sepulchre from the possession of infidels, and to deliver the Christian pilgrims from the merciless oppressions practised by the Saracens. (The Protestant princes and States of Europe, during the sixteenth and seventeenth centuries, did not scruple to confederate and wage war, in order to secure the freedom of religious worship for the votaries of their faith in the bosom of Catholic communities, to whose subjects it was denied. Still more justifiable was the interference of the Christian Powers of Europe to rescue a whole nation, not merely from religious persecution, but from the cruel alternative of being transported from their native land, or exterminated by their merciless oppressors.) The rights of human

*to defend  
religions  
faith*

nature wantonly outraged by this cruel warfare, prosecuted for six years against a civilized and Christian people, to whose ancestors mankind are so largely indebted for the blessings of arts and of letters, were but tardily and imperfectly vindicated by this measure. "Whatever," as Sir James Mackintosh said, "a nation may lawfully defend for itself, it may defend for another people, if called upon to interpose." The interference of the Christian Powers, to put an end to this bloody contest, might, therefore, have been safely rested upon this ground alone, without appealing to the interests of commerce and of the repose of Europe, which, as well as the interests of humanity, are alluded to in the treaty, as the determining motives of the high contracting parties (*d*).

We have already seen, that the relations which have prevailed between the Ottoman Empire and the other European States have only recently brought the former within the pale of that public law by which the latter are governed, and which was originally founded on that community of manners, institutions and religion, which distinguish the nations of Christendom from those of the Mohammedan world (*e*). Yet the integrity and independence of that empire have been considered essential to the general balance of power, ever since the crescent ceased to be an object of dread to the western nations of Europe. The above-mentioned interference of three of the great Christian Powers in the affairs of Greece had been complicated by the separate war between Russia and the Ottoman Empire, which was terminated by the treaty of Adrianople, in 1829, followed by the treaty of alliance between the two empires, of *Unkiar-Skelessi*, in 1833. The *casus fœderis* of the latter treaty was brought on by the attempts of Mehemet Ali, Pasha of Egypt, to assert his independence, and of the Porte, which sought to recover its lost provinces. The *status quo*, which had been established between the Sultan and his vassal by the arrangement of Kutayah, in 1833, under the mediation of France and Great Britain, on which the peace of the Levant depended, and with it the peace of Europe was supposed to depend, was thus constantly threatened by the irreconcilable pretensions of the two great divisions of the Ottoman Empire. The war again broke

Interference  
of Austria,  
Gt. Britain,  
Prussia,  
France, and  
Russia, in the  
internal  
affairs of the  
Ottoman  
Empire, in  
1840.

(*d*) Another treaty was concluded at London, between the same three Powers, on the 7th of May, 1832, by which the election of Prince Otho of Bavaria, as King of Greece, was confirmed, and the sovereignty and independence of the new kingdom guaranteed by the contracting parties, according to the terms of the protocol signed by them on the 3rd of Feb-

ruary, 1830, and accepted by Greece and the Ottoman Porte. King Otho was expelled in 1862, and, after some difficulty in finding any one to fill his place, Prince George of Denmark mounted the Greek throne and took the title of King of the Hellenes in March, 1863.

(*e*) *Vide supra*, p. 18.



out between them in 1839, and the Turkish army was overthrown in the decisive battle of Nezib, which was followed by the desertion of the fleet to Mehemet Ali, and by the death of Sultan Mahmoud II.

In this state of things, the western Powers of Europe thought they perceived the necessity of interfering to save the Ottoman Empire from the double danger with which it was threatened; by the aggressions of the Pasha of Egypt on one side, and the exclusive protectorate of Russia on the other. A long and intricate negotiation ensued between the five great European Powers, from the voluminous documents relating to which the following general principles may be collected, as having received the formal assent of all the parties to the negotiations, however divergent might be their respective views as to the application of those principles.

1. The right of the five great European Powers to interfere in this contest was placed upon the ground of its threatening, in its consequences, the general balance of power and the peace of Europe. The only difference of opinion arose as to the means by which the desirable end of preventing all future conflict between the two contending parties could best be accomplished.

2. It was agreed that this interference could only take place on the formal application of the Sultan himself, according to the rule laid down by the Congress of Aix-la-Chapelle, in 1818, that the five great Powers would never assume jurisdiction over questions concerning the rights and interests of another Power, except at its request, and without inviting such Power to take part in the conference.

3. The death of Sultan Mahnoud being imminent, and the dangers of the Ottoman Empire having increased by a complication of disasters, each of the five Powers declared its determination to maintain the independence of that empire, under the reigning dynasty; and as a necessary consequence of this determination, that none of them should seek to profit by the present state of things to obtain an increase of territory or an exclusive influence.

The negotiations finally resulted in the conclusion of the convention of the 15th July, 1840, between four of the great European Powers, Austria, Great Britain, Prussia, and Russia, to which the Ottoman Porte acceded, and in consequence of which Mehemet Ali was compelled to relinquish the possession of all the provinces held by him, except Egypt, the hereditary Pashalic of which was confirmed to him, according to the conditions contained in the separate Article of the convention (f).

(f) Wheaton, Hist. of the Law of Nations, pp. 563—583. State Papers, vol. xxviii. p. 342.



The Eastern  
Question.

The Ottoman Empire has been an endless source of disturbance to the peace of Europe ever since this treaty of 1840. It occupies a peculiar and anomalous position, and all attempts to establish a permanent and satisfactory relation between this State and the other European Powers have as yet proved failures. The situation of the inhabitants of European Turkey is in many respects unfortunate. The majority are Christians belonging to various nationalities, and subjected to the dominant and Mohammedan race of the Turks, from whom they are alienated by differences not only of religion and race, but of language, manners, and customs. The Turks are not a civilizing people. They are a nation of soldiers, who care little for the peaceful pursuits of trade, literature, and science; while many of their subjects are capable of attaining to the highest forms of civilization. The result has been that the governing race in Turkey has remained nearly stationary, while many of its subjects, and all the neighbouring States, have been rapidly progressing. The government of the Porte is negligently, and in some cases oppressively, carried on. Most of its Christian subjects are connected by the ties of religion and nationality with some of the inhabitants of the neighbouring countries, who are generally prepared to sympathise with and encourage them in any efforts to throw off the authority of the Porte. The result of this state of things has been to leave Turkey in Europe in a condition of chronic disturbance. Insurrections have been numerous, and, owing to the encouragement received by the insurgents from outside, have in some cases been very difficult to quell. In several instances these insurrections have led other European States to interfere between the Porte and its subjects, either on the ground that the Porte would not redress the wrongs of which the insurgents justly complained, or that the treatment of the Christians by the Mohammedans was such as could not be tolerated. The mere fact of the subjects of Turkey calling themselves Christians, although the term Christianity means something very different there from what it does in the west of Europe, has caused them to receive much more sympathy and support than in many cases they really deserved.

These interferences, so long as force was not used to coerce the government of the Sultan, may be justified in international law. Turkey is certainly an independent sovereign State, and *primâ facie* no other States have a right to interfere in its internal affairs. But it is not an independent State in the sense that England and France are independent. It owes its independence in recent times to the support it has received from the great Powers, and this

consequently gives those Powers some right to require that its government shall be properly administered. But this right is not so extensive as to justify the use of force, and this is so not only on general principles, but by express declaration in treaties.

The unfortunate error underlying all attempts to improve the condition of European Turkey has been to suppose that, because this country was situated in Europe, it was therefore capable of being benefited by European institutions and the introduction of European modes of thought and action. But this is not the case. The Turks and many of their subjects are Orientals, and quite different from Europeans; and institutions which have proved most beneficial in England and France are very likely to have quite an opposite effect when established in Turkey. No institutions can be advantageous to a country unless they are adapted to the habits and ideas of the people.

The unsatisfactory condition of Turkey makes it probable that, if left to herself, her empire in Europe might gradually crumble away, leaving the country split up into small and defenceless communities. But her geographical situation would make such a result dangerous to the peace of Europe. If the authority of the Sultan were removed, his territories might pass into the hands of Russia, Austria, or some other great State, and this might seriously alter the balance of power in Europe. The great importance of keeping Constantinople and the Straits of the Bosphorus and Dardanelles in the hands of a non-aggressive State, and of preventing Russia from planting her authority there, and converting the Black Sea into a Russian lake, has led the Western Powers, and especially England, to support and strengthen the authority of the Porte as much as possible. This was the policy that brought about the Crimean War; and until the Treaty of Berlin was executed, the maintenance in its integrity of the Ottoman Empire was one of the most firmly established principles of public law. Nor has the principle been yet abandoned. The Treaty of Berlin, though depriving the Sultan of a considerable portion of his European territories, professes to strengthen and consolidate the remainder, so as to leave him as powerful as the reduced area of his authority will allow him to be. "The Treaties of Paris and of Berlin resemble one another in that both alike are a negation of the right of any one Power, and an assertion of the right of the Powers collectively to regulate the solution of the Eastern Question" (g).

(g) Holland, European Concert, p. 221.



By the Treaty of Paris, 1856, which closed the Crimean War, England, Austria, France, Prussia, Russia, and Sardinia declared "the Sublime Porte admitted to participate in the advantages of the public law and system of Europe. Their Majesties engage, each on his part, to respect the independence and the territorial integrity of the Ottoman Empire; guarantee in common the strict observance of their engagement; and will, in consequence, consider any act tending to its violation as a question of general interest." A separate treaty to the same effect was entered into between England, France, and Austria, on the 15th April, 1856 (*h*). Thus, on two separate occasions in 1856, the great Powers solemnly agreed to support the Ottoman Empire, and maintain it in its integrity. And it was further stipulated in the Treaty of Paris that "if there should arise between the Sublime Porte and one or more of the other signing Powers, any misunderstanding which might endanger the maintenance of their relations, the Sublime Porte and each of such Powers, before having recourse to the use of force, shall afford the other contracting parties the opportunity of preventing such an extremity by means of their mediation" (*i*). The condition of the Christian subjects of the Porte was also considered in the Treaty; and a firman, issued by the Sultan for "ameliorating their condition without distinction of religion or race," was communicated to the contracting parties. At the same time it was distinctly acknowledged that this firman "cannot, in any case, give to the said Powers the right to interfere, either collectively or separately, in the relations of His Majesty the Sultan with his subjects, nor in the internal administration of his empire" (*k*). The international status of Turkey was thus clearly defined. She was recognised as a sovereign State, whose maintenance was deemed necessary for the welfare of Europe; and the only right over her internal administration acquired by the Powers was that already referred to, of pressing their advice on the Porte as to its methods of governing, but not of insisting by force of arms that this advice should be followed.

The Treaty of Paris.

Collect  
secu

The first attempt to overthrow the Treaty of Paris took place in 1870. On the 31st of October in that year, Russia addressed a note to England on the subject of the neutralization of the Black Sea, the terms of which had been defined in the Treaty of 1856. In this note, Prince Gortchakoff asserted the principle of neutralization to be no more than a theory. "The Treaty of 1856," wrote the Prince, "has, moreover, not escaped the modifications to

The Treaty and Declaration of London, 1871.

(*h*) Hertslet, Map of Europe, vol. ii. pp. 1255, 1280.

(*i*) Art. viii.  
(*k*) Art. ix.



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." He then enumerated some alleged infractions of the treaty, and continued: "Our illustrious Master cannot admit, *de jure*, that treaties violated in several of their essential and general clauses should remain binding in other clauses directly affecting the interests of his empire." He concluded by stating that "His Majesty, the Czar, restores to the Sultan the full exercise of his rights in this respect, resuming the same for himself" (*l*). Such a proceeding was utterly subversive of all international morality. If treaties solemnly entered into could be set aside at the mere wish of one of the contracting parties, all public faith was at an end; and no security could be felt as to the binding effect of any treaty whatever. To this note Lord Granville replied, on the part of England, that it had always been held, that the right of cancelling a treaty belongs only to the Governments who have been parties to the original instrument, and that whether the desire of Russia to be freed from the Treaty of Paris were reasonable or not, she could not by her own act abrogate any of its terms. He stated that Her Majesty's Government could not give their sanction to the course announced by Prince Gortchakoff, which he characterised as a very dangerous precedent to the validity of international obligations (*m*).

On the 22nd of November, 1870, a conference to discuss the matter was proposed by Prussia, and ultimately it was agreed that plenipotentiaries from the signatory Powers should meet in London. Before discussing the actual point raised by Russia, viz., the denaturalization of the Black Sea, it was deemed advisable to put forward the following declaration: "The plenipotentiaries of North Germany, of Austria-Hungary, of Great Britain, of Russia, and of Turkey, assembled to-day in Conference, recognise that 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 amicable arrangement" (*n*). It is melancholy to think that the most civilised Powers of the world should have considered it necessary to put forward such a

(*l*) Hertslet, Map of Europe, vol. iii. p. 1893.

(*n*) Hertslet, Map of Europe, vol. iii. p. 1904.

(*m*) *Ibid.* p. 1898.

declaration in the year 1871. It shows that international law, however much talked of and appealed to, has not yet acquired that moral force by which alone the welfare of nations in their mutual intercourse can be secured. After solemnly enunciating this elementary principle, the Powers then proceeded to comply with the demands of Russia, which had first been put forward in direct opposition to it, and a new treaty relative to the Black Sea was entered into.

The binding force of the Treaty of Paris was shaken, but not destroyed, in 1871; in 1875 fresh complications of the Eastern Question commenced. Early in that year an insurrection broke out in Herzegovina, which lasted throughout the year, and gained ground by receiving encouragement from Serbia and Montenegro. Various efforts were made by the other Powers to reconcile the differences between the Porte and its subjects. The first collective attempt was initiated by Austria, and put forward in a document which has since become known as the Andrassy Note. This was issued on the 30th of December, 1875, and was agreed to by the other Powers; but its terms were deemed inadmissible by Turkey, and it was finally rejected altogether. The Andrassy Note having proved a failure, another proposal was put forward in May, 1876, known as the Berlin Memorandum. This was issued by Austria, Russia, and Germany, and was agreed to by France and Italy. But England declined to join in pressing the acceptance of the proposals contained in it upon the Porte, and in a despatch dated 19th May, 1876, Lord Derby explained the reasons for this refusal. Her Majesty's Government were of opinion that the course recommended would tend to strengthen instead of quelling the insurrection; that the Porte did not possess the funds necessary for doing what was asked of it; that some of the points proposed would reduce the Sultan's authority to nullity in the disturbed districts; and that if the insurgents knew that the Powers would intervene further in their behalf if they continued the insurrection after the suggested armistice was over, they would be perfectly certain to continue the insurrection. This scheme also fell through without being productive of any result.

Insurrection  
in Herze-  
govina.

Before the next attempt at pacification was made, the whole aspect of the question had changed. The "Bulgarian atrocities," a series of massacres of Christians by Mohammedans, caused by the fear of a universal rising of the former, had been perpetrated, and had caused the feeling of Europe to be for the time unfavourable to Turkey. War had broken out between Turkey and Serbia; a large Russian force was being assembled on the borders of

Roumania; and the insurrection in Herzegovina somehow ceased to exist and dropped out of all notice.

Conference of  
Constantinople.

A Conference for the settlement of the whole question was then proposed by England. The Conference did meet, but its proposals, although considerably modified during the discussions, were ultimately rejected by Turkey as inconsistent with her independence. On the 31st of March, 1877, a final protocol was submitted to the Porte, in which the Powers expressed a hope that Turkey would ameliorate the condition of her Christian subjects, and that, should she fail in this, "they (the Powers) think it right to declare that such a state of affairs would be incompatible with their interests and those of Europe in general. In such a case they reserve to themselves to consider in common as to the means which they may deem best fitted to secure the well-being of the Christian populations, and the interests of the general peace" (o). The Porte, in its reply, regretted that it had not been invited to take part in the deliberations preceding the protocol, although they affected its vital interests, and it therefore felt "imperiously obliged to assert itself against the authority of such a precedent" (p).

Outbreak of  
war with  
Russia.

Up to this time the Powers had acted strictly in accordance with international law, but a different course was now adopted. On the 19th of April, Russia issued a circular note, in which it was announced that her Government had exhausted all the means in its power to bring about a lasting pacification of Turkey; that as these had failed, the Czar was resolved to undertake this work himself, and had therefore given his armies the orders to cross the frontiers of Turkey; in other words, had declared war (q). To this Lord Derby replied on the 1st of May, that "the course on which the Russian Government had entered . . . is in contravention of the stipulation of the Treaty of Paris, 1856, by which Russia and the other signatory Powers engaged, each on its own part, to respect the independence and territorial integrity of the Ottoman Empire"; that by so doing the Czar had separated himself from the European concert hitherto maintained, and had violated the Declaration of London, 1871 (r). Nevertheless, the war proceeded, and resulted in the overthrow of Turkey. Roumania and Serbia threw off the sovereignty of the Porte, joined Russia in the war, and declared themselves independent.

(o) Parl. Papers, Turkey, No. 9  
(1877), p. 2.

(p) Parl. Papers, Turkey, No. 12  
(1877), p. 5.

(q) Parl. Papers, Turkey, No. 18  
(1877), p. 2.

(r) *Ibid.* p. 3.



On the 3rd of March, 1878, a preliminary treaty of peace was signed between the belligerents at San Stefano. As this treaty made immense alterations in the existing state of things, and as its whole tenor and most of its clauses affected the arrangements made by the Treaty of Paris, it was clearly not obligatory upon the parties to the earlier treaty, other than Russia and Turkey. The Treaty of Paris had been signed by all the great Powers, and their united action could alone dissolve or alter any part of it. Accordingly the Austrian Government proposed that a Conference or Congress (which Lord Beaconsfield considered synonymous terms) should meet to discuss the treaty of San Stefano, and ratify or reject such of its provisions as might be thought best. The Russian Government raised several technical objections to communicating the whole of this treaty to Congress, but finally, through the firm attitude of England, it was agreed that a Congress should meet at Berlin and freely discuss every clause (s).

Before the final consent of Russia was obtained, a secret understanding was entered into between her and England, by which the latter agreed not to oppose certain of the demands of Russia at the Congress. This was divulged by a shorthand writer in the temporary employment of the Foreign Office, and published in an evening newspaper, and its effect was somewhat to lower the prestige England had recently gained as the champion of international law. But the understanding itself contained nothing contrary to that law. The fact that England would not resist certain Russian proposals would not prevent other Governments from doing so if they thought fit. And if, when these matters came to be actually discussed, England would not oppose them, there could be no objection to informing Russia on this point beforehand, especially as without some such understanding it seemed probable that the Congress would not meet at all. Another secret agreement, but this time formulated into a treaty, was made between England and Turkey. By it England undertook, if Russia retained Batoum, Ardahan, Kars, or any of them, and made any future attempt to take possession of any of the Sultan's territories in Asia, to join the Sultan in defending those territories by force of arms. In return, the Sultan promised to introduce such reforms into the country as might be agreed upon, and consented to assign the island of Cyprus to be occupied and administered by England.

Secret agreements of England with Russia and Turkey.

(s) See Lord Salisbury's Despatch of 1st April, 1878. Parl. Papers, Turkey, No. 27 (1878).

This convention was only to last while Russia retained her conquests in Armenia (*t*).

Congress of  
Berlin.

The Congress met at Berlin, and on the 13th of July, 1878, a final treaty for the settlement of the whole question was agreed to. This entirely superseded those parts of the Treaty of San Stefano which the Congress considered to concern the Powers, leaving in force only twelve clauses of minor importance, relating to law-suits in Turkey, prisoners, ratification, the indemnity, and so on (*u*), and materially altered the stipulations of the Treaty of Paris. Roumania, Serbia, and Montenegro were declared independent, and certain portions of territory were added to each. A new principality, under the name of Bulgaria, was formed out of the region lying between the Danube and the Balkans. It was declared autonomous and tributary under the sovereignty of the Sultan, but with a Christian government and a national militia; and its position is somewhat similar to that occupied by Roumania and Serbia before the war. An anomalous province, called Eastern Roumelia, was formed south of the Balkans. The Sultan was left the right of defending the frontiers of this province, but internal order was to be maintained by a native gendarmerie assisted by a local militia. Regular troops were not to be allowed to remain in it unless called for by the Christian Governor-General. The portion of Bessarabia at the mouth of the Danube, taken from Russia and given to Roumania in 1856, was restored to Russia. Bosnia and Herzegovina were to be occupied and administered by Austria (*x*). The rectification of the Turco-Greek frontier was permitted by the 13th Protocol to follow the valley of the Selmyrias on the Ægean side to that of Calamos on the side of the Ionian Sea. In Asia the territories of Ardahan, Kars, and Batoum were taken from Turkey and given to Russia. And, finally, the Treaties of Paris, 1856, and of London, 1871, were maintained in all such provisions as were not abrogated by these stipulations.

Greek  
frontier.

The negotiations between Turkey and Greece with respect to the delimitation of the new frontier showed only that the two States were in a position of disagreement. The intervention of the signatory Powers became necessary in 1880, and by the middle of the following year they succeeded in gaining the acceptance by both States of the frontier as laid down by an International Com-

(*t*) Parl. Papers, Turkey, No. 36 (1878).

(*u*) Holland, European Concert, p. 222.

(*x*) A law including these provinces in the Austrian Customs-Union was passed on 20th December, 1879. Holland, *loc. cit.*

mission appointed in 1880 for that purpose, giving to Greece the Province of Thessaly and part of Epirus (*y*).

Prince Alexander of Battenberg was elected ruler of Bulgaria Bulgaria. on the 29th April, 1879, and the election was assented to by the Powers in accordance with the Treaty. After some discussion the Principality made good its claim to communicate with the Sultan through the Foreign Office at the Porte, and not through a "bureau for the privileged provinces." The Organic Law, provided for by Article IV., was adopted on 28th April, 1879; was suspended by the Prince 10th May, 1881; but re-established 19th September, 1883 (*z*).

In the autumn of 1885 a revolution, the object of which was to get rid of the expensive system of double administration established by the Treaty, took place in Eastern Roumelia. The Governor-General was arrested and sent under escort to Sophia. The Prince of Bulgaria, at the invitation of a provisional government, betook himself to Philippoli. He announced to the Sultan his assumption of the Government and the union of the two countries at the desire of the people (*a*). He expressly recognised the suzerainty of the Imperial Ottoman Government; but, nevertheless, issued a proclamation in which he described himself as Alexander I., by the grace of God and the national will, Prince of the two Bulgarias, both Northern and Southern. The Porte protested, and appealed to Article XVI. of the Treaty; but before taking active measures awaited the result of the deliberations of the Powers. The Czar forbade the Russian officers in the Bulgarian army to enter Roumelia, and, later, commanded them to resign. The Signatories condemned any violation of the Treaty, and formally announced their intention to make their desire for peace respected in the Balkan States. Meanwhile popular excitement ran high in Greece (*b*) and Serbia. Each country complained of the disturbance of the balance of power in the peninsula, and claimed a territorial aggrandisement equal to that obtained by Bulgaria. On the 14th November, notwithstanding recommendations in favour of peace made by the great Powers at Athens and at Belgrade, the Serbian King proclaimed war against the Principality, and, on the same day, the Serbian army, pro-

Union with  
Eastern  
Roumelia.

(*y*) Holland, European Concert, pp. 25, 26, 27; Parl. Paper, Greece, No. 2 (1886).

(*z*) Holland, European Concert, pp. 279, 282, 283.

(*a*) This union was not the reconstruction of the Great Bulgaria esta-

blished by the San Stefano Treaty, which was to have extended to the *Ægean*.

(*b*) The Greeks alleged that the Bulgars, a people without any past or future, were in a minority in Eastern Roumelia (Thrace).



voked, as was said, by repeated Bulgar attacks on Serbian outposts on Serbian territory, crossed the frontier into Bulgaria.

On the receipt of the official declaration of war on the part of Serbia, Prince Alexander telegraphed to the Sultan that he had at once taken measures for the defence of Bulgaria, and asked the co-operation of his Suzerain for the protection of the Empire. About the same time his Highness signed a decree regulating the manner in which the Eastern Roumelia representatives for the Great National Assembly were to be selected. The King of Serbia disclaimed any intention of doing anything which would detract from the rights of the Sultan. The Bulgarians were at first worsted and driven back to their principal position at Slivnitza, covering the plain of Sophia. Prince Alexander, in the meantime, quitted Roumelia, and withdrew Bulgarian troops from that province. On or about 17th November, a series of fights near Slivnitza resulted in the rapid retirement of the Serbian forces towards their own frontier. The Prince again addressed the Sultan. He had completely evacuated Eastern Roumelia. He and his army were defending the integrity of Ottoman territory, and asked his Majesty's co-operation. On 22nd November, the Porte proposed an armistice, and that an Imperial Commissioner should be sent to Eastern Roumelia. The Prince rejected the first proposal while Serbians remained on Bulgarian soil, and deprecating the execution of the second as likely to jeopardise the tranquillity of the province, suggested its postponement till after the conclusion of peace. On 26th November the Bulgars entered Serbia, and the next day occupied Pirot. Their progress, however, was stayed by an Austrian intimation to the Prince that if he advanced further into Serbian territory he would be met by Austrian troops. In the beginning of December two Ottoman delegates proceeded to Eastern Roumelia. On 21st December an armistice was signed until 1st March, 1886, and ultimately the hostile forces withdrew into their respective territories under the supervision of a commission composed of the Austrian military attaché at Belgrade, and the military attachés of the other great Powers at Vienna (c).

Treaty of  
Bucharest.

On 3rd March, 1886, a treaty of peace, containing the single Article, "Peace is re-established between the Kingdom of Serbia and the Principality of Bulgaria from the date of the signature of the present Treaty," was signed at Bucharest by the agents of

(c) Parl. Papers, Turkey, No. 1 (1886); *Ibid.* Turkey, No. 2 (1886).

Turkey, Serbia, and Bulgaria. The ratifications were exchanged on the 17th of the same month (*d*).

On the 5th April, 1886, the Conference of ambassadors of the great Powers and Turkish plenipotentiaries, which, with an intermission of four months, had been sitting at Constantinople during the continuance of the movement in Eastern Roumelia, adopted a protocol, by which (1) the Governor-Generalship of Eastern Roumelia was to be entrusted to the Prince of Bulgaria, in accordance with Article XVII. of the Treaty of Berlin. (2) As long as the administration of Eastern Roumelia and that of the Principality of Bulgaria should remain in the hands of one and the same person, the Mussulman villages situated in the Canton of Kirdjali, as well as the Mussulman villages situated in the Rhodope district, were to be separated from Eastern Roumelia; and this in lieu of the right of the Sublime Porte, as laid down in the first paragraph of Article XV. of the Treaty of Berlin (*e*); the necessary delimitation to be carried out by a Turco-Bulgarian Commission. (3) A Turco-Bulgarian Commission was to be directed to examine the Organic Statute of Eastern Roumelia, and to modify it, with due regard to the exigencies of the situation and local requirements. All the interests of the Imperial Ottoman treasury were likewise to be taken into consideration. The labours of this latter Commission were to be completed in four months, and the result submitted to the sanction of the Conference. Until these modifications should have been sanctioned, the task of administering the province, in accordance with the forms demanded by the then present condition of affairs, was to be entrusted to the wisdom and fidelity of the Prince. (4) All other dispositions of the Treaty of Berlin relative to the Principality of Bulgaria and to Eastern Roumelia were declared maintained and in force (*f*).

Eastern  
Roumelian  
Protocol.

A few days later Prince Alexander, who had contended for a personal nomination of himself in place of the "Prince of Bulgaria," but had been defeated in this respect by Russian opposition, announced his submission to the international act, and his readiness to nominate delegates to the commissions (*g*). The state of siege in Eastern Roumelia was raised, and preparations for the elections were proceeded with. The Special Budget drawn up by the Sophia Government, however, was the cause of much dis-

Later history  
of Bulgaria.

(*d*) Parl. Papers, Turkey, No. 2 (1886).

(*e*) That is, of the right to garrison the Balkans.

(*f*) Parl. Papers, Turkey, No. 2 (1886); Hertslet, Map of Europe, No. 611.

(*g*) Parl. Papers, Turkey, No. 2 (1886); *Ibid.* Turkey, No. 1 (1887).

content in Roumelia; the Prince's civil list being increased by the addition of the salary before paid to the Governor-General, and the total expenditure of the province showing a large increase, exclusive of the tribute to the Porte. The Prince did not disguise his intention, so far as lay in his power, to amalgamate and render homogeneous the Bulgarians north and south of the Balkans; and in his speech delivered at the opening of the Sobranje in June, alluded to the complete union of the two provinces, as proved by the meeting of a single Chamber. The Turkish Commissioners for the revision of the Organic Statute arrived at Sophia in the beginning of August. The first meeting of the Commission took place on the 12th of that month; but there seemed little likelihood of agreement. Military preparations were once more renewed in both Serbia and Bulgaria, and the Bulgarian troops were sent to the frontier. On the 22nd a *coup d'état* was perpetrated at Sophia. The Prince was seized by a party of military rebels and forcibly removed to Russian territory. The Porte announced that it held the authors of any disturbance responsible for events, and declared its intention to decide and act in concert with the great Powers. The Prince, being released by the orders of the Russian Government, returned to Bulgaria, but resigned his position and retired from the country on the 7th September: declaring that the Protocol of Constantinople had broken his back, and had given the opposition an opportunity of working against him, by the fact of his having been made a Turkish functionary (*h*).

The Powers were agreed that a successor should be chosen in accordance with the provisions of the Berlin Treaty. Elections were held in both Bulgaria and Eastern Roumelia for a Great National Assembly. In the opinion of Russia these elections were illegal, and that country consequently ignored both the Assembly and the Government. On the 29th October diplomatic intercourse was resumed between Belgrade and Sophia (*i*). In November the Russian agent and consuls quitted Bulgaria and Eastern Roumelia. After much correspondence between the Powers and the Porte, and tentative movements in other directions, the Sobranje, on 4th July, 1887, elected Prince Ferdinand of Coburg as Prince of Bulgaria (*k*). The Prince, shortly afterwards, accepted the position and entered the country. His election was not confirmed by the Porte and the signatory Powers until March, 1896. In 1908, Bulgaria, which had on several occasions dis-

(*h*) Parl. Papers, Turkey, No. 1 (1887).

(*i*) *Ibid.*

(*k*) Parl. Papers, Turkey, No. 2 (1887).



regarded the nominal suzerainty of the Sultan, declared its independence (*l*), and proclaimed Prince Ferdinand Czar of Bulgaria. The Powers recognised his sovereignty the following year.

The representations of the signatory Powers did little to hinder Greece. the warlike preparations of Greece (*m*), whose attitude constituted a menace to the peace of Europe, and, but for the strenuous appeals of the Powers to the Porte to maintain a pacific and conciliatory attitude, was likely to precipitate a war, the consequences of which, however incalculable in other directions, could not fail to be calamitous to Greece (*n*). On the morning of 24th January, 1886, the Greek squadron left Salamis Bay. On the following day a collective note was delivered at Athens stating that, in the absence of any just cause for war on the part of Greece against Turkey, and in view of the injury which would be caused by it to the commerce of other nations, a naval attack by Greece on Turkey would not be permitted by the great Powers. Austria-Hungary, Germany, Great Britain, Italy, and Russia sent ships of war to Suda Bay to compel conformance with the note. France agreed in the general policy, but could not contemplate acts of hostility by French ships against Greece, and opined that a clear intimation to Greece that if she wore out the patience of the Ottoman forces she would be left to face the result unaided in any way, would be sufficient to induce a return to a peaceful demeanour. The Greek reply to the note protested against any limitation of the free disposition of their naval forces as incompatible with the independence of the State and the rights of the Crown. On the 13th April, the conclusion of the arrangement with regard to Eastern Roumelia (*o*) was communicated to the Greek Premier, with the expression of a hope that Greece would comply with the unanimous wish of Europe for the maintenance of peace. The disarmament being still delayed, certain ships of the allied squadron were sent to the Piræus. On the 6th May, a final note was presented inviting the assurance, in the course of a week, that orders had been promulgated to place the Hellenic land and sea forces on a peace footing. The answer being unsatisfactory, the representatives of the Powers and the Turkish Minister left Athens on the following day. On May 8th, the *Chargés d'Affaires* communicated a notice of the blockade of the east coast of Greece and the entrance to the Gulf of Corinth against all ships

(*l*) Statesman's Year Book, 1909, pp. 666, 667.

(*m*) Parl. Papers, Turkey, No. 1 (1886); *Ibid.* No. 2 (1886); *Ibid.* No. 1 (1887); *Ibid.* No. 2 (1887);

Greece, No. 2 (1886).

(*n*) Parl. Papers, Greece, No. 2 (1886); *Ibid.* No. 3 (1886).

(*o*) See *supra*, p. 115.

under the Greek flag. Any ship under the Greek flag endeavouring to violate the blockade was to be liable to detention (*p*). The Greek troops having retired from the frontier by the end of the month, and Greece having notified her Ministers at the Courts of the Powers of her actual proceedings in the way of disarmament, and the process of demobilization proceeding rapidly, the blockade was raised on June 7th. Shortly afterwards the Ministers of the Powers returned to Athens (*q*).

Serbia.

On 6th March, 1889, Milan, King of Serbia, abdicated in favour of his son, Alexander, a boy of twelve, and resigned his power into the hands of a council of regency. Since that date the kingdom has been in a disturbed and unsettled condition, culminating in the atrocious murder of King Alexander and his consort Queen Draga by the chiefs of a military conspiracy on the 29th day of May, 1903. The present occupant of the Serbian throne is King Peter Kara-Georgévitch.

European  
intervention  
in the  
Balkans and  
Greece.

During the Serbo-Bulgarian war 300,000 Turkish troops stood idle on the frontiers of Roumelia. If the Sultan had not been condemned to inactivity by the fear of complications with the great Powers, and by public opinion in both Russia and Great Britain, which would not have tolerated the entry of Ottoman troops into the provinces as contemplated by the XVIth Article of the Berlin Treaty, there is little doubt but that he could have compelled both the population of the province and Prince Alexander to the observance of the Treaty (*r*). In the same way, if uncontrolled by Europe, the animosities and jealousies of Greeks, Bulgars, Serbs, and Macedonians preventing them from acting in concert and leading to internecine conflicts, might quickly lead to the re-imposition of the Turkish yoke upon her former provinces, or, more probably, to an international conflict for the partition of Turkey, disturbing the peace of the world, and fatal to the independence of these little States. It is upon these and similar considerations that the intervention in the affairs of, and dominant control by Europe of the former provinces of Turkey, which owe their existence as States to European treaties, is now, for the most part, justified (*s*).

Greek war of  
1897.

The inability of the Porte to maintain order in Crete, and to restrain the Christian and the Mohammedan from cutting one another's throats, led, in February, 1897, to the intervention of

(*p*) Parl. Papers, Greece, No. 1, (1886); *Ibid.* No. 2 (1886); *Ibid.* No. 2, No. 3, No. 4 (1886). No. 1 (1887); *Ibid.* No. 2 (1887).

(*q*) Parl. Paper, Greece, No. 4 (1886). (*s*) Parl. Papers, cited preceding note; Parl. Paper, Greece, No. 2 (1886); *Ibid.* No. 4 (1886).

(*r*) Parl. Papers, Turkey, No. 1

Greece, which, in spite of the protests of the Powers, landed an armed force on the island, and established a local administration in the name of the King of the Hellenes. By a joint note the Powers assured Greece that, while Crete could not be annexed in the present circumstances, they were resolved, since Turkey had delayed the execution of the reforms settled in concert with them, to endow Crete with an effective local autonomy, which should ensure her a separate government under the suzerainty of the Sultan. Greece declined to withdraw her troops so long as the Christian population was in danger, and the Powers replied by proclaiming a blockade of the Cretan ports, and despatching (March 18) a mixed force of 3,600 men to occupy the island. Meanwhile war was becoming imminent on the Thessalian frontier, and the Powers warned both Governments that if either country assumed the aggressive in no case would the aggressor be allowed to derive any permanent advantage from the result of his action. On April 8, Greek bands crossed the frontier; on the 11th Turkey declared war, and was completely victorious in a succession of engagements, re-occupying practically the whole of Thessaly. Thereupon the Powers compelled the Sultan to grant an armistice, and further intervened to carry out what has become an unwritten law—that territory once wrenched from the Turk can never be permitted to revert to Mohammedan jurisdiction. Though she had not been the aggressor in the terms of the note of the Powers, Turkey was not allowed to retain her conquests in Thessaly, but some slight strategic modifications of frontier, in favour of the Ottoman Empire, were allowed. The sole penalty enforced upon Greece was the payment of a moderate indemnity and the temporary occupation of her territory until its payment. The Treaty of Peace made no provision for the settlement of Crete, which was placed under a temporary administrative Commission, consisting of the admirals of the French, English, Russian and Italian fleets. Anarchy and disorder, however, continued to reign until in 1898 the Porte was finally compelled to withdraw the whole of its troops and functionaries. In the same year the four Powers constituted the island an autonomous State under a High Commissioner appointed by them, subject to the suzerainty of the Sultan, but without tribute. Prince George of Greece was the first Commissioner, appointed for a term of three years, which was renewed in 1901.

The steps which were recently taken by Russia and Austria, with the sanction of the other great Powers, to enforce a scheme of reforms in Macedonia form another instance of European inter-

*Defence  
of the  
island*

*self-defence*



vention on behalf of the subjects of the Porte and of the maintenance of peace in the south-east of Europe (*t*).

Austrian  
annexation of  
Bosnia and  
Herzegovina.

For a period of thirty years from the Treaty of Berlin, 1878, Austria-Hungary had occupied and administered Bosnia and Herzegovina, over which Turkish sovereignty had nominally remained. On October 3, 1908, however, Austria set the Turkish claim aside, and formally annexed these provinces. The engagement with the European Powers under the Treaty of Berlin, and a separate engagement with Turkey that was concluded at the same time, were thus repudiated. It would have been much better, in the interests of the Balkan peninsula, as well as in the interests of international law and diplomacy, if Austria-Hungary had approached the parties to the Treaty of Berlin with a view to securing an extension of her mandate of 1878 and transforming her existing rights of administration into full rights of sovereignty. As it was, the annexation was afterwards recognised by Great Britain, France, Germany, Italy, and Russia, not by an international treaty arrived at in a general conference, but by means of separate diplomatic despatches. In February, 1909, an agreement between Austria-Hungary and Turkey was entered into, whereby Turkey engaged to abandon her rights over the provinces in question, in return for the payment of an indemnity, the recovery of Novi Bazar, and certain other concessions made by Austria-Hungary.

Albania.

As a result of the recent Balkan war, the independence of Albania was proclaimed, November 28, 1912. On December 20, 1912, the Ambassadorial Conference at London accepted the principle of Albanian autonomy. Later, the Conference marked out the boundaries of the new State, and agreed that a European prince should be nominated as ruler. Accordingly the crown was offered by an Albanian deputation to Prince Frederick William of Wied, who accepted it (February 21, 1914). An International Commission of Control was also appointed by the Conference to support and advise him. After the outbreak of the great European war in July, 1914, the Prince and nearly all the members of the International Commission left the country; and a Turkish prince appears to have been elected ruler in September, 1914.

Interference  
of the five  
great Euro-  
pean Powers

The interference of the five great European Powers represented in the conference of London, in the Belgic Revolution of 1830, affords an example of the application of this right to preserve the

(*t*) See Annual Register, 1897; Statesman's Year Book, 1903.

general peace, and to adapt the new order of things to the stipulations of the treaties of Paris and Vienna, by which the kingdom of the Netherlands had been created. We have given, in another work, a full account of the long and intricate negotiations relating to the separation of Belgium from Holland, which assumed alternately the character of a pacific mediation and of an armed intervention, according to the varying circumstances of the contest, and which was finally terminated by a compromise between the two great opposite principles which so long threatened to disturb the established order and general peace of Europe. The Belgic Revolution was recognised as an accomplished fact, whilst its legal consequences were limited within the strictest bounds, by refusing to Belgium the attributes of the rights of conquest and of postliminy, and by depriving her of a great part of the province of Luxemburg, of the left bank of the Scheldt, and of the right bank of the Meuse. The five great Powers, representing Europe, consented to the separation of Belgium from Holland, and admitted the former among the independent States of Europe, upon conditions which were accepted by her and have become the basis of her public law. These conditions were subsequently incorporated into a definite treaty, concluded between Belgium and Holland in 1839, by which the independence of the former was finally recognised by the latter (*u*).

in the Belgic  
Revolution of  
1830.

In 1861, there occurred a remarkable intervention in the affairs of Mexico, which is thus described in the Queen's Speech on the opening of Parliament: "The wrongs committed by various parties and by successive governments in Mexico upon foreigners resident within Mexican territory, and for which no satisfactory redress could be obtained, have led to the conclusion of a convention between Her Majesty, the Emperor of the French, and the Queen of Spain, for the purpose of regulating a combined operation on the coast of Mexico, with a view to obtain that redress which has hitherto been withheld" (*x*). The contracting Powers "engaged not to seek for themselves, in the employment of the contemplated coercive measures, any acquisition of territory, or any special advantage, nor to exercise in the internal affairs of Mexico any influence of a nature to prejudice the right of the Mexican nation to choose and constitute the form of its government" (*y*).

Intervention  
in Mexico in  
1861.

The main reason for this intervention was to obtain the payment of debts contracted by the Mexican Government. The

(*u*) Wheaton, *Hist. of the Law of Nations*, pp. 538—555.

(*x*) *Annual Register*, 1862, p. 5.

(*y*) Convention of Oct. 31, 1861, Art. ii. *Hertslet, Treaties*, vol. xii. p. 475.

amount due to England was very large, while that owing to France was comparatively small, yet the Emperor Napoleon thought fit to go much further than simply obtaining satisfaction for the claims of France. He set up the unfortunate Maximilian as Emperor of Mexico, and then, withdrawing the French troops, left him to maintain his throne by his own resources, and to be finally tried by court-martial and shot by the subjects upon whom he had been forced. England and Spain refused to assist France in these proceedings, and withdrew from the intervention when their claims had been satisfied. The United States were invited to join the allies, but declined, and it subsequently appeared that France was desirous of setting up a powerful Latin State on the continent of America in opposition to the United States (*z*). M. Calvo justly says that this intervention "constitue pour les puissances qui s'y sont laissé entraîner un précédent aussi peu digne d'éloges que funeste à leur considération et à leurs intérêts" (*a*). But it should be remembered that the British demands included a claim for redress on account of the breaking into the house of the British Legation on 16th November, 1860, and the removal thence of 152,000*l.* sterling bonds, and on account of the murder of a British subject on 3rd April, 1859 (*b*).

The French garrison in Rome.

The maintenance of a French garrison in Rome was an altogether anomalous proceeding. In 1856, the Emperor Napoleon occupied Rome. His troops were kept there on the ground that the Pope required to be protected in the exercise of his spiritual functions as head of the Catholic Church. The garrison was partly withdrawn in 1864 (*c*), but returned in 1868, owing to the aggressive attitude of the revolutionary party in Italy, and the invasion of the Papal States by Garibaldi. However, on the 19th of August, 1870, the French troops evacuated Rome, and what was left of the Papal States was afterwards incorporated into the kingdom of Italy, leaving the Pope nothing but the Vatican (*d*). But it was not until 1874 that the last trace of the French occupation disappeared from Rome. Up to that date the *Orenoque*, a French ship of war, was moored off Civita Vecchia, ostensibly to assist the Pope should he be in difficulties, and she was not removed until the 12th of October in that year (*e*).

(*z*) See Phillimore, Commentaries, vol. i. p. 507.

(*a*) *Droit International*, bk. iii. § 191. The view of the United States will be found stated in Wharton, Digest, §§ 58, 318.

(*b*) Wharton, Digest, p. 312.

(*c*) Hertslet, Map of Europe, vol. ii. p. 1627.

(*d*) *Ibid.* p. 1628.

(*e*) Annual Register, 1874, p. 193.



Every State, as a distinct moral being, independent of every other, may freely exercise all its sovereign rights in any manner not inconsistent with the equal rights of other States. Among these is that of establishing, altering, or abolishing its own municipal constitution of government. No foreign State can lawfully interfere with the exercise of this right, unless such interference is authorized by some special compact, or by such a clear case of necessity as immediately affects its own independence, freedom, and security. Non-interference is the general rule, to which cases of justifiable interference form exceptions limited by the necessity of each particular case.

Independence of the State in respect to its internal government.

The approved usage of nations authorizes the proposal by one State of its good offices or mediation for the settlement of the intestine dissensions of another State. When such offer is accepted by the contending parties, it becomes a just title for the interference of the mediating Power.

Mediation of foreign States for the settlement of the internal dissensions of a State.

Such a title may also grow out of positive compact previously existing, such as treaties of mediation and guaranty. Of this nature was the guaranty by France and Sweden of the Germanic Constitution at the peace of Westphalia in 1648, the result of the thirty years' war waged by the princes and States of Germany for the preservation of their civil and religious liberties against the ambition of the House of Austria.

Treaties of mediation and guaranty.

The Republic of Geneva was connected by an ancient alliance with the Swiss Cantons of Berne and Zürich, in consequence of which they united with France, in 1738, in offering the joint mediation of the three Powers to the contending political parties by which the tranquillity of the republic was disturbed. The result of this mediation was the settlement of a constitution, which gave rise to new disputes in 1768; but they were again adjusted by the intervention of the mediating Powers. In 1782, the French Government once more united with these Cantons and the court of Sardinia in mediating between the aristocratic and democratic parties; but it appears to be very questionable how far these transactions, especially the last, can be reconciled with the respect due, on the strict principles of international law, to the just rights and independence of the smallest, not less than to those of the greatest States (*f*).

The former constitution of the Swiss Confederation was also adjusted, in 1813, by the mediation of the great allied Powers,

(*f*) Flissan, Histoire de la Diplomatie Française, tom. v. p. 78; tom. vii. pp. 27, 297.

and subsequently recognised by them at the Congress of Vienna as the basis of the federative compact of Switzerland. By the same act the united Swiss Cantons guarantee to each other their respective local constitutions (*g*).

So also the local constitutions of the different States composing the former Germanic Confederation might be guaranteed by the Diet on the application of the particular State in which the constitution was established; and this guarantee gave the Diet the right of determining all controversies respecting the interpretation and execution of the constitution thus established and guaranteed (*h*).

And the Constitution of the United States of America guarantees to each State of the federal Union a republican form of government, and engages to protect each of them against invasion, and, on application of the local authorities, against domestic violence (*i*).

Proposed  
mediation in  
the American  
Civil War.

In 1862, a proposition was made by France to England and Russia, that the three countries should offer their friendly mediation to the contending parties in the American Civil War. The moment was deemed inopportune by Russia, and England declined to accede to the proposal. "According to the information we possess," wrote Prince Gortchakow to M. D'Oubil, Russian chargé d'affaires in Paris, on the 27th October, 1862, "we are led to believe that a combined movement of France, England, and Russia, however conciliatory it might be, and with whatsoever precautions it might be surrounded, if it came with an official and collective character, would incur the risk of bringing about a result opposed to the pacificatory end which the three Courts desire" (*k*). The proposal would have been declined had it been made. It was thought in the Northern States that the policy of France was hostile to the Union, and that the proposed mediation was only a preliminary step to the acquisition by France of those parts of the dismembered Union which had formerly belonged to her (*l*).

Independence  
of every State  
in respect to  
the choice of  
its rulers.

This perfect independence of every sovereign State, in respect to its political institutions, extends to the choice of the supreme magistrate and other rulers, as well as to the form of government itself. In hereditary governments, the succession to the crown

(*g*) Acte Final du Congrès de Vienne, Art. 74.

(*h*) Wiener Schluss-Acte, vom 15 Mai, 1820, Art. 62. Von Mayer, Corpus Juris Germanici, tom. ii. p. 196. As to the present constitution of Germany, see p. 78, *ante*.

(*i*) Constitution of the United States, Art. 3.

(*k*) U. S. Dipl. Cor. 1863, vol. ii. p. 769.

(*l*) Draper, Hist. of American Civil War, vol. iii. p. 439.

being regulated by the fundamental laws, all disputes respecting the succession are rightfully settled by the nation itself, independently of the interference or control of foreign Powers. So also in elective governments, the choice of the chief or other magistrates ought to be freely made, in the manner prescribed by the constitution of the State, without the intervention of any foreign influence or authority (*m*).

The only exceptions to the application of these general rules arise out of compact, such as treaties of alliance, guarantee, and mediation, to which the State itself whose concerns are in question has become a party; or formed by other Powers in the exercise of a supposed right of an intervention growing out of a necessity involving their own particular security, or some contingent danger affecting the general security of nations. Such, among others, were the wars relating to the Spanish succession in the beginning of the eighteenth century, and to the Bavarian and Austrian successions, in the latter part of the same century. The history of modern Europe also affords many other examples of the actual interference of foreign Powers in the choice of the sovereign or chief magistrate of those States where the choice was constitutionally determined by popular election, or by an elective council, such as in the cases of the head of the earlier Germanic Empire, the sovereign of the late kingdom of Poland, and the Roman pontiff; but in these cases no argument can be drawn from the fact to the right. In the particular case, however, of the election of the Pope, who is the supreme pontiff of the Roman Catholic Church, and who was a temporal sovereign till 1870, the Emperor of Austria, and the Kings of France and Spain, had, by ancient usage, each a right to exclude one candidate (*n*).

Exceptions growing out of compact or other just right of intervention.

The quadruple alliance, concluded in 1834 between Great Britain, France, Spain, and Portugal, affords a remarkable example of actual interference in the questions relating to the succession to the crown in the two latter kingdoms, growing out of compacts to which they were parties, formed in the exercise of a supposed right of interference for the preservation of the peace of the Peninsula, as well as the general peace of Europe. Having

Quadruple alliance of 1834, between Great Britain, France, Portugal, and Spain.

(*m*) Vattel, *Droit des Gens*, liv. i. ch. 5, §§ 66, 67.

(*n*) Klüber, *Droit des Gens Moderne de l'Europe*, Pt. II. tit. 1, ch. 2, § 48. This right of veto is said to have been exercised by an Austrian cardinal, on behalf of his emperor, at the conclave held in August, 1903, to choose a suc-

cessor to Pope Leo XIII.; but it seems doubtful whether it amounted to more than a protest to the effect that the election of Cardinal Rampolla would be one that Austria would be unable to welcome. See *Quarterly Review*, Oct. 1903, p. 443.



already stated in another work (*o*) the historical circumstances which gave rise to the quadruple alliance, as well as its terms and conditions, it will only be necessary here to recapitulate the leading principles, which may be collected from the debate in the British Parliament, in 1835, upon the measures adopted by the British Government to carry into effect the stipulations of the treaty.

1. The legality of the order in council permitting British subjects to engage in the military service of the Queen of Spain, by exempting them from the general operation of the Act of Parliament of 1819, forbidding them from enlisting in foreign military service, was not called in question by Sir Robert Peel and the other speakers on the part of the opposition. Nor was the obligation of the treaty of quadruple alliance, by which the British Government was bound to furnish arms and the aid of a naval force to the Queen of Spain, denied by them. Yet it was asserted, that without a declaration of war, it would be with the greatest difficulty that the special obligation of giving naval aid could be fulfilled, without placing the force of such a compact in opposition to the general binding nature of international law. Whatever might be the special obligation imposed on Great Britain by the treaty, it could not warrant her in preventing a neutral State from receiving a supply of arms. She had no right, without a positive declaration of war, to stop the ships of a neutral country on the high seas.

2. It was contended that the suspension of the foreign enlistment law was equivalent to a direct military interference in the domestic affairs of another nation. The general rule on which Great Britain had hitherto acted was that of non-interference. The only exceptions admitted to this rule were cases where the necessity was urgent and immediate; affecting, either on account of vicinage, or some special circumstances, the safety or vital interests of the State. To interfere on the vague ground that British interests would be promoted by the intervention, on the plea that it would be for their advantage to see established a particular form of government in Spain, would be to destroy altogether the general rule of non-intervention, and to place the independence of every weak Power at the mercy of its formidable neighbours. It was impossible to deny that an act which the British Government permitted, authorizing British soldiers and subjects to enlist in the service of a foreign Power, and allowing

(*o*) Wheaton, Hist. of the Law of Nations. (New York, 1845.)

them to be organized in Great Britain, was a recognition of the doctrine of the propriety of assisting by a military force a foreign government against an insurrection of its own subjects. When the Foreign Enlistment Bill was under consideration in the House of Commons, the particular clause which empowered the king in council to suspend its operation was objected to on the ground, that if there was no Foreign Enlistment Act, the subjects of Great Britain might volunteer in the service of another country, and there could be no particular ground of complaint against them; but that if the king in council were permitted to issue an order suspending the law with reference to any belligerent nation, the Government might be considered as sending a force under its own control.

Lord Palmerston, in reply, stated:—1. That the object of the treaty of quadruple alliance, as expressed in the preamble, was to establish internal peace throughout the Peninsula, including Spain as well as Portugal; the means by which it was proposed to effect that object was the expulsion of the infants Don Carlos and Don Miguel from Portugal. When Don Carlos returned to Spain, it was thought necessary to frame additional articles to the treaty in order to meet the new emergency. One of these additional articles engaged His Britannic Majesty to furnish Her Catholic Majesty with such supplies of arms and warlike stores as Her Majesty might require, and further to assist Her Majesty with a naval force. The writers on the law of nations all agreed that any Government, thus stipulating to furnish arms to another, must be considered as taking an active part in any contest in which the latter might be engaged; and the agreement to furnish a naval force, if necessary, was a still stronger demonstration to that effect. If, therefore, the recent order in council was objected to on the ground that it identified Great Britain with the cause of the existing Government of Spain, the answer was, that, by the additional articles of the quadruple treaty, that identification had already been established, and that one of those articles went even beyond the measure which had been impugned.

2. As to what had been alleged as to the danger of establishing a precedent for the interference of other countries, he would merely observe, that in the first place this interference was founded on a treaty arising out of the acknowledged right of succession of a sovereign, decided by the legitimate authorities of the country over which she ruled. In the case of a civil war proceeding either from a disputed succession, or from a prolonged revolt, no writer on international law denied that other countries

had a right, if they chose to exercise it, to take part with either of the two belligerent parties. Undoubtedly it was inexpedient to exercise that right except under circumstances of a peculiar nature. That right, however, was general. If one country exercised it, another might equally exercise it. One State might support one party, another the other party: and whoever embarked in either cause must do so with their eyes open to the full extent of the possible consequences of their decision. He contended, therefore, that the measure under consideration established no new principle, and that it created no danger as a precedent. Every case must be judged by the considerations of prudence which belonged to it. The present case, therefore, must be judged by similar considerations. All that he maintained was, that the recent proceeding did not go beyond the spirit of the engagement into which Great Britain had entered, that it did not establish any new principle, and that the engagement was quite consistent with the law of nations (*p*).

(*p*) Wheaton, *Hist. Law of Nations*, pp. 523—533.



## CHAPTER II.

## RIGHTS OF CIVIL AND CRIMINAL LEGISLATION.

EVERY independent State is entitled to the exclusive power of legislation, in respect to the personal rights and civil state and condition of its citizens, and in respect to all real and personal property situated within its territory, whether belonging to citizens or aliens. But as it often happens that an individual possesses real property in a State other than that of his domicile, or that contracts are entered into and testaments executed by him, or that he is interested in successions *ab intestato*, in a country different from either; it may happen that he is, at the same time, subject to two or three sovereign Powers; to that of his native country or of his domicile, to that of the place where the property in question is situated, and to that of the place where the contracts have been made or the acts executed. The allegiance to the sovereign Power of his native country exists from the birth of the individual, and continues till a change of nationality. In the two other cases he is considered subject to the laws, but only in a limited sense. In the foreign countries where he possesses real property, he is considered a non-resident landowner ('sujet forain'); in those in which the contracts are entered into, a temporary resident ('sujet passager'). As, in general, each of these different countries is governed by a distinct legislation, conflicts between their laws often arise; that is to say, it is frequently a question which system of laws is applicable to the case. The collection of rules for determining the conflicts between the civil and criminal laws of different States, is called private international law, to distinguish it from public international law, which regulates the relations of States (*a*).

Exclusive power of civil legislation.

Private international law.

The first general principle on this subject results immediately from the fact of the independence of nations. Every nation possesses and exercises exclusive sovereignty and jurisdiction throughout the full extent of its territory. It follows, from this

Conflict of laws. Fundamental principles.

(*a*) Fœlix, *Droit International Privé*, § 3; Story, *Conflict of Laws*, §§ 9, 10, 11; Kent, *Commentaries*, vol. ii. p. 39; Westlake, *Priv. Int. Law* (1912), pp. 1

*seq.*; J. A. Foote, *Priv. Int. Jurisprudence* (ed. Phillipson, 1914), pp. xxxvii. *seq.*

principle, that the laws of every State control, of right, all the real and personal property within its territory, as well as the inhabitants of the territory, whether born there or not, and that they affect and regulate all the acts done, or contracts entered into within its limits.

Consequently, "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" (b).

The second general principle is, "that no State can, by its laws, directly affect, bind, or regulate property beyond its own territory, or control persons who do not reside within it, whether they be native-born subjects or not. This is a consequence of the first general principle; a different system, which would recognise in each State the power of regulating persons or things beyond its territory, would exclude the equality of rights among different States, and the exclusive sovereignty which belongs to each of them" (c).

From the two principles, which have been stated, it follows that all the effect, which foreign laws can have in the territory of a State, depends absolutely on the express or tacit consent of that State. A State is not obliged to allow the application of foreign laws within its territory, but may absolutely refuse to give any effect to them. It may pronounce this prohibition with regard to some of them only, and permit others to be operative, in whole or in part. If the legislation of the State is positive either way, the tribunals must necessarily conform to it. In the event only of the law being silent, the courts may judge, in the particular cases, how to follow the foreign laws, and to apply their provisions. The express consent of a State, to the application of foreign laws within its territory, is given by acts passed by its legislative authority, or by treaties concluded with other States. Its tacit consent is manifested by the decisions of its judicial and administrative authorities, as well as by the writings of its publicists.

No obligation  
as to foreign  
laws.

There is no obligation, recognised by legislators, public authorities, and publicists, to regard foreign laws; but their application is admitted, only from considerations of utility and

(b) *Felix, Droit International Privé*, § 9. (c) *Ibid.* § 10.

the mutual convenience of States—‘*ex comitate,*’ ‘*ob reciprocam utilitatem.*’ The public good and the general interests of nations have cause to be accorded, in every State, an operation more or less extended to foreign laws. Every nation has found its advantage in this course. The subjects of every State have various relations with those of other States; they are interested in the business transacted and in the property situate abroad. Thence flows the necessity, or at least utility, for every State, in the proper interest of its subjects, to accord certain effects to foreign laws, and to acknowledge the validity of acts done in foreign countries, in order that its subjects may find in the same countries a reciprocal protection for their interests. There is thus formed a tacit convention among nations for the application of foreign laws, founded upon reciprocal wants. This understanding is not the same everywhere. Some States have adopted the principle of complete reciprocity, by treating foreigners in the same manner as their subjects are treated in the country to which they belong; other States regard certain rights to be so absolutely inherent in the quality of citizens as to exclude foreigners from them; or they attach such an importance to some of their institutions, that they refuse the application of every foreign law incompatible with the spirit of those institutions. But, in modern times, all States have adopted, as a principle, the application within their territories of foreign laws; subject, however, to the restrictions which the rights of sovereignty and the interests of their own subjects require. This is the doctrine professed by all the publicists who have written on the subject (*d*).

“Above all things,” says President Bohier, “we must remember that, though the strict rule would authorize us to confine the operation of laws within their own territorial limits, their application has, nevertheless, been extended, from considerations of public utility, and oftentimes even from a kind of necessity. But, when neighbouring nations have permitted this extension, they are not to be deemed to have subjected themselves to a foreign statute; but to have allowed it, only because they have found in it their own interest by having, in similar cases, the same advantages for their own laws among their neighbours. This effect given to foreign laws is founded on a kind of comity of the law of nations; by which different peoples have tacitly agreed that they shall apply, whenever it is required by equity and common utility, provided they do not contravene any prohibitory enactment” (*e*).

(*d*) *Caldwell v. Vanvlissengen* (1851), 9 Hare, 425.

(*e*) Bohier, *Observations sur la coutume de Bourgogne*, ch. 23, §§ 62, 63, p. 457.



Rules laid  
down by  
Huberus.

Huberus, one of the earliest and best writers on this subject, lays down the following general maxims, as adequate to solve all the intricate questions which may arise respecting it:—

1. The laws of every State have force within the limits of that State, and bind all its subjects.

2. All persons within the limits of a State are considered as subjects, whether their residence is permanent or temporary.

3. By the comity of nations, whatever laws are carried into execution within the limits of any State, are considered as having the same effect everywhere, so far as they do not occasion a prejudice to the rights of other States and their citizens.

From these maxims, Huberus deduces the following general corollary, as applicable to the determination of all questions arising out of the conflict of the laws of different States, in respect to private rights of persons and property.

All transactions in a court of justice, or out of court, whether testamentary or other conveyances, which are regularly done or executed according to the law of any particular place, are valid, even where a different law prevails, and where, had they been so transacted, they would not have been valid. On the other hand, transactions and instruments which are done or executed contrary to the laws of a country, as they are void at first, never can be valid; and this applies not only to those who permanently reside in the place where the transaction or instrument is done or executed, but to those who reside there only temporarily; with this exception only, that if another State, or its citizens, would be affected by any peculiar inconvenience of an important nature, by giving this effect to acts performed in another country, that State is not bound to give effect to those proceedings, or to consider them as valid within its jurisdiction (*f*).

*Lex loci rei  
sitæ.*

Thus, real property is considered as not depending altogether upon the will of private individuals, but as having certain qualities impressed upon it by the laws of that country where it is situated, and which qualities remain indelible, whatever the laws of another State, or the private dispositions of its citizens, may provide to the contrary. That State, where this real property is situated, cannot suffer its own laws in this respect to be changed by these dispositions, without great confusion and prejudice to its own interests. Hence it follows, that the law of a place where real

(*f*) Huberus, *Prælect. Jur. Civ.*, tom. ii. lib. i. tit. 3, *De conflictu legum*.

property is situated governs exclusively as to the tenure, the title, and the descent of such property (*g*).

This rule is applied, by the international jurisprudence of the United States and Great Britain, to the forms of conveyance of real property, both as between different parts of the same confederation or empire, and with respect to foreign countries. Hence it is that a deed or will of real property, executed in a foreign country, or in another State of the Union, must be executed with the formalities required by the laws of that State where the land lies (*h*).

But this application of the rule is peculiar to American and British law. According to the international jurisprudence recognised among the different nations of the European continent, a deed or will, executed according to the law of the place where it is made, is valid, not only as to personal, but as to real property, wherever situated; provided the property is allowed by the *lex loci rei sitæ* to be alienated by deed or will; and those cases excepted, where that law prescribes, as to instruments for the transfer of real property, particular forms, which can only be observed in the place where it is situated, such as the registry of a deed or the probate of a will (*i*).

The main reason for this divergence lies in the fact that continental conveyancing has always supposed public acts as the rule, and made but a comparatively sparing use of the private documents which constitute Anglo-American titles. The inconvenience arising from the inability to dispose of land unless the owner was in the country where it was situate, naturally led to the rule that conveyances of immoveables are rendered valid by the *lex loci actus*. On the other hand, the Anglo-American law prescribes formalities which may be performed anywhere, and are not contrary to the law of any nation, and it therefore justly refuses to give effect to transfers of land, unless such formalities have been complied with (*k*). However, no one maintains that a form expressly imposed as an exclusive one by the *lex situs*, can ever be dispensed with. Thus the French law of the 23rd March, 1855,

Reasons for  
this difference.

(*g*) Huberus, liv. i. tit. 3, De conflictu leg. § 15.

(*h*) *Robinson v. Campbell* (1818), 3 Wheaton, 212; *U. S. v. Crosby*, 7 Cranch, 115; *Coppin v. Coppin* (1725), 2 P. W. 291; *Brodie v. Barry* (1813), 2 Ves. & Beames, 127; *McGoon v. Scales*, 9 Wallace, 23; *Freke v. Lord Carbery* (1873), L. R. 16 Eq. 461; *Adams v. Clutterbuck* (1883), 10 Q. B. D. 403; *Mercantile Investment and*

*General Trust Co. v. River Plate Trust Loan and Agency Co.*, (1892) 2 Ch. 303; *Deschamps v. Miller*, (1908) 1 Ch. 856. Wharton, Conflict of Laws, p. 372; Foote, Priv. Int. Jurisp. (1914), pp. 205 seq.

(*i*) Fœlix, Droit International Privé, § 52; Huberus, *supra*.

(*k*) Westlake, Priv. Int. Law (1912), p. 226; Foote, *loc. cit.*



requires immoveable property in France to be transferred *inter vivos* by a transcription in the 'bureau des hypothèques,' and no transfer is valid without such transcription (*l*).

This diversity of opinion is now of no great importance, because the laws of most European States have adopted the principle that land is subject to the *lex loci rei sitæ*. This is done expressly by the codes of France, Belgium, Spain, Holland, Prussia, Austria, Saxony, Italy and Greece (*m*). Another point to be decided by the *lex loci rei sitæ* is the character of the property, that is, whether it be realty or not, for every nation may impress upon property in its dominions any character it pleases (*n*).

'Droit d'aubaine.'

The municipal laws of all European countries formerly prohibited aliens from holding real property within the territory of the State. During the prevalence of the feudal system, the acquisition of property in land involved the notion of allegiance to the prince within whose dominions it lay, which might be inconsistent with that which the proprietor owed to his native sovereign. It was also during the same rude ages that the 'jus albinagii' or 'droit d'aubaine' was established; by which all the property of a deceased foreigner (moveable or immoveable) was confiscated to the use of the State, to the exclusion of his heirs, whether claiming *ab intestato*, or under a will of the deceased (*o*). In the progress of civilization, this barbarous and inhospitable usage has been, by degrees, almost entirely abolished. This improvement has been accomplished either by municipal regulations, or by international compacts founded upon the basis of reciprocity. Previous to the French Revolution of 1789, the 'droit d'aubaine' had been either abolished or modified by treaties between France and other States; and it was entirely abrogated by a decree of the Constituent Assembly in 1791, with respect to all nations, without exception and without regard to reciprocity. This gratuitous concession was retracted, and the subject placed on its original footing of reciprocity by the Code Napoléon, in 1803; but this part of the Civil Code was again repealed by the Ordinance of the 14th July, 1819, admitting foreigners to the right of possessing

(*l*) Tripier, Codes Français, p. 1618.

(*m*) France, Civil Code, § 3; Belgium, id. Art. v. sub-s. 1; Holland, Dr. gen. § 7; Spain, Civil Code, § 5; Prussia, Allgemeines Landrecht, Einleitung, § 28; Austria, Code Civil, Art. 3; Saxon Civil Code, § 10; Italy, Civil Code, Disposition préliminaire, Art. 7; Civil Code of Greece, Art. 5.

(*n*) Story, § 447; Foote, pp. 194 seq.

(*o*) Du Cange (Gloss. Med. Ævi, voce *Albinagium et Albani*) derives the term from *advencæ*. Other etymologists derive it from *alibi natus*. During the Middle Age, the Scots were called *Albani* in France, in common with all other aliens; and as the Gothic term *Albanach* is even now applied by the Highlanders of Scotland to their race, it may have been transferred by the continental nations to all foreigners.



both real and personal property in France, and of taking by succession *ab intestato*, or by will, in the same manner with native subjects (*p*).

The analogous usage of the 'droit de détraction,' or 'droit de retraite' (*jus detractûs*), by which a tax was levied upon the removal from one State to another of property acquired by succession or testamentary disposition, has also been reciprocally abolished in most civilized countries.

The stipulations contained in the treaties of 1778 and 1800, between the United States and France, for the mutual abolition of the 'droit d'aubaine' and the 'droit de détraction' between the two countries, have expired with those treaties; and the provision in the treaty of 1794, between the United States and Great Britain, by which the citizens and subjects of the two countries, who then held lands within their respective territories, were to continue to hold them according to the nature and tenure of their respective estates and titles therein, was limited to titles existing at the signature of the treaty, and is rapidly becoming obsolete by the lapse of time (*q*). But by the stipulations contained in a great number of subsisting treaties, between the United States and various Powers of Europe and America, it is provided, that "where on the death of any person holding real estate within the territories of the one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and exempt from all duties of 'détraction' on the part of the government of the respective States (*r*).

It is only of late years that the right of holding lands on the same conditions as subjects has been conceded to foreigners by most countries. In Belgium this was effected by the law of the 27th of April, 1865 (*s*). Russia conceded the privilege in 1860 (*t*). Some of the Swiss cantons do not even now permit foreigners to hold real property without the express permission of the Cantonal Government, unless there be a treaty to that effect (*u*).

Rights of  
aliens to hold  
lands in  
various  
States.

(*p*) Rotteck und Welcker, Staats-Lexicon, Art. *Gastrecht*, Band 6, § 362. Vattel, liv. ii. ch. viii. §§ 112—114. Klüber, *Droit des Gens*, Pt. II. tit. 1, ch. ii. §§ 32, 33. Von Mayer, *Corp. Jur. Confæd. Germanicæ*, tom. ii. p. 17. Merlin, *Répertoire*, tit. *Aubaine*.

(*q*) Kent, *Comm.* vol. ii. pp. 67—69 (5th ed.).

(*r*) Treaty of 1828 between the United States and Prussia, Art. 14. Elliott, *Am. Diplom. Code*, vol. i. p. 388. See U. S. *Diplom. Cor.* 1873, vol. ii. p. 1415.

(*s*) Report of Naturalization Commission, 1869, p. 115.

(*t*) *Ibid.* p. 128.

(*u*) *Ibid.* p. 131.

Austria (*x*), the Netherlands (*y*), and Sweden (*z*), only accord the right on condition of reciprocity in the foreigner's country. The constitution of the German Empire provides, that every person belonging to one of the confederated States is to be treated in every other of the confederated States as a born native, and to be permitted to acquire real estate (*a*). But as regards other countries, the laws of Bavaria, Prussia, Saxony, and Würtemberg, exact for their own subjects, when abroad, the same rights they extend to foreigners in their own dominions (*b*). In Italy, Denmark, and Greece, aliens are under no disabilities in this respect (*c*). The ownership of land in the United States is regulated by the laws of each individual State of the Union. Some of the States impose no restrictions on foreigners (*d*); others require residence and an oath of allegiance (*e*); in others a declaration of an intention to become a naturalized citizen of the United States is necessary (*f*). Feudal principles were maintained so long in England, that until the year 1870, an alien was incapable of holding land for more than twenty-one years, that is, he could not purchase a freehold. This, however, was remedied by the Naturalization Act, 1870 (*g*), which relieved aliens of most of their disabilities, and, as regards land, placed them on the same footing as subjects (*h*).

Effect of birth  
in various  
States.

There is no uniform rule among nations by which the nationality of a person may be determined from the place of his birth. England, America, and the majority of South American States claim all who are born within their dominions as natural-born subjects or citizens, whatever may have been the parents' nationality; but in the case of England the child may elect to revert to the nationality of his parents. And it seems that in practice the United States do not claim as citizens children born of parents whose residence is merely transitory (*i*). A child born in Denmark is considered a Dane while he remains in the country (*k*).

(*x*) Civil Code of Austria, § 33.

(*y*) Civil Code of the Netherlands, §§ 884, 957.

(*z*) Swedish Statute of Inheritance, "Arfda Balken," ch. 15, § 2.

(*a*) Art. iii. Hertslet, Map of Europe, vol. iii. p. 1931.

(*b*) Report of Naturalization Commission, 1869, pp. 114, 124, 129, 138.

(*c*) *Ibid.* p. 116. Italian Civil Code, Art. iii. Civil Code of Greece, Art. 5.

(*d*) Ohio, Michigan, Illinois.

(*e*) Vermont, N. and S. Carolina.

(*f*) Connecticut, Maine, Delaware, Maryland, Virginia, Tennessee, Arkansas, Indiana, Missouri. See Rep. of

Nat. Comm. p. 131; and U. S. Diplom. Cor. 1873, p. 1414.

(*g*) 33 & 34 Vict. c. 14, s. 2.

(*h*) *Bloxam v. Favre* (1884), 9 P. D. 130. As to British colonies and dependencies, see Rep. of Nat. Comm. 1869, p. 137.

(*i*) *Calvin's Case* (1608), 2 State Tr. 639; *Donegani v. Donegani* (1835), 3 Knapp, P. C. 63; *Re Adam* (1837), 1 Moo. P. C. 460. Fourteenth Amendment to U. S. Constitution, U. S. Statutes at Large, vol. xv. p. 706; and Wharton, Digest, § 183.

(*k*) G. Brock to Sir C. L. Wyke, 26th July, 1868, Nat. Comm. Rep. p. 143.

Birth in Portugal confers Portuguese nationality, unless the father was at the time in the service of a foreign State, or unless the child formally renounces it (*l*).

Complete Dutch nationality is acquired by birth in Holland, if the parents are established there, but is abandoned on proof being given that such a practice is contrary to the laws of the parents' country of origin. In Sweden the children of aliens who have resided in the country without intermission from birth to the attainment of their twenty-second year become citizens at that age, but they can avoid naturalization on proof that they possess civil rights in another country (*m*). In Italy, when an alien has established his domicile in the kingdom uninterruptedly for ten years, his child is considered a citizen, but residence for commercial purposes does not suffice to confer this status (*n*). If a child is born in any other European country, he does not acquire its national character, but follows that of his father, if legitimate, and that of his mother, if illegitimate (*o*). However, in Baden (*p*), Belgium (*q*), France (*r*), Greece (*s*), and Spain (*t*), children of alien parents born there are enabled to acquire the nationality of the country by a declaration, made within a year after their coming of age, of their wish to do so. Under recent legislation (*u*), French nationality can be thus acquired by alien children themselves born in France, irrespective of whether their parents were born there or not. If either of the parents was born in France, such children are now regarded as French subjects from their birth; but if only the mother was born there the children may declare for retention of their foreign nationality in the year following the attainment of their majority (*x*).

As to personal property, the *lex domicilii* of its owner prevails *Lex domicilii.* over the law of the country where such property is situated, so far as respects the rule of inheritance, 'Mabilia ossibus inhærent, personam sequuntur.' Thus the law of the place, where the owner of personal property was domiciled at the time of his decease,

(*l*) Civil Code of Portugal, tit. iii. Art. 18, No. 2.

(*m*) Law of 28th July, 1850, F. O. No. 44, Art. 1; Swedish law of Oct. 1894; Martens, Nouv. Rec. Gén. 2me Ser. xx. p. 823.

(*n*) Civil Code of Italy, lib. i. tit. i. Art. 8.

(*o*) Rep. of Nat. Comm. pp. 141—149.

(*p*) Baden Landrecht, Art. 9.

(*q*) Civil Code of Belgium, Art. 9. Law of 27th Sept. 1835, Art. 2.

(*r*) Code Napoléon; Code Civil, liv. i. c. i. § 9.

(*s*) Civil Code of Greece, Arts. 17, 19.

(*t*) Royal Decree, 17th Nov. 1852.

(*u*) Law of 29th Jan. and 7th Feb. 1851, Art. 1; Law of 28th June, 1889.

(*x*) Laws of 28th June, 1889, and 23rd July, 1893, and on the subject generally, see G. Cogordan, La nationalité au point de vue des rapports internationaux (Paris, 1890).



governs the succession *ab intestato* as to his personal effects wherever they may be situated (*y*). Yet it had once been doubted, how far a British subject could, by changing his native domicile for a foreign domicile without the British empire, change the rule of succession to his personal property in Great Britain; though it was admitted that a change of domicile, within the empire, as from England to Scotland, would have that effect (*z*). But these doubts were overruled in a later decision by the Court of Delegates in England, establishing the law, that the actual foreign domicile of a British subject is exclusively to govern, in respect to his testamentary disposition of personal property, as it would in the case of a mere foreigner (*a*).

So also the law of a place where any instrument, relating to personal property, is executed, by a party domiciled in that place, governs, as to the external form, the interpretation, and the effect of the instrument: '*Locus regit actum*.' Thus, a testament of personal property, if executed according to the formalities required by the law of the place where it is made, and where the party making it was domiciled at the time of its execution, is valid in every other country, and is to be interpreted and given effect to according to the *lex loci*.

This principle, laid down by all the text-writers, was, in 1829, recognised in England in a case where a native of Scotland, domiciled in India, but who possessed heritable bonds in Scotland, as well as personal property there, and also in India, had executed a will in India, ineffectual to convey Scottish heritage; the question then arose whether his heir-at-law (who claimed the heritable bonds as heir) was also entitled to a share of the moveable property as legatee under the will. It was held by Lord Chancellor Brougham, in delivering the judgment of the House of Lords, affirming that of the Court below, that the construction of the will, and the legal consequences of that construction, must be determined by the law of the land where it was made, and where the testator had his domicile, that is to say, by the law of England prevailing in that country; and this, although the will

(*y*) Huberus, Prælect. tom. ii. lib. i. tit. 3, de Conflict. Leg. §§ 14, 15. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 16. See also an opinion given by Grotius as counsel in 1613, Henry, Foreign Law, App. p. 196. Merlin, Répertoire, tit. Loi, § 6, No. 3. Félix, Droit International Privé, § 37. Foote, Priv. Int. Jurisprudence (1914), pp. 252 *seq.*, 269 *seq.*, and the English cases there cited.

(*z*) Per Sir J. Nicholl, in *Curling v. Thornton* (1823), 2 Addams' Eccles. Rep. p. 17. Wharton, Conflict of Laws, § 585.

(*a*) *Stanley v. Bernes* (1830), 3 Haggard Eccles. pp. 393—465; *Moore v. Darell* (1832), 4 Hagg. 346, 354; *Bremer v. Freeman* (1857), 10 Moo. P. C. 306; *Enohin v. Wylie* (1862), 31 L. J. Ch. 402.

was made the subject of judicial inquiry in the tribunals of Scotland; for these Courts also are bound to decide according to the law of the place where the will was made (b).

The law of the domicile regulates only *universal* assignments of moveable property, as on marriage or death, because this is the only source from which a rule common to property situated in various countries can be derived. But when the title to a particular chattel is concerned, in a case not involving any universal assignment, the law of its situation is absolute (c). In England no change of domicile will avoid or affect a will which was valid by the law of the testator's domicile at the time of its execution (d). Some of the States of the American Union have adopted a different rule. Thus, in New York the law of the testator's last domicile is held to govern the will (e). The payment of legacy duty is regulated by the *lex domicilii*; and, in general, the liability to pay succession duty or no is determined by the same test. But the domicile of the settlor is not, in this latter respect, conclusive. There may be such a settlement made of the property as to give it a British character, and then the duty will be payable whatever be the domicile of the settlor (f).

The Wills Act (Lord Kingsdown's Act) of 1861 provides that, "Every will or other testamentary disposition made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be deemed to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required, either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin" (g). In 1874, Lacroix, a Frenchman by birth, but naturalized in England, made a will in Paris in the English form, relating to his property in England only. By

The *lex domicilii* only regulates universal successions. Change of domicile as to wills.

Wills of British subjects made abroad.

(b) *Trotter v. Trotter* (1829), 3 Wilson & Shaw, 407.

(c) *Cammell v. Sewell* (1858), 5 H. & N. 728; *Williams v. Colonial Bank* (1890), 38 Ch. D. 388. See as to powers of appointment respecting property in a foreign country, *Tatnall v. Hankey* (1838), 2 Moo. P. C. 342. Cf. Foote, Priv. Int. Jurisprudence (1914), pp. 239 *seq.*, 258 *seq.*

(d) 24 & 25 Vict. c. 114, s. 3.

(e) *Moultrie v. Hunt* (1860), 23

N. Y. 394; Wharton, Conflict of Laws, § 586a.

(f) *Thomson v. Adv.-Gen.* (1845). 12 Cl. & F. 1; *Wallace v. Attorney-General* (1865), L. R. 1 Ch. 1; *Attorney-General v. Campbell* (1872), L. R. 5 H. L. 524; *In re Cigala's Trust* (1878), 7 Ch. D. 351. Cf. Foote, Priv. Int. Jurisprudence (1914), pp. 284 *seq.*

(g) 24 & 25 Vict. c. 114, s. 1.

Wills made in  
England.

the law of France, the will of a naturalized British subject made in France according to the forms required by the law of England, is valid in France, whatever may be the domicile of the testator at the time of his death, or at the time of making the will. The will of Lacroix was therefore admitted to probate under this statute, as being valid according to the law of the place where it was made (*h*). The same statute provides that, "Every will or other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death), shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made" (*i*). Under this section the will of an Italian who was naturalized in England, who made his will in England, and then returned to and was domiciled in Italy at the time of his death, was admitted to probate in England. The section was held to apply equally to naturalized as to native-born British subjects (*k*).

Personal  
status.

The sovereign power of municipal legislation also extends to the regulation of the personal rights of the citizens of the State, and to everything affecting their civil state and condition.

It extends (with certain exceptions) to the supreme police over all persons within the territory, whether citizens or not, and to all criminal offences committed by them within the same (*l*).

Some of these exceptions arise from the positive law of nations, others are the effect of special compact.

There are also certain cases where the municipal laws of the State, civil and criminal, operate beyond its territorial jurisdiction. These are,

Laws relating  
to the state  
and capacity  
of persons  
may operate  
extra-  
territorially.

I. Laws relating to the state and capacity of persons.

In general, the laws of the State, applicable to the civil condition and personal capacity of its citizens, operate upon them even when resident in a foreign country.

Such are those universal personal qualities which take effect either from birth, such as citizenship, legitimacy, and illegitimacy; at a fixed time after birth, as minority and majority; or

(*h*) *In the goods of Lacroix* (1877),  
2 P. D. 95.

(*i*) 24 & 25 Vict. c. 114, s. 2.

(*k*) *In the goods of Gally* (1876),  
1 P. D. 433. Cf. Foote, p. 255.

(*l*) Cf. Huberus, tom. ii. liv. i. tit. 3,  
De conflict. leg. § 2.



at an indeterminate time after birth, as idiocy and lunacy, bankruptcy, marriage, and divorce, ascertained by the judgment of a competent tribunal. The laws of the State affecting all these personal qualities of its subjects travel with them wherever they go, and attach to them in whatever country they are resident (*m*).

This general rule is, however, subject to the following exceptions:—

1. The right of every independent sovereign State to naturalize foreigners and to confer upon them the privileges of their acquired domicile. Naturalization.

Even supposing a natural-born subject of one country cannot throw off his primitive allegiance, so as to cease to be responsible for criminal acts against his native country, it has been determined, both in Great Britain and the United States, that he may become by residence and naturalization in a foreign State entitled to all the commercial privileges of his acquired domicile and citizenship. Thus, by the treaty of 1794, between the United States and Great Britain, the trade to the countries beyond the Cape of Good Hope, within the limits of the East India Company's Charter, was opened to American citizens, whilst it still continued prohibited to British subjects: it was held by the Court of King's Bench that a natural-born British subject might become a citizen of the United States, and be entitled to all the advantages of trade conceded between his native country and that foreign country; and that the circumstance of his returning to his native country for a mere temporary purpose would not deprive him of those advantages (*n*).

2. The sovereign right of every independent State to regulate the property within its territory constitutes another exception to the rule. Regulation of property situated in a State.

Thus, the personal capacity to contract a marriage, as to age, consent of parents, &c., is regulated by the law of the party's domicile (*lex domicilii*) (*o*); but the effects of a nuptial contract upon real property ('immobilia') in another State are determined by the *lex loci rei sitæ*. Huberus, indeed, lays down the contrary doctrine, upon the ground that the foreign law, in this case,

(*m*) Pardessus, Droit Commercial, Pt. VI. tit. 7, ch. 2, § 1, Feelix, Droit International Privé, liv. i. tit. i. § 31. Huberus, tom. ii. l. i. tit. 3, De conflict. leg. § 12. *Abd-ul-Messih v. Farra* (1887), 13 App. Cas. 431, 438; *Re Price, Tomlin v. Latter*, (1900) 1 Ch. 442; and see *In re de Nicol*, (1900) A. C. 21.

(*n*) *Wilson v. Marryatt* (1798), 1 Bos. & Pull. 43; 7 T. R. 31. See further on this subject at the end of the chapter.

(*o*) *Sottomayor v. De Barros* (1877), 3 P. D. 1, C. A.; *Brook v. Brook* (1861), 9 H. L. Cas. 193; *Ogden v. Ogden* (1908), P. 46, C. A. Cf. Foote, Priv. Int. Jurisp. (1914), pp. 70, 340.

does not affect the territory immediately, but only in an incidental manner, and that by the implied consent of the sovereign, for the benefit of his subjects, without prejudicing his or their rights. But the practice of nations is certainly different, and therefore no such consent can be implied to waive the local law which has impressed certain indelible qualities upon immoveable property within the territorial jurisdiction (*p*).

Personal  
property.

As to personal property ('*mobilia*') the *lex loci contractûs*, or *lex domicilii*, may, in certain cases, prevail over that of the place where the property is situated. Huberus holds that not only the marriage contract itself, duly celebrated in a given place, is valid in all other places, but that the rights and effects of the contract, as depending upon the *lex loci*, are to be equally in force everywhere (*q*). If this rule be confined to personal property, it may be considered as confirmed by the unanimous authority of the public jurists, who unite in maintaining the doctrine that the incidents and effects of the marriage upon the property of the parties, wherever situated, are to be governed by the law of the matrimonial domicile, in the absence of any other positive nuptial contract (*r*). But if there be an express ante-nuptial contract, the rights of the parties under it are to be governed by the *lex loci contractûs* (*s*).

Matrimonial  
domicile.

The matrimonial domicile has been defined to be the actual domicile of the husband at the time of the marriage, but it may, possibly, when persons marry with the avowed intention of immediately settling in some country where the husband is not actually domiciled, mean not the actual, but the intended, domicile of the husband (*t*). "The marriage contract," said Lord Brougham, "is emphatically one which parties make with an immediate view to the usual place of their residence" (*u*). The matrimonial domicile is not changed by an abandonment of one party by the other (*x*). It seems fairly established that the law of the matrimonial domicile will always govern personal property acquired before marriage (*y*); and instruments relating to it, such

(*p*) Kent, Comment. vol. ii. pp. 182, 186, n. (5th edit.); Foote, p. 220.

(*q*) Huberus, l. i. tit. 3, De conflict. leg. § 9.

(*r*) Fœlix, § 66. Westlake, Priv. Int. Law (1912), p. 77. Field, International Code, § 575. Foote, p. 220.

(*s*) *De Couche v. Savetier*, 3 Johnson, Ch. Rep. 211.

(*t*) Cf. Dicey, Conflict of Laws (1908), p. 640; and see Field, International Code, § 577 (2nd ed.). Story,

Conflict of Laws, § 193. Wharton, § 190.

(*u*) *Warrender v. Warrender* (1835), 2 Cl. & Fin. 488.

(*x*) *Bonati v. Welsh* (1861), 24 New York, 157. See *Le Sueur v. Le Sueur* (1876), 1 P. D. 139.

(*y*) Phillimore, vol. iv. § 445. *Watts v. Schrimpton* (1856), 21 Beavan, 97; *Wright's Trusts* (1856), 2 K. & J. 595. Westlake, *loc. cit.* Dicey, p. 635. Foote, p. 312.

as marriage settlements, are to be construed according to that law (*z*). But when the matrimonial domicile is changed after marriage, there is a difference of opinion as to what effect this will have upon personal property acquired after such change of domicile. Story lays it down that when there has been a change, the law of the actual, and not of the matrimonial, domicile will govern as to all future acquisitions of personal property, if the laws of the place where the rights are sought to be enforced do not prohibit such arrangements (*a*). On the other hand, in England the law of the matrimonial domicile, in the absence of express contract, regulates the rights of the husband and wife in the moveable property belonging to either of them at the time of their marriage, or acquired by either of them during the marriage. The French law is to the same effect (*b*).

By the general private international law of Europe and America, a certificate of discharge obtained by a bankrupt in the country of which he is a subject, and where the contract was made and the parties domiciled, is valid to discharge the debtor in every other country; but the opinions of jurists and the practice of nations have been much divided upon the question, how far the title of his assignees or syndics will control his personal property situated in a foreign country, and prevent its being attached and distributed under the local laws in a different course from that prescribed by the bankrupt code of his own country. According to the law of most European countries, the proceeding which is commenced in the country of the bankrupt's domicile draws to itself the exclusive right to take and distribute the property. The rule thus established is rested upon the general principle that personal (or moveable) property is, by a legal fiction, considered as situated in the country where the bankrupt had his domicile. But the principles of jurisprudence, as adopted in the United States, consider the *lex loci rei sitæ* as prevailing over the *lex domicilii* in respect to creditors, and that the laws of other States cannot be permitted to have an extra-territorial operation to the prejudice of the authority, rights, and interests of the State

Effect of  
bankrupt  
discharge and  
title of  
assignees  
in another  
country.

(*z*) *Anstruther v. Adair* (1834), 2 Mylne & K. 513; *Este v. Smith* (1854), 18 Beavan, 112; *Saul v. His Creditors*, 5 Martin, N. S. 569; *De Lane v. Moore* (1852), 14 Howard, 253; *Colliss v. Hector* (1875), L. R. 19 Eq. 334; *Re Marsland* (1886), 55 L. J. Ch. 581.

(*a*) *Conflict of Laws*, § 187. Burge, Col. and For. Laws, pt. i. ch. 7, § 8.

Wharton, § 198.

(*b*) *De Nicols v. Curlier*, (1900) A. C. p. 21. Cf. Westlake, *Priv. Int. Law* (1912), p. 74. Foote, pp. 312 *seq.* For the French law, see Fœlix, p. 91. This is approved of by Sir R. Phillimore, vol. iv. § 447, and accords with the opinion of Savigny; cf. English translation by Guthrie, p. 293.



where the property lies. The Supreme Court of the United States has therefore determined, that both the government under its prerogative priority, and private creditors attaching under the local laws, are to be preferred to the claim of the assignees for the benefit of the general creditors under a foreign bankrupt law, although the debtor was domiciled and the contract made in a foreign country (c).

The *lex loci contractus* often causes exceptions to this rule.

3. The general rule as to the application of personal statutes yields in some cases to the operation of the *lex loci contractus*.

Thus a bankrupt's certificate under the laws of his own country cannot operate in another State to discharge him from his debts contracted with foreigners in a foreign country (d). And though the personal capacity to enter into the nuptial contract as to age, consent of parents, and prohibited degrees of affinity, &c., is generally to be governed by the *lex domicilii*, the marriage ceremony is always regulated by the law of the place where it is celebrated (*lex loci celebrationis*) (e); and if valid there, it is considered as valid everywhere else, unless made in fraud of the laws of the country of which the parties are domiciled subjects.

*Lex loci contractus*.

II. The municipal laws of the State may also operate beyond its territorial jurisdiction, where a contract made within the territory comes either directly or incidentally, in question in the judicial tribunals of a foreign State.

A contract, valid by the law of the place where it is made, is, generally speaking, valid everywhere else. The general comity and mutual convenience of nations have established the rule, that the law of that place governs in every thing respecting the form, interpretation, obligation, and effect of the contract, wherever the authority, rights, and interests of other States and their citizens are not thereby prejudiced (f).

Exceptions to its operation.

This qualification of the rule suggests the exceptions which arise to its application.

(c) Bell, Commentaries on the Law of Scotland, vol. ii. pp. 681—687. Rose, Cases in Bankruptcy, vol. i. p. 462. Kent, Comment. vol. ii. pp. 393, 404—408, 459 (5th edit.); *Harison v. Sterry*, 5 Cranch, 289; *Ogden v. Saunders*, 12 Wheaton, 153. Westlake, Priv. Int. Law (1912), pp. 328 seq. Story, §§ 403—415. The English Court will administer the estate in accordance with the *lex fori*, but will allow due operation and effect to a bankruptcy in the forum of the

domicile. *Ex parte Sibeth* (1885), 14 Q. B. D. 417; *Ex parte Dever* (1887), 18 Q. B. D. 660; *Sill v. Worswick* (1791), 1 H. Bl. 665. Cf. Foote, pp. 300 seq.

(d) *Phillips v. Allan* (1828), 8 B. & C. 477. Foote, p. 430.

(e) *Brook v. Brook* (1861), 9 H. L. C. 193, 224; *Marshall v. Marshall* (1908), The Times, March 10. Cf. Foote, p. 92.

(f) See Huberus, l. ii. tit. 3, De conflict. leg. § 11.

1. It cannot apply to cases properly governed by the *lex loci rei sitæ* (as in the case, before put, of the effect of a nuptial contract upon real property in a foreign State), or by the laws of another State relating to the personal state and capacity of its citizens.

2. It cannot apply where it would injuriously conflict with the laws of another State relating to its police, its public health, its commerce, its revenue, and generally its sovereign authority, and the rights and interests of its citizens.

Thus, if goods are sold in a place where they are not prohibited, to be delivered in a place where they are prohibited, although the trade is perfectly lawful by the *lex loci contractûs*, the price cannot be recovered in the State where the goods are deliverable, because to enforce the contract there would be to sanction a breach of its own commercial laws. But the tribunals of one country do not take notice of, or enforce, either directly or incidentally, the laws of trade or revenue of another State, and therefore an insurance of prohibited trade may be enforced in the tribunals of any other country than that where it is prohibited by the local laws (*g*).

Huberus holds that the contract of marriage is to be governed by the law of the place where it is celebrated, excepting fraudulent evasions of the law of the State to which the party is subject (*h*). Such are marriages contracted in a foreign State, and according to its laws, by persons who are minors, or otherwise incapable of contracting, by the law of their own country. But according to the international marriage law of the British Empire, a clandestine marriage in Scotland, of parties originally domiciled in England, who resort to Scotland, for the sole purpose of evading the English Marriage Act, requiring the consent of parents or guardians, is considered valid in the English Ecclesiastical Courts. This jurisprudence is said to have been adopted upon the ground of its being a part of the general law and practice of Christendom, and that infinite confusion and mischief would ensue, with respect to legitimacy, succession, and other personal and proprietary rights, if the validity of the marriage contract was not determined by the law of the place where it was made. The same principle

Foreign marriages.

English law.

(*g*) Pardessus, *Droit Commercial*, pt. vi. tit. 7, ch. 2, § 3. Émérigon, *Traité des Assurances*, tom. i. pp. 212—215. Park, *Insurance*, p. 341 (6th ed.). The moral equity of this rule

has been strongly questioned by Bynkershock and Pothier. Also by Story, § 257; Heffter, § 36; but it is admitted to be correct.

(*h*) *De conflict. leg. l. c.*

has been recognised between the different States of the American Union, upon similar grounds of public policy (*i*).

French law.

On the other hand, the age of consent required by the French Civil Code is considered, by the law of France, as a personal quality of French subjects, following them wherever they remove; and, consequently, a marriage by a Frenchman, within the required age, will not be regarded as valid by the French tribunals, though the parties may have been above the age required by the law of the place where it was contracted (*k*).

Execution of contract in another country.

3. Wherever, from the nature of the contract itself, or the law of the place where it is made, or the expressed intention of the parties, the contract is to be executed in another country, everything which concerns its execution is to be determined by the law of that country. Those writers who affirm that this exception extends to everything respecting the nature, the validity, and the interpretation, appear to have erred in supposing that the authorities are at variance on this question. They will be found, on a critical examination, to establish the distinction between what relates to the validity and interpretation, and what relates to the execution of the contract. By the usage of nations, the former is to be determined by the *lex loci contractûs*, the latter by the law of the place where it is to be carried into execution (*l*).

English law.

By the law of England, what is to be the law by which a contract, or any part of it, is to be governed or applied, must always be a matter of construction of the contract itself, as read by the light of the subject-matter and of the surrounding circumstances (*m*).

The law of the domicile regulates the capacity of the parties to marry.

“There can be no doubt,” said Lord Campbell, “of the general rule that a foreign marriage, valid according to the law of a country where it is celebrated, is good everywhere. But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractûs*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of

(*i*) *Harford v. Morris* (1776), 2 Hagg. Cons. 428. Kent, Commentaries, vol. ii. p. 93.

(*k*) Merlin, Répertoire, tit. Loi, § 6. Toullier, Droit Français, tom. i. No. 118, 576. *Simonin v. Mallac* (1860), 2 Swa. & Tr. 62.

(*l*) Fœlix, Droit International Privé, § 74.

(*m*) *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115; *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. 589, 599; *Re Missouri Steamship Co.* (1889), 42 Ch. D. 321; 5 T. L. R. 438. Cf. Foote, pp. 369 *seq.*



celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated" (n). It is quite obvious that no civilized State can allow its subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract, to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or any of its fundamental institutions.

In 1840, W. L. Brook married Charlotte Armitage in England. *Brook v. Brook* In 1847, Mrs. Brook died, and in 1850 W. L. Brook married Emily Armitage, the lawful sister of his deceased wife, at Wandsbeck, in Denmark, according to the laws of Denmark. At the time of the marriage Brook and Emily Armitage were domiciled in England, and had merely gone to Denmark on a temporary visit. The question arose whether this marriage could be recognised as valid in England. The law of Denmark does not prohibit the marriage of a widower with his deceased wife's sister, but the law of England then did (o). The House of Lords held that the parties being at the time domiciled in England, their capacity to marry, and the consequent validity of their marriage, was to be decided by English law. "A marriage between a man and the sister of his deceased wife," said Lord Campbell, "being Danish subjects domiciled in Denmark, may be good all over the world, and this might likewise be so even if they were native-born English subjects, who had abandoned their English domicile and were domiciled in Denmark. But I am by no means prepared to say that the marriage now in question ought to be, or would be, held valid in the Danish courts, proof being given that the parties were British subjects domiciled in England, that England was to be their matrimonial residence, and that by the law of England such a marriage is prohibited as being contrary to the law of God" (p). Every State has a perfect right to decide what marriages it will deem 'contra bonos mores,' and what marriages

(n) *Brook v. Brook* (1861), 9 H. of L. Cas. 207; *Sottomayor v. De Barros* (1877), 3 P. D. 1. See also *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67; *Harvey v. Farnie* (1880), 8 App. Cas. 43, 50. And see Dicey, *Conflict of Laws* (1908), pp. 613 seq. Foote, p. 70.

(o) *Hill v. Good*, Vaughan, 302; *R. v. Chadwick*, 11 Q. B. 173, 205. Marriage with a deceased wife's sister was made lawful by the Deceased Wife's Sister's Marriage Act, 1907.  
(p) *Brook v. Brook* (1861), 9 H. L. Cas. 212.

it will prohibit within its jurisdiction. If such marriages are entered into abroad by its domiciled subjects, their validity will not be recognised in the State prohibiting them.

Polygamous  
and incestuous  
marriages.

When a marriage is polygamous or incestuous by the law of the place where it is drawn in question, its validity will not be recognised in such place, although the marriage may have been lawful where celebrated. There can be no question as to what is a polygamous marriage. Marriage, as understood in Christendom, has been defined to be the voluntary union for life of one man and one woman, to the exclusion of all others (*g*). In 1866, Lord Penzance refused to recognise a Mormon marriage as valid in England. The marriage was a species of compact entered into between the parties in Utah, but it was such that the law of England could not take notice of it, so as to decree a restitution of conjugal rights (*r*). But what amounts to an incestuous marriage is by no means so clear. Marriages between blood relations in the lineal ascending or descending line, and marriages between brother and sister in the collateral line, whether of the whole or of the half-blood, are universally regarded as incestuous (*s*). Beyond this there is no rule upon which nations are agreed.

Clandestine  
Scotch  
marriages.

As regards clandestine Scotch marriages, it is now enacted that "an irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony, shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland twenty-one days next preceding such marriage" (*t*).

Marriages of  
British  
subjects  
abroad.

By the Foreign Marriage Act of 1892, it is provided that all marriages between parties of whom one at least is a British subject, and solemnized in the manner therein provided in any foreign country or place by a marriage officer within the meaning of the Act, shall be as valid in law as if the same had been solemnized in the United Kingdom with a due observance of all forms required by law. The Act applies to embassy and consular marriages, and marriages celebrated on board ships of war on foreign stations. The "marriage officer" is not required to solemnize a

(*g*) *Hyde v. Hyde* (1866), L. R. 1 P. & D. 130, per Lord Penzance, at p. 133; see also *Re Bethell* (1888), 38 Ch. D. 220; and *Brinkley v. The Attorney-General* (1890), P. D. 76.

(*r*) *Hyde v. Hyde*, *ut supra*.

(*s*) Story, Conflict of Laws, § 114; Foote, pp. 98 *seq.* See also *Sottomayor v. De Barros* (1879), 5 P. D. 94; *Roth v. Roth*, 104 Ill. 35. As to

the marriage laws of the British Empire, see Report of Royal Commission on the Marriage Laws, 1868, and a return made to the House of Commons in 1894. Parl. Papers, H. C. (1894), 144, 145, 323, 324.

(*t*) 19 & 20 Vict. c. 96. *Lawford v. Davies*, 47 L. J. P. D. & A. 38; L. R. 4 P. D. 6.

marriage if in his opinion the solemnization would be inconsistent with international law or the comity of nations (*u*). The Act of 1892 is supplemented by the Marriage with Foreigners Act, 1906, which is intended to protect British subjects who marry aliens, either here or abroad, and then find that though the marriage is recognised here, it is not held valid by the other party's personal law. Opportunities are thereby afforded to a British subject, desiring to marry an alien in a foreign country, to fulfil the provisions of the foreign law (*x*).

4. As every sovereign State has the exclusive right of regulating the proceedings in its own courts of justice, the *lex loci contractus* of another country cannot apply to such cases as are properly to be determined by the *lex fori* of that State where the contract is brought in question. *Lex fori.*

Thus, if a contract made in one country is attempted to be enforced, or comes incidentally in question, in the judicial tribunals of another, everything relating to the forms of proceeding, the rules of evidence, and of limitation, (or prescription,) is to be determined by the law of the State where the suit is pending, not of that where the contract is made (*y*).

III. The municipal institutions of a State may also operate beyond the limits of its territorial jurisdiction, in the following cases:—

Foreign sovereign, his ambassador, army, or fleet, within the territory of another State.

1. The person of a foreign sovereign, or head of a State, going into the territory of another State, is, by the general usage and comity of nations, exempt from the ordinary local jurisdiction. Representing the power, dignity, and all the sovereign attributes of his own nation, and going into the territory of another State, under the permission which (in time of peace) is implied from the absence of any prohibition, he is not amenable to the civil or criminal jurisdiction of the country where he temporarily resides (*z*). According to earlier practice, the foreign sovereign

(*u*) 55 & 56 Vict. c. 23. For previous legislation on the subject, see schedule to the Act containing the statutes repealed. Foote, pp. 103 *seq.*

(*x*) Foote, p. 107.

(*y*) Kent, Commentaries, vol. ii. p. 459 (5th ed.). Félix, Droit International Privé, § 76. *Don v. Lippman* (1837), 5 Cl. & F. 1; *Scudder v. Bank*, 91 U. S. 406. Cf. Foote, pp. 474 *seq.* (where numerous cases are cited).

(*z*) Bynkershoek, De Foro Legat., cap. iii. § 13, cap. ix. § 10. In the case of *Duke of Brunswick v. King of Hanover* (1844), 6 Beav. 1, at p. 51, Lord Langdale said: "On the whole it ought to be considered as a general rule, in accordance with the law of nations, that a sovereign prince, resident in the dominions of another, is exempt from the jurisdiction of the Courts there." See *infra*, p. 329; and see *Mighell v. Sultan of Johore*, (1894)



possessed criminal jurisdiction over members of his suite during temporary residence within another State (a), but now this rule is considered inapplicable. Thus, in 1873, when the Shah of Persia was on a visit to this country, he condemned to death one of the members of his suite, but the British Government refused to allow the sentence to be carried out.

2. The person of an ambassador, or other public minister, whilst within the territory of the State to which he is delegated, is also exempt from the local jurisdiction. His residence is considered as a continued residence in his own country, and he retains his national character, unmixed with that of the country where he locally resides (b).

3. A foreign army or fleet, marching through, sailing over, or stationed in the territory of another State, with whom the foreign sovereign to whom they belong is in amity, are also, in like manner, exempt from the civil and criminal jurisdiction of the place (c).

If there be no express prohibition, the ports of a friendly State are considered as open to the public armed and commissioned ships belonging to another nation, with whom that State is at peace. Such ships are exempt from the jurisdiction of the local tribunals and authorities, whether they enter the ports under the license implied from the absence of any prohibition, or under an express permission stipulated by treaty. But the private vessels of one State, entering the ports of another, are not exempt from the local jurisdiction, unless by express compact, and to the extent provided by such compact (d).

The above principles, respecting the exemption of vessels belonging to a foreign nation from the local jurisdiction, were asserted by the Supreme Court of the United States, in the celebrated case of *The Exchange* (e), a vessel which had originally belonged to an American citizen, but had been seized and confiscated at St. Sebastian, in Spain, and converted into a public armed vessel by the Emperor Napoleon, in 1810, and was reclaimed by the original owner, on her arrival in the port of Philadelphia.

1 Q. B. 149; *The Parlement Belge* (1880), L. R. 5 P. D. 197; *De Haber v. Queen of Portugal* (1851), 17 Q. B. 196. Cf. Foote, Priv. Int. Jurisp. (1914), pp. 152 seq. In *Statham v. Statham* (1912), 28 T. L. R. 180, an Indian prince, recognised as a reigning sovereign, was sued as a co-respondent in a divorce suit, but on his application was struck out of the proceedings.

(a) Cf. the case of *Queen Christina*

of Sweden (1657), Calvo, Droit int., vol. iii. § 1477.

(b) Vide *infra*, pt. iii. ch. 1.

(c) Casaregis, Discursus de commercio (Venetiis, 1740), 136, 174. See *infra*, p. 155.

(d) *United States v. Diekelman* (1875), 2 Otto, 520; 92 U. S. 520; *Wildenhuis' Case* (1886), 120 U. S. 1.

(e) *The Exchange v. McFadden* (1812), 7 Cranch, 116.

Foreign  
public  
vessels.

The case of  
*The Exchange*.

In delivering the judgment of the Court in this case, Chief Justice Marshall stated that the jurisdiction of courts of justice was a branch of that possessed by the nation as an independent sovereign Power. The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that Power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They could flow from no other legitimate source. This consent might be either express or implied. In the latter case it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory. The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, under certain peculiar circumstances, of that absolute and complete jurisdiction, within their respective territories, which sovereignty confers. This consent might, in some instances, be tested by common usage, and by common opinion growing out of that usage. A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly, and without previous notice, exercise its territorial jurisdiction in a manner not consonant to the usages and received obligations of the civilized world.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, has given rise to a class of cases, in which every sovereign is understood to waive the exercise of a part of that complete, exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

1. One of these was the exemption of the person of the sovereign from arrest or detention within a foreign territory. If he enters that territory with the knowledge and license of its sovereign, that license, although containing no express stipulation exempting his person from arrest, was universally understood to imply such stipulation. Why had the whole civilized world concurred in this construction? The answer could not be mistaken. A foreign sovereign was not understood as intending to subject

Exemption of the person of the foreign sovereign from the local jurisdiction.

himself to a jurisdiction incompatible with his dignity and the dignity of his nation, and it was to avoid this subjection that the license had been obtained. The character of the person to whom it was given, and the object for which it was granted, equally required that it should be construed to impart full security to the person who had obtained it. This security, however, need not be expressed; it was implied from the circumstances of the case. Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which did not appear to be perfectly settled, a decision of which was not necessary to any conclusion to which the Court might come in the case under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign whose dominions he had entered, it would seem to be because all sovereigns impliedly engage not to avail themselves of a power over their equal, which a romantic confidence in their magnanimity had placed in their hands.

Exemption of  
foreign  
ministers  
from the local  
jurisdiction.

2. A second case, standing on the same principles with the first, was the immunity which all civilized nations allow to foreign ministers. Whatever might be the principle on which this immunity might be established, whether we consider the minister as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extra-territoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it. This consent is not expressed. It was true that in some countries, and in the United States among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess. The assent of the local sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the consideration, that, without such exemptions, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign Power to the care of a person whom he has selected for that purpose, cannot intend to subject his



minister in any degree to that Power; and, therefore, a consent to receive him implies a consent that he shall possess those privileges which his principal intended he should retain, privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform. In what cases a public minister, by infringing the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, was an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original consent, has ceased to be entitled to them.

3. A third case, in which a sovereign is understood to cede a portion of his territorial jurisdiction, was where he allows the troops of a foreign prince to pass through his dominions. In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require. But if, without such express permission, an army should be led through the territories of a foreign prince, might the territorial jurisdiction be rightfully exercised over the individuals composing that army? Without doubt, a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign. But if his consent, instead of being expressed by a particular license, be expressed by a general declaration that foreign troops may pass through a specified tract of country, a distinction between such general permission and a particular license is not perceived. It would seem reasonable, that every immunity which would be conferred by a

Exemption from the local jurisdiction of foreign troops passing through the territory.

special license, would be, in like manner, conferred by such general permission.

It was obvious that the passage of an army through a foreign territory would probably be, at all times, inconvenient and injurious, and would often be eminently dangerous to the sovereign through whose dominions it passed. Such a passage would break down some of the most decisive distinctions between peace and war, and would reduce a nation to the necessity of resisting by war an act not absolutely hostile in its character, or of exposing itself to the stratagems and frauds of a Power whose integrity might be doubted, and who might enter the country under deceitful pretexts. It is for reasons like those that the general license to foreigners to enter the dominions of a friendly Power is never understood to extend to a military force; and an army marching into the dominions of another sovereign, without his special permission, may justly be considered as committing an act of hostility; and, even if not opposed by force, acquires no privileges by its irregular and improper conduct. It might, however, well be questioned whether any other than the sovereign of the State is capable of deciding that such military commander is acting without a license.

Exemption of foreign ships of war, entering the ports of any nation, under an express or implied permission.

But the rule which is applicable to armies did 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, had been generally adopted. If, for reasons of State, the ports of a nation generally, or any particular ports, be closed against vessels of war generally, or against 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.

The treaties between civilized nations, in almost every instance, contain a stipulation to this effect in favour of vessels driven in by stress of weather or other urgent necessity. In such cases the sovereign is bound by compact to authorize foreign vessels to enter his ports, and this is a license which he is not at liberty to retract. If there be no treaty applicable to the case, and the sove-

reign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly Powers, the conclusion seems irresistible that they enter by his assent. And if they enter by his assent necessarily implied, no just reason is perceived for distinguishing their case from that of vessels which enter by express assent.

The whole reasoning, upon which such exemption had been implied in the case of a sovereign or his minister, applies with full force to the exemption of ships of war in the case in question. "It is impossible to conceive," said Vattel, "that a prince who sends an ambassador, or any other minister, can have any intention of subjecting him to the authority of a foreign Power; and this consideration furnishes an additional argument, which completely establishes the independence of a public minister. If it cannot be reasonably presumed that his sovereign means to subject him to the authority of the prince to whom he is sent, the latter, in receiving the minister, consents to admit him on the footing of independence; and thus there exists between the two princes a tacit convention, which gives a new force to the natural obligation" (f). Equally impossible was it to conceive, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this could not be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent to which it must have been understood to be asked.

According to the judgment of the Supreme Court of the United States, where, without treaty, the ports of a nation are open to the public and private ships of a friendly Power, whose subjects have also liberty, without special license, to enter the country for business or amusement, a clear distinction was to be drawn between the rights accorded to private individuals, or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.

Distinction  
between  
public and  
private  
vessels.

When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other; or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals did not owe temporary and local allegiance, and

(f) Vattel, *Droit des Gens*, liv. 4, ch. 7, § 92.



were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects, then, passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption.

But the situation of a public armed ship was, in all respects, different. She constitutes a part of the military force of her nation, acts under the immediate and direct command of the sovereign, is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign State. Such interference cannot take place without seriously affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port may reasonably be construed, and it seemed 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. Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly, in practice, nations had not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.

Bynkershoek, a public jurist of great reputation, had indeed maintained that the property of a foreign sovereign was not distinguishable, by any legal exemption, from the property of an ordinary individual; and had quoted several cases in which courts of justice had exercised jurisdiction over cases in which a foreign sovereign was made a party defendant (*g*). Without indicating any opinion on this question, it might safely be affirmed that there is a manifest distinction between the private property of a person who happens to be a prince and that military force which supports the sovereign power, and maintains the dignity and independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the character of a prince and assuming that of a private individual (*h*); but he cannot be pre-

(*g*) Bynkershoek, De Foro Legat., cap. i.

(*h*) Cf. *The Charkieh* (1873), L. R. 4 A. & E. 87.

sumed to do this with respect to any portion of that armed force which upholds his crown and the nation he is intrusted to govern.

The only applicable case cited by Bynkershoek was that of the Spanish ships of war, seized in 1668, in Flushing, for a debt due from the King of Spain. 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 (*i*).

This case of the Spanish vessels was believed to be the only case furnished by the history of the world, of an attempt made by an individual to assert a claim against a foreign prince by seizing the armed vessels of the nation. That this proceeding was at once arrested by the government, in a nation which appears to have asserted the power of proceeding against the private property of the prince, would seem to furnish no feeble argument in support of the universality of the opinion in favour of the exemption claimed for ships of war. The distinction made in the laws of the United States between public and private ships would appear to proceed from the same opinion.

Without doubt the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction which it would be a breach of faith to exercise. Those general statutory provisions, therefore, which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual, whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found, ought not, in the opinion of the Supreme Court, to be so construed as to give them jurisdiction in a case in which the sovereign power had implicitly consented to waive its jurisdiction.

The Court came to the conclusion, that the vessel in question, being a public armed ship, in the service of a foreign sovereign with whom the United States were at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly Power, must be considered as having come into the American territory under an implied promise that, while neces-

(*i*) Bynkershoek, cap. iv.

sarily within it and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country (*k*).

*The Sitka*  
(1855).

As to the position of persons on board public vessels, the case of *The Sitka* may be mentioned. During the Crimean war, 1855, a British cruiser captured the Russian public vessel, *Sitka*, and brought her into San Francisco, with a prize crew on board. On behalf of two prisoners on board, application was made to the local courts for a writ of *habeas corpus* to try whether their detention was valid. Process was served, but was disregarded by the commander of the *Sitka*, who departed with the prisoners on board. The opinion of the Attorney-General of the United States was taken as to whether the Government had a just ground of complaint against Great Britain. The Attorney-General, after stating that unless there had been a violation of a State's neutrality, its courts could not decide on the validity of a belligerent's capture, pointed out that the Courts of the United States had "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" (*l*). This is now the general rule of international law; it must be taken, of course, subject to certain qualifications that arise in time of war (*m*).

Proceedings  
against ships  
of war.

The point actually decided in the case of *The Exchange* was, that the local court would not inquire into the title by which the foreign sovereign held his vessel; but it did not follow from this that ships of war were to be exempt from the jurisdiction in all cases when complying with the terms of the implied license under which they entered the friendly port. The municipal law of most countries prohibits subjects from taking proceedings against the ships of war of their own country, except with the consent of the government (*n*). But whether a subject of one State could take legal proceedings against a ship of war of another State for the purpose of enforcing a maritime lien, like salvage or damage, or for establishing any other claim against such ship of war, has given rise to much discussion. The general rule, as to all persons and property within the territorial jurisdiction of a sovereign being amenable to the jurisdiction of himself and his courts, is beyond dispute, but there are exceptions to it which are allowed

(*k*) *The Schooner Exchange v. McFadden and others* (1812), 7 Cranch, 135—147.

(*l*) Opinions of Attorneys-General of the United States, vol. vii. p. 122.

(*m*) See *infra*, Part IV. chap. iii.,

on the rights of neutral States with regard to belligerent vessels entering their ports and territorial waters.

(*n*) *The Comus*, 2 Dods. Ad. 464; *Briggs v. The Light Ships* (1865), 11 Allen (Mass. Rep.), 157.



in order to preserve the peace and harmony of nations, and the exemption of ships of war is one of the principal of these exceptions. But the exemption must be understood to apply only to the ship itself. The jurisdiction of the local sovereign over persons on board such ship, or over acts committed thereon, is not necessarily waived because no rights over the *corpus* of the ship are claimed. The extritoriality of such a ship is discussed further on (*o*), but its exemption from legal process may now be considered as established in almost all possible cases. It is not even necessary, in order to claim exemption, that a ship should be a ship of war. Any vessel declared by a sovereign authority to be a public vessel, and the property of the State, will be equally exempt. Thus, a mail packet belonging to the Belgian Government, and running between Dover and Ostend, was sued for damages resulting from a collision, but the Court held that it had no jurisdiction, even though the ship was partly used as a trading vessel (*p*). This principle has even been pushed to the extent of exempting the cargo on board a public ship. The *Constitution*, a frigate of the United States, was employed in carrying home goods belonging to American exhibitors at the Paris Exhibition. She stranded off the English coast, and several tugs went to her assistance. The sum of 200*l.* was offered to the owners of the tugs as payment, but, not being deemed sufficient, they sued the *Constitution*. The Court held that it had no jurisdiction either against the ship or the cargo on board, even though the latter belonged to private persons (*q*). Similarly, in a more recent case (*r*), it was held that no proceedings would lie against a public vessel belonging to a sovereign State (Roumania), and that the entering of an appearance by the vessel's local agents, under a misapprehension, did not amount to a submission to the territorial jurisdiction. It would seem, however, on principle, that if a public vessel has practically ceased to be under the control of the State, and is employed entirely for trading purposes, the exemption would not apply; for here the sovereign authority would justifiably be presumed to have waived her public character, in the absence of its declaration to the contrary (*s*).

As regards other property belonging to a foreign sovereign, the principle of exempting it from the local tribunals is not so

Other property of foreign sovereigns.

(*o*) See *infra*, p. 165.

(*p*) *The Parlement Belge* (1880), L. R. 5 P. D. 197.

(*q*) *The Constitution* (1879), L. R. 4 P. D. 39; *The Prins Frederik* (1820), 2 Dods. Ad. 451.

(*r*) *The Jassy*, (1906) P. 270.

(*s*) As to the proof of character, cf. *The Santissima Trinidad* (1812), 7 Wheat. 283; *The Parlement Belge* (1880), 5 P. D. 197; *Mighell v. Sultan of Johore*, (1894) 1 Q. B. 149.

clear and simple as in the case of ships. The tendency of international law is to protect such property in all cases where any dealings with it would impair the dignity of the foreign sovereign, and to substitute negotiations between governments for proceedings in the local courts in such cases. But where the suit can be carried on without affecting his dignity, there seems no objection to the local court deciding the case in the ordinary way (*t*). But no suit can ever be maintained against a foreign sovereign for acts done by him by virtue of his authority as sovereign, for this would most undoubtedly impair his dignity. This has been held to be the case even though the foreign sovereign should also happen to be at the same time a British subject (*u*). But if the foreign sovereign, who is at the same time a subject of the British crown, enters into transactions or does acts in his private capacity, he will be subject to the local jurisdiction' (*x*). He will also be amenable to the local courts in respect of actions arising out of such immoveable property as he possesses within the territory (*y*). When the status of the foreign sovereign is doubtful, the Court must of necessity inquire into that status, for the purpose of ascertaining whether he is or is not an independent sovereign. In the case of *The Charkieh*, a ship belonging to the Khedive of Egypt, which was arrested by the Admiralty Court in 1872 for running down a vessel in the Thames, Sir R. Phillimore in his judgment reviewed the international position of Egypt, and held that the Khedive was not at that time to all intents and purposes an independent sovereign, and therefore his property was not entitled to exemption from the local courts (*z*).

If a foreign sovereign himself institutes a suit in the local court, he thereby submits to its jurisdiction as regards all matters relating to the suit (*a*); and therefore the Court may put him on terms, and order all proceedings to be stayed, unless he complies with its terms (*b*). Thus, the French courts would not allow the United States to sue certain shipbuilders for fitting out privateers

Suits by  
foreign  
sovereigns.

(*t*) *Gladstone v. Musurus Bey* (1862), 1 H. & M. 492; *Vavasour v. Krupp* (1878), L. R. 9 Ch. D. 351; *Larivière v. Morgan* (1872), L. R. 7 H. L. 423.

(*u*) *Duke of Brunswick v. King of Hanover* (1844), 2 Cl. & F. 1.

(*x*) *Duke of Brunswick v. King of Hanover*, *supra*.

(*y*) *The Charkieh* (1873), L. R. 4 A. & E. 97; *Taylor v. Best* (1854), 14 C. B. 487, 523; 23 L. J. C. P. 89.

(*z*) *The Charkieh* (1873), L. R. 4 A. & E. 59; but see *The South African*

*Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, L. R. (1898) 1 Ch. D. 190.

(*a*) *Hullet v. King of Spain* (1828), 1 D. & Cl. 174; *Duke of Brunswick v. King of Hanover* (1844), *supra*.

(*b*) *Prioleau v. U. S. of America* (1866), L. R. 2 Eq. 659; *U. S. v. Wagner* (1867), L. R. 2 Ch. 582; *Republic of Peru v. Weguelin* (1875), L. R. 20 Eq. 140. Westlake, *Priv. Int. Law* (1912), pp. 274 *seq.* Foelix, § 217. Foote, *Priv. Int. Jurisp.* (1914), pp. 147 *seq.*

for the Confederate States, until that Government had deposited 150,000 francs as security for costs (c). The rights of a foreign sovereign, as regards the public property of his State, do not abate by reason of a change in the person of the sovereign, and his successor may continue or institute a suit to enforce such rights (d).

The maritime jurisprudence of France, in respect to foreign private vessels entering the French ports for the purposes of trade, appears to be inconsistent with the principles established in the judgment of the Supreme Court of the United States in the case of *The Exchange*; or, to speak more correctly, the legislation of France waives, in favour of such vessels, the exercise of the local jurisdiction to a greater extent than appears to be imperatively required by the general principles of international law. As it depends on the option of a nation to annex any conditions it thinks fit to the admission of foreign vessels, public or private, into its ports, so it may extend, to any degree it may think fit, the immunities to which such vessels, entering under an implied license, are entitled by the general law and usage of nations.

Private vessels and the local jurisdiction. The law of France.

The law of France, in respect to offences and torts committed on board foreign merchant vessels in French ports, establishes a twofold distinction between:

1. Acts of mere interior discipline of the vessel, or even crimes and offences committed by a person forming part of its officers and crew, against another person belonging to the same, where the peace of the port is not thereby disturbed.

2. Crimes and offences committed on board the vessel against persons not forming part of its officers and crew, or by any other than a person belonging to the same, or those committed by the officers and crew upon each other, if the peace of the port is thereby disturbed.

In respect to acts of the first class, the French tribunals decline to assert jurisdiction. The French law declares that the rights of the Power, to which the vessel belongs, should be respected, and that the local authority should not interfere, unless its aid is demanded. These acts, therefore, remain under the police and jurisdiction of the State to which the vessel belongs. In respect to those of the second class, the local jurisdiction is asserted by those tribunals. It is based on the principle, that the protection accorded to foreign merchantmen in the French ports cannot divest

(c) Report of Neutrality Laws Commission, 1868, p. 49.

(d) *The Sapphire* (1870), 11 Wallace, 164; *King of Spain v. Oliver* (1810), 2 Washington C. C. 431.



the territorial jurisdiction, so far as the interests of the State are affected; that a vessel admitted into a port of the State is of right subjected to the police regulations of the place; and that its crew are amenable to the tribunals of the country for offences committed on board of it against persons not belonging to the ship, as well as in actions for civil contracts entered into with them; that the territorial jurisdiction for this class of cases is undeniable.

It is on these principles that the French authorities and tribunals act, with regard to merchant ships lying within their waters. The grounds upon which the jurisdiction is declined in one class of cases, and asserted in the other, are stated in a decision of the Council of State, pronounced in 1806. This decision arose from a conflict of jurisdiction between the local authorities of France and the American consuls in the French ports, in the two following cases:—

The cases of  
*The Newton*  
and *The Sally*.

The first case was that of the American merchant vessel, *The Newton*, in the port of Antwerp; where the American consul and the local authorities both claimed exclusive jurisdiction over an assault committed by one of the seamen belonging to the crew against another, in the vessel's boat. The second was that of another American vessel, *The Sally*, in the port of Marseilles, where exclusive jurisdiction was claimed both by the local tribunals and by the American consul, as to a severe wound inflicted by the mate on one of the seamen, in the alleged exercise of discipline over the crew. The Council of State pronounced against the jurisdiction of the local tribunals and authorities in both cases, and assigned the following reasons for its decision:

“Considering that a neutral vessel cannot be indefinitely regarded as a neutral place, and that the protection granted to such vessels in the French ports cannot oust the territorial jurisdiction, so far as respects the public interests of the State; that, consequently, a neutral vessel admitted into the ports of the State is rightfully subject to the laws of the police of that place where she is received; that her officers and crew are also amenable to the tribunals of the country for offences and torts (*e*) committed by them, even on board the vessel, against other persons than those belonging to the same, as well as for civil contracts made with them; but that, in respect to offences and torts committed on board the vessel, by one of the officers and crew against another, the rights of the neutral Power ought to be respected, as exclusively

(*e*) The term used in the original is ‘*délits*,’ which includes every wrong done to the prejudice of individuals, whether they be ‘*délits publics*’ or ‘*délits privés*.’

concerning the internal discipline of the vessel, in which the local authorities ought not to interfere, unless their protection is demanded, or the peace and tranquillity of the port is disturbed; the Council of State is of opinion that this distinction, indicated in the report of the Grand Judge, Minister of Justice, and conformable to usage, is the only rule proper to be adopted, in respect to this matter; and applying this doctrine to the two specific cases in which the consuls of the United States have claimed jurisdiction; 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 case 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 without leave; is 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" (f).

Wheaton, in a notice of Ortolan's work, came to the conclusion that the French law established the true rule, and was most in conformity with the practice of nations (g). A ship of war and a private merchant vessel cannot both claim the same immunities. As has already been stated, it is doubtful whether a ship of war may not be proceeded against in some cases, but it is beyond doubt that merchant vessels are always liable to be sued in a local court. It is also a separate point how far a local court may exercise jurisdiction over acts done or persons found on board a public or a private ship.

Distinction between public and private ships.

It has been laid down by many writers that a ship of war is in all respects a portion of the territory of the State to which she belongs, and that when in the waters of another State not only is the vessel herself exempt from the local law, but the exemption extends to all persons and things on board her (h). Although this doctrine of extritoriality has been very widely received, there is a great weight of authority against it.

Doctrine of extritoriality.

In the case of John Brown, a British subject, who was imprisoned by the Spaniards at Callao in 1819, for assisting in a Peruvian revolt, and who escaped on board a British ship of war

Case of John Brown.

(f) Ortolan, Règles Internationales de la Mer, tome i. pp. 293—298. Appendice, Annexe H. p. 441.

(g) Revue de Droit Français et Etranger, vol. ii. p. 206. Wheaton, by Lawrence, p. 191.

(h) Historicus, The Times, Nov. 4th, 1875. Italy and Germany maintain

this extritoriality. See Report of Royal Commission on Fugitive Slaves, 1876, p. 7, where the subject is fully discussed. This Report is a most valuable contribution to international law, and well repays the most careful reading.



then in the port of Lima, Lord Stowell, on being asked his opinion as to whether Brown ought to have been delivered up to the Spanish authorities, replied "that individuals merely belonging to the same country with the ship of war, are exempted from the civil and criminal process of the country in its ordinary jurisdiction of justice by getting on board such ship, and claiming what is called the protection of its flag, is a pretension which, however heard of in practice occasionally, has no existence whatever in principle" (i). In accordance with this opinion Lord Castlereagh directed the English minister in Spain to disavow the act of the captain of the ship of war in not delivering up John Brown.

Opinion of  
the U. S.  
Attorney-  
General.

In 1794, the opinion of Mr. William Bradford, the United States Attorney-General, was taken, as to whether a writ of *habeas corpus* would go to bring up a subject illegally detained on board a foreign ship of war. He replied that although he could find no instance of this having been done, he was of opinion that a writ might be legally awarded in such a case, and that the commander of the foreign ship of war could not claim to be exempt from the jurisdiction of the State where he happens to be (k).

Opinion of  
Cockburn,  
C. J., on the  
exemption of  
public ships.

Lord Chief Justice Cockburn, in criticising the case of *The Exchange*, allows the exemption of a ship of war "if restricted to the ship itself, which was all the Court had to deal with." But as regards those on board, his Lordship adds, that "inasmuch as the crew may commit offences against the local law, which the ship, being an inanimate thing, cannot, it cannot be equally implied that the local sovereign has consented that if they violate the local law they shall enjoy immunity from its penalties." It is admitted that they are liable to be arrested for offences against the local law committed on shore, why therefore "should they be exempt because they get back to the ship before they are taken? And *à fortiori*, why should a person living under the local law, as a subject of the local State, be able to withdraw himself from the operation of that law by getting on a ship which, but for this alleged extritoriality, would clearly be within the jurisdiction? Is it necessarily to be implied that, because by the comity of nations the ports of every State are open to the ships of war of other States, the local sovereign has assented to his law becoming powerless in respect of crime committed within its jurisdiction in case the criminal can get on board a foreign ship lying in its waters? Has this country ever assented to this doctrine? Is it

(i) Report of Royal Commission on Fugitive Slaves, 1876, p. 77. See also *ibid.*, pp. 27, 54, 56. U. S. Papers on Foreign Affairs, vol. i. p. 446.

(k) Opinions of Attorneys-General,



prepared to do so now? Can any instance be cited in which a criminal has been allowed to escape because he found his way to a foreign ship of war? Certainly none such has been brought to our knowledge."

This opinion was delivered on the question as to what course an English naval commander was to pursue, when a slave escaped on to his vessel, while she was in the waters of a State that permitted slavery. After reviewing all the leading authorities on this subject, the Lord Chief Justice arrived at the conclusion that, "The rule which reason and good sense would, as it strikes me, prescribe, would be that, as regards the discipline of a foreign ship of war, and offences committed on board, as between members of her crew towards one another, matters should be left entirely to the law of the ship, and that should the offender escape to the shore, he should, if taken, be given up to the commander of the ship on demand, and should be tried on shore only if no such demand be made. But if a crime be committed on board the ship upon a local subject, or if, a crime having been committed on shore, the criminal gets on board a foreign ship, he should be given up to the local authorities. In whatever way the rule should be settled, so important a principle of international law ought not to be permitted to remain in its present unsettled state" (1).

Rule laid  
down by  
Cockburn,  
C. J.

There is, no doubt, a distinction between a criminal going on board a ship of war, and a slave escaping to it from his master. Nevertheless, from an international point of view, to protect either is a violation of the rights of the local sovereign. The law of England, as is shown further on, recognised the existence of slavery in some countries, and consequently the rights of slave-owners in such countries were to be respected. To assert that a slave, by coming on board a ship of war while she is in the waters of a slave-owning State immediately becomes a free man, is equivalent to asserting that a slave-owner's rights would not be regarded, and is tantamount to making the State to which the ship of war belongs, pass judgment on the laws of a foreign and independent State. The question cannot be confined even to criminals or slaves. England has abolished imprisonment for ordinary debt, but when her ships of war are in a State that incarcerates debtors, is a debtor to escape by going on board an English ship of war? No State would submit to such a pretension. But the case of a slave and a debtor are very similar, so far as the ship of war is concerned. Each claims the protection of

Criminals and  
fugitive  
slaves.

(1) Report of Royal Commission on Fugitive Slaves, 1876, pp. 37, 43.

its flag from a liability imposed by the local law, and it is not for the commander, by protecting either, virtually to decide whether the local law is a proper or an improper one.

Merchant  
vessels in  
foreign ports.

A merchant vessel is not in the same position as a ship of war. Every State claims to exercise jurisdiction over its own merchant vessels wherever they are, and even when they are in the waters of another State. But when in a foreign port they must also obey the laws of the country to which the port belongs (*m*). They are thus at the same time subject to two concurrent systems of law. Any State may decline to exercise jurisdiction over foreign merchant vessels in its harbours to whatever extent it pleases, as is the case with France; but the right nevertheless exists, and might be resumed on due notice being given. Thus, a claim by the local officers of France to board the ship, search her, and take out of her any one who has become amenable to the local laws, could not lawfully be resisted or disputed after such due notice (*n*).

Case of *The  
Creole*.

A peculiar case arose in 1841. The brig *Creole*, an American merchant vessel, sailed from a port in Virginia with 135 slaves on board. On the high seas some of the slaves rose, and took possession of the vessel, killing a passenger, and wounding the captain and several of the crew. They compelled the mate to navigate the ship to Nassau. On arrival there the local authorities, at the request of the American Consul, arrested such slaves as were proved to have committed acts of violence, and the rest escaped to the shore, but whether with connivance of the local authorities or not did not appear. The United States demanded that those who had gained the shore should be restored, but this was refused by Great Britain, on the ground that they could not be seized while they had committed no crime within British jurisdiction. The matter was finally referred to an arbitrator, who awarded a pecuniary indemnity to the American owner for the loss of his slaves (*o*). The difficulty of this case arises from the fact that the *Creole* entered the port of Nassau under duress, and against the will of her owners and master. Yet it can hardly be maintained that even under such circumstances the local authorities were bound to try and prevent the slaves from going on

(*m*) *R. v. Anderson*, L. R. (1868) 1 C. C. R. 161; *R. v. Sattler* (1858), D. & B. C. C. 525; *R. v. Lesley* (1860), 1 Bell, C. C. 220; *Wildenhus' Case* (1886), 120 U. S. 1. Boyd, *The Merchant Shipping Laws*, p. 438.

(*n*) Report on Fugitive Slaves, 1876, p. 26.

(*o*) Report of Decisions of Commissions under Convention of 1853, p. 242. See also Wheaton, ed. Lawrence, p. 206; ed. Dana, p. 166. Hansard, Parl. Debates (Lords), vol. lx. p. 318.

shore. The ship was within British dominions, and the slaves when trying to escape, violated no British law; but, on the contrary, were endeavouring to dissolve a tie looked upon with abhorrence by British law. The arrest of those who had committed acts of violence rested on a different ground. They were seized, not because they had endeavoured to regain their liberty, but because they had committed piratical acts (*p*).

Generally speaking, we may now say that, though the municipal law of different States varies more or less on this question, private vessels when in foreign ports and waters enjoy exemption from the local jurisdiction in regard to such offences as affect simply the crew or the internal discipline of the vessel, and also to those delinquencies that do not involve a breach of the peace of the port. This is not a rule of universal or even general international law; it is based rather on considerations of comity or on treaties expressly concluded for the purpose. By means of consular conventions, consuls are frequently empowered to take cognizance of these matters, which the French rule withdraws from the local jurisdiction, viz., such as concern only the crew and the internal discipline of the vessel, including disputes as to wages (*q*). In a case that occurred in 1874, it was held in the Supreme Court of Hong Kong that failing a consular convention of this kind the American consul was not entitled to settle a dispute as to seamen's wages (*r*).

*Wildenhus' Case* (1886) (*s*) is one of the most important cases relating to the present international usage as to the exercise of jurisdiction over private vessels when in foreign ports. Whilst the Belgian vessel *Noordland* was in the port of Jersey City, U.S.A., one of the crew, Wildenhus, a Belgian subject, killed another member of the crew. There was a convention, concluded in 1880, between the United States and Belgium, whereby it was agreed that the Belgian consul should decide differences on Belgian vessels when in the ports of the United States, and that the local authorities should not intervene "except where a disorder arose of such a nature as to disturb the tranquillity or public order on shore or in the port." However, the offender was arrested by the American authorities; whereupon the Belgian consul made an application to the Circuit Court for a writ of *habeas corpus*, urging

(*p*) See Calvo, *Droit International*, vol. ii. §§ 269, 550.

(*q*) With regard to the British law and practice, cf. Piggott, *Nationality*, ii. 17-32; for the law and practice of the United States, cf. Moore, *Digest*

of Int. Law, vol. ii. § 206.

(*r*) *Ellis v. Mitchell* (1874), U. S. Foreign Relations, 1875, p. 600.

(*s*) 120 U. S. 1. Cobbett, *Cases*, vol. i. pp. 277 *seq.*



that by the general rules of international law, and more particularly by the Convention of 1880, Belgium alone possessed the jurisdiction in question. The prisoner's discharge being refused, an appeal was taken to the Supreme Court, which held that the crime of felonious homicide was not covered by the said convention, and that under the general rules of international law the United States' Courts were empowered to try it.

In pronouncing the judgment of the Court, Chief Justice Waite said that under the law of civilized nations a foreign merchant vessel entering a State's ports for trading purposes became subject to the local jurisdiction, in the absence of any treaty to the contrary. In return for the protection afforded, it was said in a leading American case, temporary allegiance to the local law was expected (*t*). The English Courts, too, uniformly held that offences, committed by one foreigner against another on a foreign merchantman, were triable by the local tribunals (*u*). But it had come to be generally recognised that, in comity, "all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and which did not involve the peace or dignity of the country or the tranquillity of the port, should be left to be dealt with by the authorities of the nation to which the vessel belonged." Conventions were sometimes entered into to define more precisely the rights and obligations of the parties concerned. The Convention of 1880 did not exclude the local jurisdiction in the case of a disorder on board disturbing the peace or public order on shore or in port. The commission of a grave offence affected the community at large and warranted the interference of the local government.

It may be added that in a case that came before the Supreme Court of Mexico (*x*) it was held that the murder of a Frenchman by another Frenchman on board a French merchant vessel when in a Mexican port did not necessarily constitute a disturbance of the peace of the port. On the contrary, in *The Tempest* (*y*), the French Court of Cassation held that an act of homicide amounted to such a disturbance.

Exemption of public or private vessels from the local jurisdiction

Whatever may be the nature and extent of the exemption of the public or private vessels of one State from the local jurisdiction in the ports of another, it is evident that this exemption,

(*t*) *The Exchange* (1812), 7 Cranch, 116, at p. 144, per Marshall, C. J.

(*u*) *Reg. v. Cunningham* (1859), Bell, C. C. 72; *Reg. v. Anderson* (1868), 1 Cox, C. C. 198; *Reg. v.*

*Keyn* (1877), 2 Ex. D. 63.

(*x*) *L'Anémone* (1875), see F. SNOW, Cases and Opinions on Int. Law (Boston, 1893), p. 124.

(*y*) *Ibid.* p. 121.

whether express or implied, can never be construed to justify acts of hostility committed by such vessel, her officers, and crew, in violation of the law of nations, against the security of the State in whose ports she is received, or to exclude the local tribunals and authorities from resorting to such measures of self-defence as the security of the State may require.

This just and salutary principle was asserted by the French Court of Cassation, in 1832, in the case of the private Sardinian steam-vessel, the *Carlo Alberto*, which, after having landed on the southern coast of France the Duchess of Berry and several of her adherents, with the view of exciting civil war in that country, put into a French port in distress. The judgment of the Court, pronounced upon the 'conclusions' of M. Dupin aîné, Procureur-Général, reversed the decision of the inferior tribunal, releasing the prisoners taken on board the vessel, upon the following grounds:

1. That the principle of the law of nations, according to which a foreign vessel, allied or neutral, is considered as forming part of the territory of the nation to which it belongs, and consequently is entitled to the privilege of the same inviolability with the territory itself, ceases to protect a vessel which commits acts of hostility in the French territory, inconsistent with its character of ally, or neutral; as if, for example, such vessel be chartered to serve as an instrument of conspiracy against the safety of the State, and after having landed some of the persons concerned in these acts, still continues to hover near the coast, with the rest of the conspirators on board, and at last puts into port under pretext of distress.

2. That supposing such allegation of distress be founded in fact, it could not serve as a plea to exclude the jurisdiction of the local tribunals, taking cognizance of a charge of high treason against the persons found on board, after the vessel was compelled to put into port by stress of weather (z).

So also it has been determined by the Supreme Court of the United States, that the exemption of foreign public ships, coming into the waters of a neutral State, from the local jurisdiction, does not extend to their prize ships, or goods captured by armaments fitted out in its ports, in violation of its neutrality, and of the laws enacted to enforce that neutrality.

Such was their judgment in the case of the Spanish ship

does not extend to justify acts of aggression against the security of the State.

The exemption of public ships from the local jurisdiction does not extend to their prize goods taken in violation of the neutrality of

(z) Sirey, Recueil général de Jurisprudence, tome xxxii.; partie i. p. 578. M. Dupin aîné has published his

learned and eloquent pleading in this memorable case, in his Collection des Réquisitoires, tome i. p. 447.

the country  
into which  
they are  
brought.

*Santissima Trinidad*, from which the cargo had been taken out, on the high seas, by armed vessels commissioned by the United Provinces of the Rio de la Plata, and fitted out in the ports of the United States in violation of their neutrality. The tacit permission, in virtue of which the ships of war of a friendly Power are exempt from the jurisdiction of the country, cannot be so interpreted as to authorize them to violate the rights of sovereignty of the State, by committing acts of hostility against other nations, with an armament supplied in the ports, where they seek an asylum. In conformity with this principle, the Court ordered restitution of the goods claimed by the Spanish owners, as wrongfully taken from them (a).

Jurisdiction  
of the State  
over its public  
and private  
vessels on the  
high seas.

3. Both the public and private vessels of every nation, on the high seas, and out of the territorial limits of any other State, are subject to the jurisdiction of the State to which they belong (b). In *Reg. v. Lesley* (1860) (c) it was said: "It is clear that an English ship on the high sea, out of any foreign country, is subject to the laws of England; and persons, whether foreign or English, on board such ship are as much amenable to English law as they would be on English soil" (cc).

Vattel says that the domain of a nation extends to all its just possessions; and by its possessions we are not to understand its territory only, but all the rights ('droits') it enjoys. And he also considers the vessels of a nation on the high seas as portions of its territory. Grotius holds that sovereignty may be acquired over a portion of the sea, 'ratione personarum, ut si classis quæ maritimus est exercitus, aliquo in loco maris se habeat.' But, as one of his commentators, Rutherford, has observed, though there can be no doubt about the jurisdiction of a nation over the persons who compose its fleets when they are out at sea, it does not follow that the nation has jurisdiction over any portion of the ocean itself. It is not a permanent property which it acquires, but a mere temporary right of occupancy in a place which is common to all mankind, to be successively used by all as they have occasion (d).

This jurisdiction which the nation has over its public and

(a) *The Santissima Trinidad* (1822), 7 Wheaton, 352.

(b) *R. v. Anderson*, L. R. (1868) 1 C. C. R. 161; *R. v. Dudley* (1884), 14 Q. B. D. 273.

(c) 29 L. J. M. C. 97; Bell, C. C. 220.

(cc) Cf. the case of *John Ander-*

*son* (1879), Moore, Digest, vol. i. p. 932.

(d) Vattel, liv. i. ch. 19, § 216, liv. ii. ch. 7, § 80. Grotius, *De Jur. Bel. ac Pac.*, lib. ii. cap. iii. § 13. Rutherford, *Inst.*, vol. ii. b. 2, ch. 9, §§ 8, 19.



private vessels on the high seas, is exclusive only so far as respects offences against its own municipal laws. Piracy and other offences against the law of nations, being crimes not against any particular State, but against all mankind, may be punished by the competent tribunal of any country where the offender may be found, or into which he may be carried, although committed on board a foreign vessel on the high seas (*e*).

Though these offences may be tried in the competent court of any nation having, by lawful means, the custody of the offenders, yet the right of visitation and search does not exist in time of peace. This right cannot be employed for the purpose of executing upon foreign vessels and persons on the high seas the prohibition of a traffic, which is neither piratical nor contrary to the law of nations (such, for example, as was the slave trade), unless the visitation and search be expressly permitted by international compact (*f*).

Every State has an incontestable right to the service of all its members in the national defence, but it can give effect to this right only by lawful means. Its right to reclaim the military service of its citizens can be exercised only within its own territory, or in some place not subject to the jurisdiction of any other nation. The ocean is such a place, and any State may unquestionably there exercise, on board its own vessels, its right of compelling the military or naval services of its subjects. But whether it may exercise the same right in respect to the vessels of other nations, is a question of more difficulty.

In respect to public commissioned vessels belonging to the State, their entire immunity from every species and purpose of search is generally conceded. As to private vessels belonging to the subjects of a foreign nation, the right to search them on the high seas in time of peace, for deserters and other persons liable to military and naval service, was uniformly asserted by Great Britain, and as constantly denied by the United States. This litigation between the two nations, who by the identity of their origin and language were the most deeply interested in the question, formed one of the principal causes of the war between them. The sources of this controversy might have been dried up by the substitution of a registry of seamen, and a system of voluntary enlistment with limited service, for the practice of impressment

Former impressment of seamen by England.

(*e*) Sir L. Jenkins, Works, vol. i. p. 714.

(*f*) *The Louis* (1817), 2 Dods. Ad. 238; *The Marianna Flora* (1826), 9

Wheaton, 39; *The Antelope* (1825), 10 Wheaton, 122; *et vide infra*, pp. 202 *et seq.*

which formerly prevailed in the British navy, and which can never be extended, even to the private ships of a foreign nation, without provoking hostilities on the part of any maritime State capable of resisting such a pretension (*g*).

Discussions  
on this point.

The subject was incidentally passed in review, though not directly treated of, in the negotiations which terminated in the treaty of Washington, 1842, between the United States and Great Britain. In a letter addressed by the American negotiator to the British plenipotentiary on the 8th August, 1842, it was stated that no cause had produced, to so great an extent, and for so long a period, disturbing and irritating influences on the political relations of the United States and England, as the impressment of seamen by the British cruisers from American merchant vessels.

From the commencement of the French revolution to the breaking out of the war between the two countries in 1812, hardly a year elapsed without loud complaint and earnest remonstrance. A deep feeling of opposition to the right claimed, and to the practice exercised under it, took possession of the public mind of America; and this feeling, it was well-known, co-operated with other causes to produce the state of hostilities which ensued.

At different periods, both before and after the war, negotiations had taken place between the two governments, with the hope of finding some means of quieting these complaints. Sometimes the effectual abolition of the practice had been requested and discussed; at other times, its temporary suspension; and, at other times, again, the limitation of its exercise and some security against its enormous abuses. A common destiny had attended these efforts: they had all failed. The nearest approach to a settlement was a convention, proposed in 1803, which had come to the point of signature, when it was broken off in consequence of the British Government insisting that the "Narrow Seas" should be expressly excepted out of the sphere over which the contemplated stipulations against impressment should extend. The American minister, Mr. King, regarded this exception as quite inadmissible, and chose rather to abandon the negotiation than to acquiesce in the doctrine which it proposed to establish.

England asserted the right of impressing British subjects. She asserted this as a legal exercise of the prerogative of the crown; which prerogative was alleged to be founded on the English law of the perpetual and indissoluble allegiance of the subject, and

(*g*) Edinburgh Review, vol. xi. September 23, 1807. American State Papers, vol. vi. p. 103.

his obligation, under all circumstances, and for his whole life, to render military service to the Crown whenever required.

This statement, made in the words of eminent British jurists, showed at once that the English claim was far broader than the basis on which it was raised. The law relied on was English law; the obligations insisted on were obligations between the crown of England and its subjects. This law and these obligations, it was admitted, might be such as England chose they should be. But then they must be confined to the parties. Impressment of seamen, out of and beyond the English territory, and from on board the ships of other nations, was an interference with the rights of other nations; it went, therefore, further than English prerogative could legally extend; and was nothing but an attempt to enforce the peculiar law of England beyond the dominions and jurisdiction of the crown. The claim asserted an extra-territorial authority for the law of British prerogative, and assumed to exercise this extra-territorial authority, to the manifest injury of the citizens and subjects of other States, on board their own vessels, on the high seas.

Every merchant vessel on those seas was rightfully considered as part of the territory of the country to which it belonged. The entry, therefore, into such vessel, by a belligerent Power, was an act of force, and was, *primâ facie*, a wrong, a trespass which could be justified only when done for some purpose allowed to form a sufficient justification by the law of nations. But the act of a British cruiser that stopped an American vessel in order to take therefrom supposed British subjects, offering no justification therefor under the law of nations, but claiming the right under the law of England respecting the king's prerogative, could not be defended. English soil, English territory, English jurisdiction, was the appropriate sphere for the operation of English law. The ocean was the sphere of the law of nations; and any merchant vessel on the high seas was, by that law, under the protection of the laws of her own nation, and might claim immunity, unless in cases in which that law allows her to be entered or visited.

If this notion of perpetual allegiance, and the consequent power of the prerogative, were the law of the world; if it formed part of the conventional code of nations, and was usually practised, like the right of visiting neutral ships, for the purpose of discovering and seizing enemy's property; then impressment might be defended as a common right, and there would be no remedy for the evil until the international code should be altered. But this was by no means the case. There was no such principle incor-



porated into the code of nations. The doctrine stood only as English law, not as international law; and English law could not be of force beyond English dominion. Whatever duties or relations that law creates between the sovereign and his subjects, could only be enforced within the realm, or within the proper possessions or territory of the sovereign. There might be quite as just a prerogative right to the property of subjects as to their personal services, in an exigency of the State; but no Government thought of controlling, by its own laws, the property of its subjects situated abroad; much less did any Government think of entering the territory of another Power, for the purpose of seizing such property and appropriating it to its own use. As laws, the prerogatives of the crown of England have no obligation on persons or property domiciled or situated abroad. "When, therefore," as has been well said, "we speak of the right of a State to bind its own native subjects everywhere, we speak only of its own claim and exercise of sovereignty over them, when they return within its own territorial jurisdiction, and not of its right to compel or require obedience to such laws on the part of other nations, within their own territorial sovereignty. On the contrary, every nation has an exclusive right to regulate persons and things within its own territory, according to its sovereign will and public polity."

Other  
objections to  
impressment.

But impressment was subject to objections of a much wider range. If it could be justified in its application to those who are declared to be its only objects, it still remained true that, in its exercise, it touched the political rights of other Governments, and endangered the security of their own native subjects and citizens. The sovereignty of the State was concerned in maintaining its exclusive jurisdiction and possession over its merchant ships on the seas, except so far as the law of nations justifies intrusion upon that possession for special purposes; and all experience had shown that no member of a crew, wherever born, was safe against impressment when a ship was visited.

In the calm and quiet which had succeeded the war of 1812, a condition so favourable for dispassionate consideration, England herself had evidently seen the harshness of impressment, even when exercised on seamen in her own merchant service; and she had adopted measures, calculated if not to renounce the power or to abolish the practice, yet, at least, to supersede its necessity, by other means of manning the royal navy, more compatible with justice and the rights of individuals, and far more conformable to the principles and sentiments of the age.

Under these circumstances, the Government of the United States had used the occasion of the British minister's pacific mission to review the whole subject, and to bring it to his notice and to that of his Government. It had reflected on the past, pondered the condition of the present, and endeavoured to anticipate, so far as it might be in its power, the probable future; and the American negotiator communicated to the British Minister the following, as the result of those deliberations.

The American Government, then, was prepared to say that the practice of impressing seamen from American vessels could not hereafter be allowed to take place. That practice was founded on principles which it did not recognise, and was invariably attended by consequences so unjust, so injurious, and of such formidable magnitude, as could not be submitted to. In the early disputes between the two Governments, on this so long contested topic, the American Secretary of State declared, that "the simplest rule will be, that the vessel being American shall be evidence that the seamen on board are such." Fifty years' experience, the utter failure of many negotiations, and a careful reconsideration of the whole subject when the passions were laid, and no existing interest or emergency to bias the judgment, had convinced the American Government that this was not only the simplest and best, but the only rule, which could be adopted and observed, consistently with the rights and honour of the United States, and the security of their citizens. That rule announced, therefore, what would hereafter be the principle maintained by their Government. In every regularly documented American merchant vessel, the crew who navigated it would find their protection in the flag which was over them (*h*).

It is hardly possible that this dispute should arise again. The practice of impressment fell into complete disuse in England after the conclusion of the Napoleonic wars in 1815, and the alterations in the municipal laws of each country, added to the naturalization treaty between them, have altered the whole aspect of the question (*i*). England no longer claims the perpetual allegiance of her subjects; and even if she did, it is highly improbable that she would at the present day assert the right of taking them out of foreign vessels on the high seas.

At the beginning of the century Great Britain was engaged in a gigantic struggle with France, which she maintained to a great

(*h*) Wheaton, *Hist. Law of Nations*, pp. 737—746. Webster's Letter to Lord Ashburton, August 8, 1842. See

Parl. Papers, 1842, p. 59.

(*i*) See *infra*, p. 254.

Change of circumstances since the dispute arose.

extent at sea. It appears from an Admiralty minute of 1812, that there were supposed to be upwards of 20,000 British-born seamen in the American marine; many of them provided with fraudulent protections (*k*). Under such circumstances, it is hardly surprising that the royal prerogative should have been called into force, for the purpose of seizing such as could be got at. If the question is to be decided according to the rules of international law as existing at the present day, Great Britain was perhaps in the wrong. She claimed to take persons alleged to be her subjects out of the ships of a friendly State on the high seas, and to force them into her service. This claim was appended to the right of search; that is, it was only exercised over neutral vessels in time of war. It was not alleged that the fact of English seamen being on board gave a British cruiser any right of stopping and searching the neutral vessel, but there being an admitted right of entering for the purpose of seizing contraband or enemy's goods, it was contended that British officers, being rightfully on board, had also the power of seizing anyone they found there who owed allegiance to the British Crown (*l*). But the claim of England had in reality nothing to do with the right of search. The seamen she seized were neither contraband of war nor enemy's goods; they were seized simply because they owed allegiance. It so happened that the only way of catching them was by taking them out of foreign ships; and as they were not wanted during peace, there was no need for asserting the claim except during war, when the right of search existed. But these were circumstances which only accidentally connected impressment with the right of search. The two have nothing in common. It must, however, be remembered that international law has not always been, and is not even now, in all respects fixed and definite, and that the views of the present day are not precisely the same as those held at the beginning of the nineteenth century (*m*).

Case of *The Trent*.

In 1861, the question as to how far a merchant vessel may be stopped on the high seas and persons taken out of her by the officers of a foreign Government reappeared in a very different form. The British mail-steamer *Trent* sailed from Havana for St. Thomas on the 7th November, 1861, under charge of a commander in the navy. There were on board as passengers two persons, Messrs. Slidell and Mason, who were commissioners of

(*k*) Report of Naturalization Commission, 1869, p. 35, where a history of the impressment controversy will be found. Cf. Moore, Digest, vol. ii.

§§ 317 *seq.*

(*l*) Proclamation of the Prince Regent, 1813, Annual Reg. 1813, p. 350.

(*m*) Wheaton, ed. Dana, p. 179.



the Confederate States, proceeding to England and France. About nine miles from Cuba, the *Trent* was stopped by the *San Jacinto*, an American ship of war, the two commissioners, with their secretaries, were taken out, and the *Trent* was then allowed to continue her voyage. The commissioners were imprisoned in a military fortress in the United States. The British Government instantly demanded their restoration, with an apology for the aggression, and in case of refusal Lord Lyons was directed to withdraw from Washington (*n*). Instructions were given to the ambassadors of France, Austria, Prussia, Italy, and Russia, by their respective Governments to sustain the demands of Great Britain.

It was contended by the United States that the persons seized and their despatches were to be considered contraband of war and in the same position as naval and military persons (*o*), and that the *Trent* being a neutral merchant vessel, it was the right of the *San Jacinto*, as a belligerent cruiser, to stop her for the purpose of ascertaining her true national character, and of seizing any contraband found on board. The detention of the commissioners was, however, not persisted in, and they were delivered up on considerations connected with complaints previously made by the United States as to the impressment of seamen from their vessels (*p*). Although the American Government congratulated the captain of the *San Jacinto* "for the great public service he had rendered," and although his acts were approved by many eminent American jurists, the transaction cannot be regarded as justifiable. The *Trent* was on a *bonâ fide* voyage from one neutral port to another. She was a mail steamer, a class of vessel peculiarly exempt from molestation, and instead of being captured and brought before a Prize Court, she was simply stopped on the high seas, and certain arbitrary acts performed on board her by the American captain.

One of the reasons alleged by the captain of the *San Jacinto* for not bringing in the *Trent* for adjudication before a Prize Court was, that he wished to spare the other passengers the inconvenience

(*n*) Parl. Papers, 1862, N. America, vol. lxii. (No. 5), p. 3.

(*o*) The authority of Vattel was invoked; he holds that a belligerent may prevent his enemy from sending ministers to solicit assistance. Reference was also made to passages found in the judgments in *The Caroline* (1807), 6 C. Rob. 461, and *The Orozambo* (1807), 6 C. Rob. 430; but, in

point of fact, Sir W. Scott's dictum in the former did not concern the case of an ambassador sent to a neutral State on board a neutral vessel; and the latter was not applicable to the question at issue, as the vessel involved was found to have acted as an enemy transport.

(*p*) Mr. Seward to Lord Lyons, 26th Dec. 1861.

of deviating from their voyage. Such a reason was no doubt humane and honourable, but it cannot be taken as sufficient to set aside a universal rule of public law, that a ship and cargo are not lawful prize until condemned by a competent court, and that until so condemned a captor has no right to do anything beyond bringing the ship before the court. Furthermore, there is no authority to support the contention that persons and despatches, when found in a neutral vessel and on a voyage to a neutral port, could ever be seized as contraband<sup>(q)</sup>. In connection with this subject we may refer to Article 47 of the Declaration of London (1909), which says: "Any individual embodied in the armed forces of the enemy, who is found on board a neutral merchant vessel, may be made a prisoner of war, even though there be no ground for the capture of the vessel." Under this rule, it is obvious that the envoys of the Southern Confederacy could not have been forcibly removed from the *Trent*.

Consular  
jurisdiction.

IV. The municipal laws and institutions of any State may operate beyond its own territory, and within the territory of another State, by special compact between the two States.

Such are the treaties or capitulations by which the consuls and other commercial agents of one nation are authorized to exercise, over their own countrymen, a jurisdiction within the territory of the State where they reside. The nature and extent of this peculiar jurisdiction depends upon the stipulations of the treaties between the two States. Among Christian nations, it is generally confined to the decision of controversies in civil cases arising between the merchants, seamen, and other subjects of the State in foreign countries; to the registering of wills, contracts, and other instruments executed in presence of the consul; and to the administration of the estates of their fellow-subjects deceased within the territorial limits of the consulate. The resident consuls of the Christian Powers in Turkey, the Barbary States, and other Mohammedan countries, exercise both civil and criminal jurisdiction over their countrymen, to the exclusion of the local magistrates and tribunals<sup>(r)</sup>. This jurisdiction is subject, in civil cases, to an appeal to the superior tribunals of their own country. The criminal jurisdiction is usually limited to the infliction of pecuniary penalties, and in offences of a higher grade the consular functions are similar to those of a police magistrate,

<sup>(q)</sup> Cf. Sir W. Harcourt, *Letters of Historicus*, pp. 187 *seq.* See Moore, *Digest*, vol. vii. § 1265.

<sup>(r)</sup> See *Re Tootal's Trusts* (1883), 23 Ch. D. 332; *Abd-ul-Messih v. Farra* (1887), 13 App. Cas. 431.



or 'juge d'instruction.' He collects the documentary and other proofs, and sends them, together with the prisoner, home to his own country for trial (s).

By the treaty of peace, amity, and commerce, concluded at Wang Hiya, 1844, between the United States and the Chinese Empire, it is stipulated (Article 21) that "citizens of the United States, who may commit any crime in China, shall be subject to be tried and punished only by the consul, or other public functionary of the United States thereto authorized, according to the laws of the United States." Article 25: "All questions in regard to rights, whether of property or of person, arising between citizens of the United States and in China, shall be subject to the jurisdiction, and regulated by the authorities, of their own Government. And all controversies occurring in China, between citizens of the United States and the subjects of any other Government, shall be regulated by the treaties existing between the United States and such Governments respectively, without interference on the part of China" (t).

Treaty  
between  
China and the  
United States.

From a very early time, owing to the total difference of habits and religious feelings between the Europeans and Asiatics, it was deemed necessary by their respective Governments to withdraw Europeans from the authority of the native courts of these States. In process of time, and with the consent, express or implied, of the Turkish Government, a general system of Consular Courts became established throughout the Sultan's dominions. The Ottoman Porte gave to the Christian Powers of Europe authority to administer justice to their own subjects according to their own laws, but it did not profess to give, nor could it give, to one such Power any jurisdiction over the subjects of another Power. It has left those Powers at liberty to deal with each other as they may think fit; and if the subjects of one country desire to resort to the tribunals of another, there can be no objection to their doing so with the consent of their own Sovereign and that of the Sovereign to whose tribunals they resort (u). This kind of jurisdiction, exercised by the consuls of Christian States in Mohammedan countries, is to be carefully distinguished from the ordinary

British  
Consular  
Courts in non-  
Christian  
countries.

(s) De Steck, *Essai sur les Consuls*, sect. vii. §§ 30—40. Pardessus, *Droit Commercial*, pt. vi. tit. 6, ch. 2, § 2, ch. 4, §§ 1, 2, 3. As to English consuls, see Boyd, *The Merchant Shipping Laws*, Index, tit. Consular officer; Hall, *Foreign Jurisdiction of the British Crown*, chap. II.; Sir F. T.

Piggott, *Exterritoriality, the law relating to consular jurisdiction and to residence in Oriental countries* (1907).

(t) See further Wharton, *Digest*, Appendix, § 125.

(u) *The Laconia* (1863) (*Papayanni v. The Russian Steam Navigation Co.*), 2 Moo. P. C. N. S. 183.



powers exercised by foreign consuls in Christian States (*x*). Judicial powers are not necessarily incidental to the office of consul. These powers depend altogether upon treaty (*y*).

In *The Laconia* (*z*), a case arising out of a collision between the *Laconia*, a steamship belonging to a British subject domiciled in England, and the *Colchida*, a steamship belonging to a Russian company, Dr. Lushington delivered the judgment of the Privy Council in the appeal brought from the Consular Court of Constantinople. He said that though in general no State could claim jurisdiction within the territory of another sovereign State, irrespective of treaty, yet in Oriental countries a privileged jurisdiction might arise through constant usage, knowingly acquiesced in by the local authorities. At first grave differences in religion had necessitated the exclusion of British subjects from the native courts; in time and with the progress of commerce, and Western nations having the same interest in abstaining from Mussulman tribunals, recourse was had to the Consular Courts; finally, the system became general. The acquiescence of the Ottoman Government proved its consent. The exercise of such a jurisdiction in foreign countries was provided for by the Foreign Jurisdiction Act, 6 & 7 Vict. c. 94, s. 1, and was regulated by the Orders in Council passed in pursuance of that Act.

The numerous Orders in Council and other provisions for regulating the British Consular Courts in Turkey, were repealed and consolidated by an Order in Council, dated August 8th, 1899 (*a*). The position of British subjects in China is very similar to that which they occupied in Turkey, and consular courts are established in those countries with much the same powers as those in Turkey (*b*). The jurisdiction exercised by England in these Eastern countries is regulated by the Foreign Jurisdiction Act of 1890, which recites that "by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty hath jurisdiction within divers foreign countries"; and enacts that "Her Majesty may hold, exercise, or enjoy any jurisdiction which Her Majesty now hath or may at any time hereafter have, within a foreign country, in the same and as ample a manner as if Her Majesty

(*x*) *Messina v. Petrocchino* (1872), L. R. 4 P. C. 158; *Dent v. Smith* (1869), L. R. 4 Q. B. 445.

(*y*) *Dainese v. Hale*, 1 Otto, 13; 91 U. S. 13; *Mahoney v. U. S.*, 10 Wall. 62.

(*z*) *Supra*.

(*a*) Hertslet, Commercial Treaties,

vol. xxi. 835.

(*b*) See Order in Council, 9th March, 1865. Hertslet, Commercial Treaties, vol. xii. p. 281. Phillimore, vol. ii. § 276, p. 314. *Re Tootal's Trusts* (1883), 23 Ch. D. 332; *Abd-ul-Messih v. Farra* (1887), 13 App. C. 431.

had acquired that jurisdiction by the cession or conquest of territory" (c).

The authority of the Consular Courts of the United States is derived from Acts of Congress passed in 1848, 1860 and 1870. But in every case the power to pass such legislative measures, whether British, American, French, or those of any other country, depends on treaties entered into and customs acquiesced in by the local sovereigns. This system of consular jurisdiction (*d*) originating in Turkey (including her former vassal State, Egypt) came to be extended in the same manner to other non-Christian countries, such as China, Japan, Korea, Persia, Siam, Morocco, Muscat.

In Egypt the consular system was replaced in 1876 by a system of mixed tribunals, usually described as international courts, whose judges are in part natives and in part foreigners. The foreign members of the courts are appointed by the Egyptian administration, on the recommendation of their respective Governments. These international tribunals included three courts of first instance, sitting at Alexandria, Cairo and Zagazig, and a Court of Appeal at Alexandria. In December, 1914—owing to the fact that the Sultan of Turkey and the Khedive of Egypt joined the enemies of the Allies in the Great War—Turkish suzerainty over Egypt was abolished, and the country was formally declared a British protectorate. After making the necessary adjustments which this change involved, the British Government informed the newly-appointed Sultan of Egypt that with regard to the judicial administration of the country they had for some time been of the opinion that the system of capitulations no longer harmonized with the development of Egypt and that a revision would be effected at the close of the war.

It is to be noted that before Turkey openly became a belligerent, the Sublime Porte denounced the capitulations. No doubt difficulties, anomalies, and abuses were incidental to the system of consular jurisdiction. But this unilateral repudiation of conventional and customary obligations on the part of the Ottoman Government was undoubtedly an illegitimate proceeding. In view of established arrangements, such change ought to have been made after negotiation with and with the consent of the other Powers concerned.

(c) 53 & 54 Vict. c. 37, s. 1.  
(d) As to the origin of the system,

see Sir H. Jenkyns, *British Rule and Jurisdiction beyond the Seas* (1902).

In the case of Japan (e), whose civilization and progress inspired the Christian States with confidence, the extra-territorial privileges and immunities of consuls were abolished in 1899 by means of treaties. In other countries the system of consular jurisdiction is more or less being relaxed in favour of the local government.

Independence  
of the State as  
to its judicial  
power.

Every sovereign State is independent of every other in the exercise of its judicial power.

This general position must, of course, be qualified by the exceptions to its application arising out of express compact, such as conventions with foreign States, and acts of confederation, by which the State may be united in a league with other States for some common purpose. By the stipulations of these compacts it may part with certain portions of its judicial power, or may modify its exercise with a view to the attainment of the object of the treaty or act of union.

Exceptions.

Subject to these exceptions, the judicial power of every State is co-extensive with its legislative power. At the same time it does not embrace those cases in which the municipal institutions of another nation operate within the territory. Such are the cases of a foreign sovereign, or his public minister, fleet or army, coming within the territorial limits of another State, which, as already observed, are, in general, exempt from the operation of the local laws.

Extent of the  
judicial power  
over criminal  
offences.

I. The judicial power of every independent State, then, extends, with the qualifications mentioned,—

1. To the punishment of all offences against the municipal laws of the State, by whomsoever committed, within the territory.

2. To the punishment of all such offences, by whomsoever committed, on board its public and private vessels on the high seas, and on board its public vessels in foreign ports.

3. To the punishment of all such offences by its subjects, wheresoever committed.

4. To the punishment of piracy and other offences against the law of nations, by whomsoever and wheresoever committed.

It is evident that a State cannot punish an offence against its municipal laws committed within the territory of another State, unless by its own citizens; nor can it arrest the persons or property of the supposed offender within that territory: but it may

(e) Cf. *Imperial Japanese Government v. The P. & O. Co.*, (1895) A. C. 644.



arrest its own citizens in a place which is not within the jurisdiction of any other nation, as the high seas, and punish them for offences committed within such a place, or within the territory of a foreign State.

By the Common Law of England, which has been adopted, in this respect, in the United States, criminal offences are considered as altogether local, and are justiciable only by the courts of that country where the offence is committed (*f*). But this principle is peculiar to the jurisprudence of Great Britain and the United States; and even in these two countries it has been frequently disregarded by the positive legislation of each, in the enactment of statutes, under which offences committed by a subject or citizen, within the territorial limits of a foreign State, have been made punishable in the courts of that country to which the party owes allegiance, and whose laws he is bound to obey. There is some contrariety in the opinions of different public jurists on this question; but the preponderance of their authority is greatly in favour of the jurisdiction of the courts of the offender's country, in such a case, wherever such jurisdiction is expressly conferred upon those courts, by the local laws of that country. This doctrine is also fully confirmed by the international usage and constant legislation of the different States of the European continent, by which crimes in general, or certain specified offences against the municipal code, committed by a citizen or subject in a foreign country, are made punishable in the courts of his own (*g*).

The cases in which English Courts have jurisdiction to try offences committed abroad (*h*), are exceptions to the general rule that crimes are local in their character, that is, they are offences against the law of the State in which they are committed; but they may also be and frequently are offences against the law of the State to which the offender owes allegiance (*i*). The following are the principal exceptions to the general rule: Political offences, such as treason (*k*); administering unlawful oaths, and forging government documents (*l*). As these acts must necessarily be intended to take effect in the country against which they are

Jurisdiction  
of British  
Courts over  
crimes  
committed  
abroad.

(*f*) Cf. *Macleod v. Attorney-General for New South Wales*, (1891) App. C. 455.

(*g*) *Fœlix, Droit International Privé*, §§ 510—532. See *American Jurist*, vol. xxii. pp. 381—386.

(*h*) Cf. *Footé, Priv. Int. Jurisp.* (1914), pp. 470 *seq.*; *Cobbett, Cases*, vol. i. pp. 225 *seq.*

(*i*) *Macleod v. Att.-Gen. for New South Wales* (1891), 60 L. J. P. C.

55.

(*k*) 35 Henry VIII. c. 2. As to what is treason, see Sir James Stephen, *Digest of Criminal Law*, ch. vi.; and *R. v. Lynch*, (1903) 1 K. B. 444 (where a British subject was tried here for treason committed in South Africa).

(*l*) 52 Geo. III. c. 104, s. 7. *Whar-ton, Conflict of Laws*, § 916.

devised, they may perhaps not be looked upon as a real exception. But homicide and bigamy (*m*) abroad are undoubted exceptions, and also certain statutory offences under the Foreign Enlistment Act, the Commissioners for Oaths Act, 1889, and the Explosive Substances Act, 1883 (*n*). A British subject who commits murder or manslaughter abroad on land, whether within the King's dominions or without, and whether he kills a British subject or not, can be tried in England or Ireland wherever he may be apprehended. This is not to prevent his being tried elsewhere (*o*). Offences against property or person committed at any place, ashore or afloat, out of His Majesty's dominions, by any master, seaman or apprentice, who, at the time when the offence is committed, or within three months previously, has been employed in any British ship, may be tried in England (*p*).

Varying  
practices  
in different  
States.

With regard to criminal jurisdiction, the States of the world have by no means adopted the same practice. Some countries, like Great Britain and the United States, recognise the territorial principle, subject to such modifications and extensions as may be made by legislative enactments. Other countries, *e.g.*, Russia, Italy, Norway, Austria, some of the German States and some of the Swiss cantons, claim a general criminal jurisdiction over their subjects, irrespectively of their place of residence and no matter against whom the offence was committed. Others, again, claim a greater or lesser jurisdiction over offences committed even by foreigners on foreign territory; of these, one group of States (*e.g.*, France, Germany, Austria, Italy) limit the claim to serious crimes against the State; another group (*e.g.*, Russia, Greece, Mexico) extend it to serious offences against their respective subjects. And so on with the different claims of other States (*q*). Such offenders could not, of course, be tried and punished, unless they came within the territory of the aggrieved State. Moreover, the claims of each State are not necessarily recognised by the others.

An interesting case illustrating the claim to exercise jurisdiction over an extra-territorial offence committed by a foreigner is *Cutting's Case* (1886) (*r*). In 1886, Mr. Cutting, an American, who had before resided intermittently in Mexico, published in a

(*m*) 24 & 25 Vict. c. 100, s. 57.

(*n*) 17 & 18 Vict. c. 104, s. 267 (the Merchant Shipping Act, extended by 53 & 54 Vict. c. 37, Foreign Jurisdiction Act); and see 33 & 34 Vict. c. 90, s. 4 (Foreign Enlistment Act), 46 Vict. c. 3 (The Explosive Substances Act), and 52 Vict. c. 10 (The Commissioners for Oaths Act).

(*o*) 24 & 25 Vict. c. 100, s. 9.

(*p*) 17 & 18 Vict. c. 104, s. 267.

(*q*) Cf. the Report of the American Department of State on *Extra-territorial Crime and the Cutting Case*, pp. 38—53.

(*r*) Wharton, Digest, vol. i. pp. 48, 49; vol. ii. pp. 439—442; Moore, Digest, vol. ii. §§ 200—202.

newspaper circulating in Texas a libel on a Mexican citizen. Criminal proceedings were instituted in the Mexican Courts; and later Mr. Cutting having been found in Mexican territory was arrested and imprisoned. This action purported to be in accordance with the Mexican Penal Code, which empowered the local courts to try offences against Mexican citizens, even when committed abroad. The United States Government, however, demanded the release of their citizen. The Secretary of State pointed out that the newspaper had not been published in Mexico, and that Mexico could not assume jurisdiction over the author of the libel published in the United States. The Federal and State Governments would themselves mete out justice for wrongs done within their jurisdiction, and they would not allow their prerogative to be usurped by Mexico, or allow a citizen of the United States to be tried elsewhere for acts done in the United States. Further, by the law of nations no punishment could be inflicted on a foreigner save conformably to the sanctions of justice held by all civilized nations, *e. g.*, the right to have the accusation examined by an impartial court, an explanation of the alleged facts to the accused, the opportunity of having counsel and preparing the defence, permission to go at large on bail where the alleged offence is not of a very grave character, the production on oath of evidence supporting the charge with the right to cross-examine and bring evidence in reply; and in the present case all these sanctions were disregarded. To the American demand the Mexican Government replied that the offence was punishable under the local law, and that the national Government could not interfere with the ordinary course of law. Eventually, however, the Mexican Government induced the prosecutor to withdraw from the case, and so Mr. Cutting was released.

Laws of trade and navigation cannot affect foreigners, beyond the territorial limits of the State, but they are binding upon its citizens, wherever they may be. Thus, offences against the laws of a State, prohibiting or regulating any particular traffic, may be punished by its tribunals, when committed by its citizens, in whatever place; but if committed by foreigners, such offences can only be thus punished when committed within the territory of the State, or on board of its vessels, in some place not within the jurisdiction of any other State.

Laws of trade  
and naviga-  
tion.

The public jurists are divided upon the question, how far a sovereign State is obliged to deliver up persons, whether its own subjects or foreigners, charged with or convicted of crimes com-

EXTRADITION  
OF CRIMINALS.



mitted in another country, upon the demand of a foreign State, or of its officers of justice. Some of these writers maintain the doctrine, that, according to the law and usage of nations, every sovereign State is obliged to refuse an asylum to individuals accused of crimes affecting the general peace and security of society, and whose extradition is demanded by the Government of that country within whose jurisdiction the crime has been committed. Such is the opinion of Grotius, Heineccius, Burlamaqui, Vattel, Rutherford, Schmelzing, and Kent (*s*). According to Pufendorf, Voet, Martens, Klüber, Leyser, Kluit, Saalfeld, Schmaltz, Mittermaier, and Heffter, on the other hand, the extradition of fugitives from justice is a matter of imperfect obligation only; and though it may be habitually practised by certain States, as the result of natural comity and convenience, requires to be confirmed and regulated by special compact, in order to give it the force of an international law (*t*). And the last-mentioned writer considers the very fact of the existence of so many special treaties respecting this matter as conclusive evidence that there is no such general usage among nations, constituting a perfect obligation, and having the force of law properly so called. Even under systems of confederated States, such as the North American Union and the former Germanic Confederation, this obligation is limited to the cases and conditions mentioned in the federal compacts (*u*).

The negative doctrine that, independent of special compact, no State is bound to deliver up fugitives from justice upon the demand of a foreign State, was maintained at an early period by the United States Government, and is confirmed by a considerable preponderance of judicial authority in the American courts of justice, both State and Federal (*x*).

(*s*) Grotius, *De Jur. Bel. ac Pac.*, lib. ii. cap. xi. §§ 3—5. Heineccius, *Prælect. in Grot. j. t.* Burlamaqui, tome ii. pt. iv. ch. 3, §§ 23—29. Vattel, liv. ii. ch. 6, §§ 76, 77. Rutherford, *Inst. of Nat. Law*, vol. ii. ch. 9, p. 12. Schmelzing, *Systematischer Grundriss des praktischen Europäischen Völkerrechts*, § 161. Kent, *Comm.*, vol. i. pp. 36, 37 (5th ed.).

(*t*) Pufendorf, *Elementa*, lib. viii. cap. 3, §§ 23, 24. Voet, *De Stat.* § 11, cap. 1, No. 6. Martens, *Droit des Gens*, liv. iii. ch. 3, § 101. Klüber, *Droit des Gens*, pt. ii. tit. 1, ch. 2, § 66. Leyser, *Meditationes ad Pandect. Med.* 10. Kluit, *De Deditioe Profugorum*, § 1, p. 7. Saalfeld, *Handbuch des positiven Völkerrechts*,

§ 40. Schmaltz, *Europäisches Völkerrecht*, p. 160. Mittermaier, *Das deutsche Strafverfahren*, Theil i. § 59, pp. 314—319. Heffter, *Das Europäische Völkerrecht*, § 63.

(*u*) Mittermaier, *ibid.*

(*x*) See the communication of Jefferson to the French envoy Genêt, Sept. 12th, 1793. The decision of Chancellor Kent, *In re Washburn*, 4 Johnson, Ch. Rep. 166, is counterbalanced by that of Tilghman, C. J., in *Respub. v. Deacon*, 10 Sergeant & Rawle, 125; by that of Parker, C. J., in *Respub. v. Green*, 17 Mas. 515—548; and by that of the Supreme Court in *Holmes v. Jennison* (1840), 14 Peters, 540.

The constitution of the United States (Article 4, s. 2), provides that "a person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

Extradition  
by the U. S.  
Constitution.

It is still a debated question whether the surrender of fugitives, except under a treaty, is an absolute international duty. One or two writers (*y*) endeavour to show that the existence of the right to demand extradition is not denied by the majority of the earlier jurists. But most of the quotations cited from the works of the latter do not support such a contention; they tend, on the contrary, to emphasize the view that extradition is a natural right or moral duty, rather than a legal right or duty. The weight of modern authority, too, inclines towards treating it as a matter of comity or moral obligation (*z*). In such a matter as this, if any rules can be laid down at all, they must be founded only on the practice of nations. A State is not likely to change its law or practice in this respect, because it is not in accordance with the theories of text-writers.

Obligation of  
extradition  
depends on  
comity.

Treaties of extradition were not unknown in Ancient Egypt, China, Greece, and Rome (*a*). In modern times the majority of extradition treaties date from the nineteenth century, indeed from the second half. The extension of international intercourse and commercial relationships, the improvements in communication and transport, added to the more definite recognition of State sovereignty and the growing insistence on the territorial principle in criminal jurisdiction, have rendered inevitable the practice of extradition. The earlier treaties on the subject were, unlike those of the present time, concerned with the surrender of political offenders rather than that of ordinary criminals.

The law of England has apparently undergone a change on this point during the nineteenth century. In some of the older cases it is laid down by the judges that the "government may send a prisoner to answer for a crime wherever committed" (*b*).

Practice of  
England.

(*y*) *E.g.*, Sir E. Clarke, *Treatise on the Law of Extradition* (1904), chap. i.

(*z*) Phillimore, vol. i. § 367. Heffter, *Droit International*, p. 128. Molesworth, *Foreign Jurisdiction*, p. 37. Calvo, vol. ii. §§ 325, 402. Creasy, *First Platform of International Law*, § 208, &c. Hall, *International Law*, p. 57 (5th ed.). Moore, *Digest*, §§ 580

*seq.* The opinions of various American jurists and statesmen will be found in S. T. Spear, *The Law of Extradition* (Albany, 1885), chap. i.

(*a*) Cf. Phillipson, *Int. Law and Custom of Ancient Greece and Rome*, vol. i. pp. 358 *seq.*

(*b*) *East India Co. v. Campbell* (1749), 1 Ves. 247.



In Lord Loughborough's time, the crew of a Dutch ship mastered the vessel, ran away with her, and brought her into Deal; the question arose whether the English Courts could seize them and send them to Holland. It was held that they could (c). So late as 1827 the Provincial Court of Appeals for Lower Canada held that a fugitive accused of larceny in Vermont (U. S.), who escaped into Canada, could be surrendered to the United States, although there was then no treaty on the subject (d). There seems to be no doubt that this would not now be done. The constitutional doctrine in England is, that the Crown may make treaties with foreign States for the extradition of criminals; but those treaties can only be carried into effect by Act of Parliament, for the executive has no power, without statutory authority, to seize an alien here and deliver him to a foreign Power. Lord Denman said in the House of Lords that he believed all Westminster Hall, including the judicial bench, were unanimous in holding the opinion that in this country there was no right of delivering up; indeed, no means of securing persons accused of crimes committed in foreign countries (e). It may thus be regarded as certain that England will not at present surrender fugitives except under a treaty. Nevertheless, she does not hesitate to ask other countries for fugitives from herself. Thus, in 1874, the Spanish Government, at the request of England, gave up Austin Bidwell, one of the Bank forgers, without there being at the time any treaty between the two countries (f). The Royal Commission on extradition (1878) suggested that a statutory power of surrendering fugitive criminals, irrespectively of the existence of any treaty, should be created in England (g). Whilst the Extradition Acts, 1870—1873, apply in the case of countries with which Great Britain has extradition treaties (and she has such treaties with practically all civilized

(c) *Mure v. Kaye* (1811), 4 Taunt. 34.

(d) *In re Fisher* (1827), Stuart, Lower Canada Rep. 245.

(e) Forsyth, Cases and Opinions, p. 369. And see Earl Russell to Mr. Adams, 12th June, 1862; U. S. Dipl. Cor. 1862, p. 111.

(f) Clarke, Extradition (4th ed.), p. 74, note.

(g) Report, 1878. Parl. Papers, Cd. 2039. Further defects in the English law of extradition were brought to light in the case of Dr. Hertz: see Hansard, 4th series, xxxi. p. 446 (March 5, 1895); and see the same volume, pp. 454 *et seq.*, for the proceedings relative to the extradition of Jabez Balfour, who had taken refuge

in the Argentine Republic, in 1892, at a date when the extradition treaty concluded between that country and Great Britain in 1889 (Hertslet, Com. Treaties, xix. p. 94) had not been ratified. On ratification, the treaty was held by the Argentine Courts to be retroactive in its operation. In the course of the debate in the House of Commons, a former Chief Commissioner of the Metropolitan Police asserted that it was often easier to obtain the surrender of a prisoner from a country with which there was no extradition treaty than from a country with which a treaty had been concluded. On the English law with regard to the subject, see Sir F. T. Piggott, Extradition (1910).



foreign countries), the Fugitive Offenders Act, 1881, applies to certain foreign countries in which the Crown then exercised foreign jurisdiction, *e.g.*, Japan, China, Turkey, Egypt, Cyprus, Korea, Persia, Morocco, Zanzibar, Siam, &c.

The practice of the United States has not always been uniform. In 1791, the Governor of South Carolina made a request that the President should demand the surrender of certain persons from Florida (then Spanish territory), who had committed crimes in South Carolina, and then fled to Florida. Mr. Jefferson said respecting this, "The laws of the United States, like those of England, receive every fugitive, and no authority has been given to our executives to give them up. . . . If, then, the United States could not deliver up to Florida a fugitive from the laws of his country, we cannot claim as a right the delivery of fugitives from us" (*h*). Mr. Monroe, as Secretary of State, in his instructions to the American Commissioners at Ghent, in 1814, says, "Offenders, even conspirators, cannot be pursued by one Power into the territory of another, nor are they delivered up by the latter, except in compliance with treaties, or by favour" (*i*). These passages show that, in the opinion of the writers, the Executive were neither bound, nor able to surrender fugitives at the time, in the absence of treaty or special legislation. The opinion delivered by Mr. Legare, Attorney-General, in 1841 is to the same effect (*k*). In 1864 a somewhat different opinion was adopted. Arguelles, the Governor of a district in Cuba, wrongfully sold certain negroes into slavery, while in his charge, with the aid of forged papers, and then escaped to New York. There was at the time no treaty between Spain and America, but Spain asked for the surrender of Arguelles as a matter of comity, and the United States complied. The senate thereupon requested the President to inform them under what authority of law or treaty he had surrendered Arguelles. Mr. Seward prepared an elaborate defence of the affair, in which he examined the state of international law when not regulated by treaty. After citing various authorities (*l*), he came to the conclusion, "upon the plainest reason, and a uniform concurrence of authority, that the United States, in its relations to foreign nations, certainly possesses the authority to surrender to the pursuing justice of a foreign State,

Practice of  
the United  
States.

Case of  
Arguelles.

(*h*) Jefferson, Works (ed. 1854), vol. iii. p. 290.

(*i*) See *Holmes v. Jennison* (1840), 14 Peters, 549.

(*k*) Opinions of Attorneys-General, vol. iii. p. 661.

(*l*) Wheaton, § 115. Halleek, ch. vii. § 28. Story, Conflict of Laws, § 626. *U. S. v. Davis* (1873), 2 Sumner, 486.

a fugitive criminal found within our territory" (*m*). However this may be, it is generally admitted in the United States that this unauthorized surrender of Arguelles constituted a breach of American constitutional law and custom, and as such the act has been unhesitatingly condemned (*n*).

Case of Carl Vogt.

In 1873, the earlier rule of refusing to grant extradition without a treaty was reverted to in a case where the law should have been pushed to its furthest limits to obtain the conviction of the offender. In that year Carl Vogt, a German subject, was accused of robbery, arson, and murder in Belgium, and escaped to the United States. There was at the time a treaty with Germany, but none with Belgium. Both these countries applied for the fugitive, but the United States refused to give him up to either. The application of Germany was refused on the ground that the crimes were not committed within her jurisdiction, and that of Belgium on the ground of there being no treaty (*o*). In giving an opinion on this case, the Attorney-General said: "Some writers have contended that there is a reciprocal obligation upon nations to surrender fugitives from justice, but it now seems to be generally agreed that this is altogether a matter of comity. It is to be presumed, where there are treaties upon the subject, that fugitives are to be surrendered only in cases and upon the terms specified in such treaties" (*p*).

Extradition in France.

French jurists are of opinion that the right of sending fugitive criminals to the country where their crime was committed is inherent in every Government, and exists independently of all treaties. Treaties are deemed to regulate the mode in which the right is to be exercised, and not to create it (*q*). A circular of the Minister of Justice, issued in 1841, states that most civilized countries, except England and America, would surrender notorious criminals without being bound to do so by treaty (*r*). It may be added that even Great Britain and the United States are prepared to take advantage of this principle, adopted by France and most other States, when there are no existing extradition treaties with them, and to demand the surrender of fugitive criminals on the ground of comity, when they themselves would, in like circumstances, refuse on such grounds to comply with a demand made by

(*m*) U. S. Dipl. Cor. 1864, pt. iv. p. 40.

(*n*) On the *Arguelles Case*, see also J. B. Moore, *Treatise on Extradition* (Boston, 1891), vol. i. pp. 33 *seq.*; Spear, *Extradition*, pp. 1 *seq.*; Clarke, *Extradition*, pp. 72 *seq.*

(*o*) U. S. Dipl. Cor. 1873, pp. 81,

300.

(*p*) *Opinions of Attorneys-General* (U. S.), vol. xiv. p. 288. Wharton, *Digest*, § 269.

(*q*) Mouton, *Les Lois pénales de la France*, tom. i. p. 9.

(*r*) Dalloz, *Jurisp. Gén.* (1841), p. 440.

other States. In 1893, the United States Government obtained from Costa Rica the surrender of a fugitive named Weeks (accused of embezzlement within the United States), although there was no treaty of extradition between the two countries (s).

It is thus evident that the practice of nations does not furnish a definite rule on the subject. It may therefore be assumed that the surrender of criminals is not at present looked upon as an absolute international duty. Every State may refuse to harbour fugitives if it pleases; but if it prefers to receive and protect them, other States have no remedy but to enter into treaties with it to regulate future cases.

Practice of States is not uniform.

It seems to be agreed that extradition should be confined to grave crimes, such as murder, robbery with violence, forgery, and those offences which it is the common interest of all nations to suppress. Some writers suggest certain classes of acts that should not create a liability to extradition; for example: (1) Crimes or offences of a purely political character; (2) any offence committed in furthering civil war, insurrection or political commotion, which, if committed between belligerents, would not be a crime; (3) desertions from, or evasions of, military or naval service; (4) offences which, by reason of the lapse of time or any other cause, the demanding nation cannot lawfully punish (t). A long list of extraditable crimes is contained in the Extradition Act of England (1870); and others were added by the Extradition and Slave Trade Acts of 1873.

What criminals are subject to extradition.

It is an almost universal rule that no State will surrender political refugees (u). But if the hospitality of a State is so abused by such refugees, that the safety of its neighbours becomes imperilled, it then becomes its duty to adopt such measures as will control them, and make their residence harmless to other States (x). After the attempt to assassinate Napoleon III. on the 10th of January, 1858, France represented that the plot had been formed in England, and asked that England should provide for the punishment of such offences. Lord Palmerston accordingly introduced a Bill for the punishment of conspiracies formed in England to commit murder beyond Her Majesty's dominions, but the excited state of public opinion at the time caused its

Political refugees.

(s) Moore, Digest, vol. iv. pp. 253 seq.

(t) See Field, International Code, § 214, notes, where the provisions of the principal existing treaties are analysed.

(u) Forsyth, Cases and Opinions, p. 371. Woolsey, Int. Law, § 79.

As to what gives a political character to crime, see *In re Castioni*, (1890) 1 Q. B. 165; *In re Meunier*, (1894) 2 Q. B. 415. Cf. Calvo, Droit int., vol. ii. § 1034.

(x) Bluntschli, Le Droit international codifié, § 396.



Foreign  
police agents.

rejection (*y*). Sardinia at the same time passed a law punishing such acts when committed in her territory (*z*). In 1888, one Schroeder, and again in 1889, one Wohlgenuth, German police agents, engaged in watching German subjects on Swiss soil, were expelled from Switzerland, on the ground that by their actions and conduct they had disturbed the peace in that country. Germany protested, and was supported by Russia and Austria, and, in the more recent incident, by Italy. It was urged, on the German part, that Switzerland had no right to avail herself of the protection of her neutrality to further, by toleration and support in her territory, acts against a friendly neighbour which, in the case of another State, might lead to rupture and war. The Federal Government replied that its neutrality does not diminish its sovereign rights, but seemed disposed to seek legislative aid to the end that it might itself better control foreigners residing in Switzerland-(*a*).

Political  
offences.

The Swiss Extradition Law of 1892 lays down that, in general, political criminals are not liable to extradition; but if the offence in question is characterized more by the marks of an ordinary crime than of a political offence, then they are liable to surrender, subject to the opinion of the Supreme Court of Justice.

There is no consensus of opinion as to the definition of a political offence. One or two English cases may be referred to. In *In re Castioni* (1891) (*b*), a Swiss subject was, at the instance of the Swiss Government, arrested here on a charge of murder. In a political disturbance (1890) in the canton of Ticino, due to alleged abuses of administration which the Government refused to remedy, Castioni and others seized an arsenal, took possession of arms, overcame the police, forced their way into the municipal palace, and in the scuffle Castioni killed a councillor. A provisional government was formed there by the insurgents, but was soon put down, whereupon Castioni fled to England. The Divisional Court held that crimes, otherwise extraditable, became political offences if they were incidental to and formed part of a political disturbance; that within this category fell the act of the prisoner, who had no private spite against the victim; and that the act was done in furtherance of the rising. Hence the prisoner was set at liberty (*c*). In the later case of *In re Meunier* (1894) (*d*) the

(*y*) Annual Reg. 1858, pp. 5, 33, 202. *Annuaire des deux Mondes*, 1857-8, pp. 32, 110, 420.

(*z*) *Annuaire des deux Mondes*, 1857-8, p. 216.

(*a*) Annual Register, 1888. The Times, May, June, July, 1889.

(*b*) 1 Q. B. D. 149.

(*c*) As to the view of a political offence adopted by the Court, cf. Stephen, *Hist. of Crim. Law*, vol. ii. p. 71.

(*d*) 2 Q. B. D. 415.

prisoner was an anarchist who had caused explosions in Paris, resulting in the death of two persons. The Court held that in order to make an offence a political one there must be two or more parties in the State, each seeking to impose the government of its choice on the other, and committing an act of violence solely in furtherance of that object. These conditions did not apply to the present case, as the person sought to be extradited was hostile to all government, and his efforts were primarily directed against the general body of citizens. Hence the offence was not of a political character; and the accused was surrendered to the French authorities.

In order to indicate the prevailing view amongst international jurists, the rules adopted at Oxford (1880) by the Institute of International Law, and modified at Geneva (1892), may be here given. "Article 13. Extradition is inadmissible for purely political crimes or offences. Nor can it be admitted for unlawful acts of a mixed character or connected with political crimes or offences, also called relative political offences, unless in the case of crimes of great gravity from the point of view of morality and of the common law (*i.e.*, common as opposed to political), such as murder, manslaughter, poisoning, mutilation, grave wounds inflicted wilfully with premeditation, attempts at crimes of that kind, outrages to property by arson, explosion or flooding, and grave robbery, especially when committed with arms and violence. So far as concerns acts committed in the course of an insurrection or of a civil war by one of the parties engaged in the struggle and in the interest of its cause, they cannot give occasion to extradition unless they are acts of odious barbarism or vandalism forbidden by the laws of war, and then only when the civil war is at an end. Article 14. Criminal acts directed against the bases of all social organization, and not only against a certain State or a certain form of government, are not considered political offences in the application of the preceding rules. Article 15. In any case, extradition for crimes having the characters both of political and common law crime ought not to be granted unless the demanding State gives the assurance that the person surrendered shall not be tried by extraordinary courts" (*e*).

By Article X. of the treaty concluded at Washington on the 9th August, 1842, between the United States and Great Britain, it was "agreed that Her Britannic Majesty and the United States

The Ash-  
burton  
Treaty.

(*e*) Trans. by Westlake, *Int. Law*, text in *Annuaire de l'Institut de droit international*, vol. xii. p. 182. vol. i. (1904), pp. 246, 247. Original



shall, upon mutual requisitions by them or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other:—provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed; and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive.’

Construction  
of this treaty.

The construction of this treaty has given rise to some difficulties. It has been held that piracy in it does not include piracy *jure gentium*, but is confined to piracy by municipal law. As pirates *jure gentium* can be tried anywhere, it was considered that there was no need to give them up *(f)*. In another case the Lord Chief Justice said, “We must assume that the terms employed are used in a sense which they would have in the law of both countries, and not in a sense wholly peculiar to some local law in one of them.” And, therefore, where certain acts were made forgery by the law of New York, but did not amount to forgery in England, or by the general law of the United States, the fugitive accused of such acts was not delivered up *(g)*. If the evidence presents several views of the case, on any one of which, if adopted, there may be a conviction, it has been held in Canada that the prisoner may be extradited *(h)*. It has also been deter-

*(f)* *In re Tirnan*, 5 B. & S. 643; 10 L. T. N. S. 449. Cockburn, C. J., dissented from the opinion of the majority. See also the case of *The Chesapeake* (1863), Parl. Papers, N. America, No. 10 (1876), p. 37.

*(g)* *In re Windsor* (1865), 6 B. & S. 527; *In re Trueman Smith*, 4 Upper

Canada Practice Rep. 215. As to murder, see *Anderson's Case*, Ann. Reg. 1861, p. 520. As to construction of treaty with France, see *The Lennie Mutineers* (1876), Parl. Papers, N. America, 1876 (No. 1), p. 97.

*(h)* *R. v. Gould* (1869), 20 Upper Canada C. P. 154.



mined in Canada that the extradition treaty contains the whole law of surrender between the United States and Canada (*i*). The offence must also have been committed within the jurisdiction of the country demanding the surrender of the fugitive. In 1858, Thomas Allsop, a British subject, was charged as an accessory before the fact to the murder of a Frenchman in Paris, and escaped to the United States. He could have been tried for this in England (*k*), but the law officers held that his surrender could not be demanded from America under the treaty, since he was not charged with a crime committed within British jurisdiction (*l*). But where a person was charged with murder on the high seas, on board a British ship, this was held to be within British jurisdiction, and the prisoner was accordingly surrendered by the United States (*m*).

In 1870, an Extradition Act was passed in England (*n*), which provides *inter alia*, that "A fugitive criminal shall not be surrendered to a foreign State unless provision is made by the law of that State, or by arrangement, that the fugitive shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign State for any offence committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded" (*o*). In February, 1875, a person named Lawrence escaped from the United States, and sailed for England. The American Government requested that he should be arrested on his arrival on a charge of forgery. This was done, and he was accordingly sent back. Before the trial Her Majesty's Government were informed that he was also to be tried on a charge of smuggling, an offence not included in the treaty. Lord Derby, the Foreign Secretary, thereupon instructed the British Minister in America to protest if Lawrence was tried for any crime but that for which he had been extradited. Mr. Secretary Fish contended that neither by the general law of extradition, nor the practice of both countries, could such a proviso be implied in the treaty (*p*). He cited the cases of Von Aernam (*q*), Paxton (*r*),

Extradition  
Act, 1870.

Case of  
Lawrence.

(*i*) *R. v. Tubbee*, 1 Upper Canada Prac. Rep. 98.

(*k*) 24 & 25 Vict. c. 100, s. 9; and 24 & 25 Vict. c. 94, s. 1.

(*l*) Forsyth, Cases and Opinions on Constitutional Law, p. 368. And see Opinions of Attorneys-General (U. S.), vol. viii. 215.

(*m*) *In re Bennett*, 11 L. T. N. S. 488.

(*n*) 33 & 34 Vict. c. 52. (This Act

was supplemented by the Acts of 1873, 1895, and 1907.)

(*o*) 33 & 34 Vict. c. 52, s. 3, subsect. (2).

(*p*) Mr. Fish to Col. Hoffmann, Parl. Papers, N. America, 1876 (No. 1), p. 80.

(*q*) (1854), 4 Upper Canada Rep. 288.

(*r*) (1866), 10 Lower Canada Jur. 212.

Caldwell (*s*), and Burley (*t*), to show that, under the treaty, criminals had been extradited for one offence and tried for another; and he contended that the Act of 1870, being subsequent to the treaty, and made by only one party, could not incorporate any new terms into it (*u*). Lord Derby declined to recede, and refused to give up various other American fugitives, including one Winslow, whose surrender had been asked for, unless the United States would agree to try them for no other offences but those they were extradited for. His lordship quoted the case of *The Lennie Mutineers* (*x*), where it was held that a prisoner delivered up under the French Extradition Treaty for murder, could not be tried in England for being an accessory after the fact. The discussion ended without any conclusion being arrived at; Mr. Fish informing Lord Derby that Lawrence would not be tried for anything but forgery, the offence for which he was surrendered (*y*).

A case of great interest and importance in this connection was decided by the Supreme Court of the United States in October, 1886; and definite principles, on which American judicial opinion had not previously been unanimous, were laid down. The defendant being charged with murder on board an American vessel on the high seas fled to England, and, on demand, was surrendered on that charge. The Circuit Court of the United States for the Southern District of New York, in which he was tried, did not proceed against him for murder, but upon an indictment under § 5347, Revised Statutes, charging him with cruel and unusual punishment of the man of whose murder he was before accused, such punishment consisting of the identical acts proved in the extradition proceedings, but not constituting an offence

(*s*) (1871), 8 Blatchford, C. C. 131.

(*t*) (1864), 1 Upper Canada L. J. (N. S.) 20.

(*u*) Parl. Papers, N. America, 1876 (No. 3).

(*x*) 4th May, 1876. Parl. Papers, N. America, 1876 (No. 1), p. 97. See 36 & 37 Vict. c. 60, s. 3.

(*y*) Mr. Fish to Mr. Pierrepont, Aug. 5th, 1876, Parl. Papers, N. America, 1877 (No. 1), p. 5. A Convention between Great Britain and the United States was signed at London, 25th June, 1886. The provisions of Art. 10 of the 1842 Treaty were extended to manslaughter, burglary, embezzlement, or larceny of the value of 50 dollars, or 10*l*. and upwards, and "malicious injuries to property, whereby the life of any person shall be endangered, if such injuries constitute a crime according to the laws of both"

countries. The provisions of the same Art. 10 and of the Convention were to apply to persons convicted of the specified crimes, but whose sentence had not been executed. No fugitive criminal was to be surrendered if demanded in respect of a crime deemed to be of a political character, or if his surrender should be, in fact, demanded with a view to try or punish him for a crime of a political character. (Parl. Papers, United States (No. 2), 1888.) But notwithstanding the last-mentioned provision, the ratification of the Convention was refused by the Senate, owing, apparently, to apprehensions entertained by certain persons, who seemed to exercise an important influence in American politics, that the extended list of extraditable offences would prove inconvenient for themselves or their friends.



provided for in the Ashburton Treaty. The judges of the Circuit Court, being divided in opinion, certified to the Supreme Court for its judgment whether this could be done. It was laid down in the opinion of the Court, delivered by Miller, J., in which the cases upon the subject and the opinions of writers are examined and reviewed: (1) That, prior to treaties, and apart from them, there was no well-defined obligation on one country to deliver up fugitives from justice to another; and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and has never been recognised as among those obligations of one government towards another which rest upon established principles of international law. (2) That a treaty to which the United States is a party is a law of the land, of which all Courts, state and national, are to take judicial notice, and by the provisions of which they are to be governed, so far as they are capable of judicial enforcement. (3) That it is the better opinion that in any question of extradition which can arise between the United States and a foreign nation the extradition must be negotiated through the Federal Government, and not by that of a State, though the demand may be for a crime committed against the laws of that State. (4) That, on a sound construction of the Ashburton Treaty, and Acts of Congress on the subject, Revised Statutes, §§ 5272, 5275, the defendant could not be lawfully tried for any other offence than murder, because a person who has been brought within the jurisdiction by virtue of proceedings under an extradition treaty can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings. (5) That the circumstance that the same evidence might be sufficient to convict for the minor offence which was produced before the committing magistrate to support the charge of murder did not justify a departure from the principle of the treaty, the minor charge being an offence for which the treaty made no provision.

Gray, J., concurred upon the simple ground that by the Act of Congress of 3rd March, 1869, c. 141, § 1 (§ 5275, Revised Statutes), the political department of the Government had clearly manifested its will, in the form of an express law, that an accused person should be tried only for the crime specified in the warrant of extradition, and should be allowed a reasonable time to depart



out of the United States before he could be arrested or detained for another offence. He expressed no opinion upon the broader question, which he considered a question of comity within the domain of diplomacy.

Waite, C. J., dissented. The prisoner having been brought within the jurisdiction was triable there. Whether he ought to be tried for an offence other than that for which he had been delivered was no part of his defence, but a matter for diplomacy. § 5275 of the Revised Statutes only enabled the Federal Government to regain possession of the prisoner if they should desire to keep their faith with Great Britain in respect of the surrender (z).

Ker's Case.

In another case, decided in December of the same year, where the defendant was not surrendered by the Government of Peru, to which country he had fled, but was arrested in Peru by the United States messenger of his own mere motion, it was held by the Supreme Court that the case was not cognizable by that Court at all, for the defendant had failed to establish that any treaty with the United States conferred upon him a right of asylum in a foreign country, and the Court, therefore, gave no opinion upon the question whether, having thus been forcibly removed, the prisoner could resist trial in the State Court (a).

French decision.

The French Courts have laid it down as a principle of international law, that a prisoner whose extradition has been obtained cannot be tried for any crimes but those mentioned in the demand for the surrender (b).

It may be added that in the case of extradition between States of the American Union, surrendered fugitives may be tried for crimes other than those for which they were extradited (c).

Treaty between France and the United States.

By the convention concluded at Washington on the 9th November, 1843, between the United States and France, it was agreed as follows:—"Article 1. That the high contracting parties shall, on requisitions made in their name, through the medium of their respective diplomatic agents, deliver up to justice persons who, being accused of the crimes enumerated in the next following Article, committed within the jurisdiction of the requiring party, shall seek an asylum or shall be found within the territories of the other: Provided, that this shall be done only when the fact

(z) *U. S. v. Rauscher* (1886), 119 U. S. 407.

(a) *Ker v. Illinois* (1886), 119 U. S. 436; cf. *Re Parisot*, 5 T. L. R. 344. And for other recent American cases, see Clarke, *Extradition* (4th ed.),

pp. 87—91.

(b) Dalloz, *Jurisp. Gén.* 1874, p. 502.

(c) Cf. *State of Missouri v. Patterson* (1893), 116 Missouri, 505 (where several cases are referred to).

of the commission of the crime shall be so established, as that the laws of the country, in which the fugitive or the person so accused shall be found, would justify his or her apprehension and commitment for trial, if the crime had been there committed. Article 2. Persons shall be so delivered up who shall be charged, according to the provisions of this convention, with any of the following crimes, to wit: murder (comprehending the crimes designated in the French penal code by the terms assassination, parricide, infanticide, and poisoning), or with an attempt to commit murder, or with rape, or with forgery, or with arson, or with embezzlement by public officers, when the same is punishable with infamous punishment. Article 3. On the part of the French Government the surrender shall be made only by authority of the Keeper of the Seals, Minister of Justice; and on the part of the Government of the United States, the surrender shall be made only by the authority of the Executive thereof. Article 4. The expenses of any detention and delivery, effected in virtue of the preceding provisions, shall be borne and defrayed by the Government in whose name the requisition shall have been made. Article 5. The provisions of the present convention shall not be applied in any manner to the crimes enumerated in the second Article, committed anterior to the date thereof, nor to any crime or offence of a purely political character."

The following additional Article to the above convention was concluded between the contracting parties at Washington on the 24th February, 1845, and subsequently ratified: "The crime of robbery, defining the same to be the felonious and forcible taking from the person of another, of goods or money, to any value, by violence or putting him in fear; and the crime of burglary, defining the same to be, breaking and entering by night into a mansion-house of another, with intent to commit felony; and the corresponding crimes included under the French law in the words '*vol qualifié crime*,' not being embraced in the second Article of the convention of extradition concluded between the United States and France on the 9th of November, 1843, it is agreed by the present Article, between the high contracting parties, that persons charged with those crimes shall be respectively delivered up, in conformity with the first Article of the said convention; and the present Article, when ratified by the parties, shall constitute a part of the said convention, and shall have the same force as if it had been originally inserted in the same" (*d*).

Additional  
article.

(*d*) The treaties of France with other countries up to 1874 are collected in Billot, *De l'Extradition*, pp. 471—571.

Extradition  
treaties.

In the negotiation of treaties, stipulating for the extradition of persons accused or convicted of specified crimes, certain rules are generally followed, and especially by constitutional Governments. The principle underlying these rules is, that a State should never authorize the extradition of its own citizens or subjects, or of persons accused or convicted of political or purely local crimes, or of slight offences, but should confine the provision to such acts as are, by common accord, regarded as grave crimes (*e*).

The delivering up by one State of deserters from the military or naval service of another also depends entirely upon mutual comity, or upon special compact between different nations (*f*).

Surrender of  
its own  
subjects by a  
State.

In countries whose jurisprudence is founded on the civil law, crimes committed abroad by subjects can be punished at home. Such States, therefore, usually decline to surrender their own subjects (*g*). But where the common law prevails, crimes are regarded as local, and punishable only by the laws of the place where they were committed. In this case the surrender of subjects for crimes committed abroad is absolutely necessary if the offenders are to be punished at all. British Courts have no jurisdiction, except in cases of treason, homicide, or bigamy, and the statutory offences enumerated on a previous page (*h*), to try British subjects for offences committed in foreign countries. Therefore, unless England agrees to surrender her subjects accused of other offences abroad, they will escape scot free. This actually happened in a case in 1877. A British subject having been accused of larceny in Switzerland, escaped to England. The Swiss Government applied for his extradition, under their treaty with England made in 1874. In February, 1875, an Order in Council had been issued pursuant to the Extradition Act, 1870, declaring that the Act applied to Switzerland (*i*). But the Order also contained this clause: "No Swiss shall be delivered up by Switzerland to the Government of the United Kingdom, and no subject of the United Kingdom shall be delivered up by the Government thereof to Switzerland." Counsel for the Swiss Government contended that the terms of this clause were not imperative, but merely meant that neither Government should be bound to deliver up its own subjects. The Court, however,

Case of  
Wilson.

(*e*) Ortolan, *Règles Internationales de la Mer*, t. i. p. 340.

(*f*) Bynkershoek, *Quæst. Jur. Pub.* lib. i. cap. 22. Note to Duponceau's *Transl.* p. 174.

(*g*) As to France, see Billot, *De l'Extradition*, p. 64; Clarke, *Extra-*

*dition* (4th ed. 1903), pp. 208 *seq.* As to Germany, see Clarke, *Extradition* (2nd ed.), p. 66.

(*h*) See *ante*, p. 185.

(*i*) London Gazette, 1875, vol. i. p. 702.



came to the conclusion that the clause was imperative, and that under it each Government could not surrender its own subjects. The prisoner was therefore discharged (*k*). Lord Chief Justice Cockburn characterised this as a blot on our system of extradition. Both England and the United States are willing to surrender their own subjects (*l*), but Continental nations, as a rule, are not. The only means of insuring the punishment of all extraditable offenders is either for Continental nations to surrender their own subjects, or for England and America to make their treaties with the Continental States non-reciprocal; that is, that they should agree to surrender their own subjects, while allowing the Continental States to keep theirs. The Royal Commission on Extradition suggest that reciprocity in this matter should no longer be insisted upon, whether the criminal be a British subject or not. If he has broken the laws of a foreign country, his liability to be tried by them ought not to depend upon his nationality (*m*). The only real ground for refusing to surrender subjects is when they are not likely to be fairly treated by the State demanding them; and this does not apply to most civilized States.

The convenience of trying crimes in the country where they were committed is obvious. It is very much easier to transport the criminal to the place of his offence, than to carry all the witnesses and proofs to some other country where the trial is to be held.

An arrangement made under the British Extradition Acts is not confined to the extradition of subjects of the sovereign State with which it is made, but will, in general, apply to persons of other nationalities committing offences within that State if their extradition is requested by that State (*n*). Thus, one Ganz, an Austrian by birth, but a naturalised citizen of the United States, having been accused of an offence committed in Holland, it was held that he was amenable to the law of the State where the crime was committed, and that he was extraditable, under the extradition treaty existing between Great Britain and Holland (*o*).

A criminal sentence pronounced under the municipal law in one State can have no direct legal effect in another. If it is a

Extra-territorial operation of

(*k*) *R. v. Wilson* (1877), 3 Q. B. D. 42.

(*l*) *Burley's Case* (1864), 1 Upp. Can. L. J. (N. S.) 20. Cf. Parl. Papers, 1876, N. America (No. 3), p. 12. Per Cockburn, C. J., in *In re Windsor* (1865), 6 B. & S. 527; *Ex parte Von Aernam* (1854), 3 Blatch-

ford, C. C. 160.

(*m*) Report of Commission, 1878. Parl. Papers, cd. 2039.

(*n*) *R. v. Ganz* (1882), 9 Q. B. D. 93.

(*o*) *Re Ganz* (1882), 9 Q. B. D. 93.

a criminal sentence.

sentence of conviction, it cannot be executed without the limits of the State in which it is pronounced upon the person or property of the offender; and if he is convicted of an infamous crime, attended with civil disqualifications in his own country, such a sentence can have no legal effect in another independent State (*p*).

But a valid sentence, whether of conviction or acquittal, pronounced in one State, may have certain indirect and collateral effects in other States. If pronounced under the municipal law in the State where the supposed crime was committed, or to which the supposed offender owed allegiance, the sentence, either of conviction or acquittal, would, of course, be an effectual bar (*exceptio rei judicate*) to a prosecution in any other State. If pronounced in another foreign State than that where the offence is alleged to have been committed, or to which the party owed allegiance, the sentence would be a nullity, and of no avail to protect him against a prosecution in any other State having jurisdiction over the offence (*q*).

The judicial power of every State extends to the punishment of certain offences against the law of nations, among which is piracy.

Piracy under the law of nations.

Piracy is defined by the text writers to be the offence of depredating on the seas, without being authorized by any sovereign State, or with commissions from different sovereigns at war with each other (*r*).

Ingredients of piracy.

"Piracy," said Sir Charles Hedges, Judge of the Admiralty Court, to the Grand Jury, in 1696, "is only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty. . . . If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself, or any of the goods, or tackle, apparel, or furniture, with a felonious intention in any place where the Lord Admiral hath, or pretends to have, jurisdiction, this is also robbery and piracy" (*s*). "I apprehend," said Dr. Lushington, "that in the administration of our criminal law, generally speaking, all persons are held to be pirates who are found guilty of piratical acts; and piratical acts are robbery and murder on the high seas. . . . It was never deemed

(*p*) Martens, Précis, &c., liv. iii. ch. 3, § 86. Klüber, Droit des Gens Moderne de l'Europe, pt. ii. tit. 1, ch. 2, §§ 64, 65. Fœlix, Droit International Privé, § 565.

(*q*) See *Rex v. Hutchinson* (1678), 3 Keble, 785.

(*r*) See authorities cited in note to

the case of *United States v. Smith* (1820), 5 Wheaton, 157.

(*s*) *R. v. Dawson and others*, 13 State Trials, 454, approved of in *Attorney-General for Hong Kong v. Kwok-a-Sing* (1873), L. R. 5 P. C. 199.

necessary to inquire whether the parties so convicted had intended to rob or to murder on the high seas indiscriminately." (t). In the case then before the Court it was urged that the acts complained of had been committed in a bay, and not on the high seas, and were therefore not legally piratical. To this Dr. Lushington replied, "the ships were carried away and navigated by the very same persons who originally seized them. I consider the possession at sea to have been a piratical possession, and the carrying away the ships on the high seas to have been piratical acts" (u). An offence committed on the high seas is not piracy *jure gentium* so long as the ship on which it is committed remains subject to the authority of the State to which it belongs. An essential ingredient of piracy is throwing off this authority.

The officers and crew of an armed vessel commissioned against one nation, and depredating upon another, are not liable to be treated as pirates in thus exceeding their authority. The State by whom the commission is granted, being responsible to other nations for what is done by its commissioned cruisers, has the exclusive jurisdiction to try and punish all offences committed under colour of its authority. (x).

Commissioned  
cruisers.

The offence of depredating under commissions from different sovereigns at war with each other is clearly piratical, since the authority conferred by one is repugnant to the other; but it has been doubted how far it may be lawful to cruise under commissions from different sovereigns allied against a common enemy. The better opinion, however, seems to be, that although it might not amount to the crime of piracy, still it would be irregular and illegal, because the two co-belligerents may have adopted different rules of conduct respecting neutrals, or may be separately bound by engagements unknown to the party (y).

Pirates being the common enemies of all mankind, and all nations having an equal interest in their apprehension and punishment, they may be lawfully captured on the high seas by the vessels of any particular State, and brought within its territorial jurisdiction for trial in its tribunals (z). It is held by some

Piracy triable  
everywhere.

(t) *The Magellan Pirates* (1853), 1 Spinks, 81. Phillimore, vol. i. p. 424.

(u) 16 Jurist, 1145.

(x) Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. 17. Rutherford, *Inst.*, vol. ii. p. 595.

(y) Bynkershoek, *Quæst. Jur. Pub.* lib. i. cap. 17, p. 130, Duponceau's *Transl. tom. ii. p. 236.* Valin, *Commentaire sur l'Ord. de la Marine.* "The law," says Sir L. Jenkins, "dis-

tinguishes between a pirate who is a highwayman, and sets up for robbing, either having no commission at all, or else hath two or three, and a lawful man of war that exceeds his commission."—*Works*, vol. ii. p. 714.

(z) "Every man, by the usage of our European nations, is justiciable in the place where the crime is committed: so are pirates, being reputed out of the protection of all laws and



writers that only the warships of a State may lawfully capture pirates. But this contention is untenable; for piracy is an offence against mankind in general, and any vessel capable of seizing a pirate and restoring peace and order on the sea has not only in principle a right, but is even under an obligation, to do so.

Distinction between piracy by the law of nations and piracy under municipal statutes.

This proposition, however, must be confined to piracy as defined by the law of nations, and cannot be extended to offences which are made piracy by municipal legislation. Piracy under the law of nations may be tried and punished in the courts of justice of any nation, by whomsoever and wheresoever committed; but piracy created by municipal statute can only be tried by that State within whose territorial jurisdiction, and on board of whose vessels, the offence thus created was committed. There are certain acts which are considered piracy by the internal laws of a State, to which the law of nations does not attach the same signification. It is not by force of the international law that those who commit these acts are tried and punished, but in consequence of special laws which assimilate them to pirates, and which can only be applied by the State which has enacted them, and then with reference to its own subjects, and in places within its own jurisdiction. The crimes of murder and robbery committed by foreigners, on board of a foreign vessel, on the high seas, are not justiciable in the tribunals of another country than that to which the vessel belongs; but if committed on board of a vessel not at the time belonging, in fact as well as right, to any foreign Power or its subjects, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no flag whatsoever, these crimes may be punished as piracy under the law of nations in the Courts of any nation having custody of the offenders (a).

Insurgents carrying on war at sea.

When an insurrection or rebellion has broken out in any State, the rebel cruisers may be treated as pirates by the established Government, if the rebel Government has not been recognised as a belligerent by the parent State, or by foreign nations; but this right ceases to exist on the recognition of the rebels as belligerents (b). During the American War of Independence, an Act was passed by the English parliament, the object of which was

privileges, and to be tried in what ports soever they may be taken."—Sir L. Jenkins, Works, *ib.* See Sir L. Jenkins' Charge to the Grand Jury at the Admiralty Sessions in Southwark, 18th Feb. 1680; Marsden, Adm. Cas., p. 255.

(a) *U. S. v. Klintock* (1820), 5 Wheaton, 144; *U. S. v. Pirates* (1820), 5 Wheaton, 184.

(b) *Rose v. Himely* (1808), 4 Cranch, 272; *The Prize Causes* (1862), 2 Black. 273; *Miller v. U. S.* (1870), 11 Wallace, 268. See *ante*, p. 41 *et seq.*

to declare that the legal status of the revolted Americans was that of felons or pirates, but as a matter of fact none of the prisoners were so treated (*c*). The American Civil War assumed such gigantic proportions at the outset, that there was very little time during which it could be doubted whether it was actually a civil war or only a partial insurrection, and the President's proclamation of the 19th April, 1861, declaring the Confederate ports blockaded, settled the point, by virtually recognising the South as belligerents. From that time the duly commissioned Southern cruisers became entitled to the rights of war, and ceased to be pirates.

When rebels cannot produce a regular commission from their Government, the question of whether they are pirates becomes to a great extent one of intention. If their acts are not done with a piratical intent, but with an honest intention to assist in the war, they cannot be treated as pirates. But it is not because they assume the character of belligerents, that they can thereby protect themselves from the consequences of acts really piratical (*d*). If their acts are at first unauthorized, but are subsequently avowed by the insurgent Government, this may or may not take them out of the category of pirates. A recognition of belligerency does not imply that other acts than those of war will be recognised, and the avowal of any past proceedings is not an act of war (*e*).

A case which gave rise to considerable discussion, and caused great excitement at the time, occurred during the Neapolitan insurrection of 1857. The *Cagliari*, a Sardinian merchant steamer, running between Genoa and Tunis, left Genoa, on one of her regular voyages, on the 25th June, 1857, with thirty-three passengers, a crew of thirty-two men, and a cargo consisting partly of firearms. While on the high seas on the same evening, about twenty-five of her passengers suddenly produced concealed arms, took forcible possession of the ship, placed the master and some of the other passengers and crew under restraint, and took the ship to Ponga, a Neapolitan fortress and prison on an island. The mutineers landed at Ponga, and, overpowering the garrison, took possession of the fortress, and liberated 300 prisoners. Thus reinforced, they committed other excesses, and then proceeded in the *Cagliari* to Sapri, where they were soon after all killed or taken prisoners by the Neapolitan troops. The master then re-

Rebels  
without a  
commission.

The case of  
*The Cagliari*.

(*c*) 17 Geo. III. c. 9.

(*d*) *In re Tirnan*, 5 B. & S. 643; 10 L. T. N. S. 449; *U. S. v. Klintoock* (1820), 5 Wheaton, 149.

(*e*) See judgment of Mr. Justice Wilson in *Burley's Case*, Parl. Papers, N. America, 1876 (No. 3), p. 19; Wharton, Digest, § 380, p. 20; and see the five sections there following.



sumed his authority over the *Cagliari*, and left Sapri, announcing his intention of going to Naples, and informing the Neapolitan Government of what had occurred. About twelve miles west of Capri, on the high seas, the *Cagliari* fell in with two Neapolitan cruisers, who boarded her, and not deeming the explanations of the captain satisfactory, took possession of the ship and conveyed her to Naples. The ship was condemned as prize by a Neapolitan Prize Court, and the crew were imprisoned. The *Cagliari* at the time of her capture carried the Sardinian flag, and on receiving the news of this event, the Sardinian Government demanded the release of the ship and her crew. Naples refused, on the ground that the vessel had been engaged in warlike acts against the country, and that the master and crew had assisted in these acts. Among the crew were two British subjects, named Watts and Park, who acted as engineers. England demanded their release, but it was not until they had been confined for ten months that Naples surrendered them, and then only upon the ground of yielding to superior force. The ship and the rest of the crew were afterwards surrendered on the same ground to a British consul—no notice being taken of Sardinia—and were sent by the consul to Genoa. The right of Sardinia to claim their release was never admitted by Naples.

After this, the Superior Prize Court of Naples decided that the *Cagliari* was rightly seized on the high seas, as having been engaged in acts which were partly warlike and partly piratical, with the fault of her master and crew.

The British law officers were of opinion that the seizure was, under the circumstances, justifiable, but that there was no ground for the condemnation, or for the imprisonment of the two British subjects. They said, "We forbear from enlarging upon the serious consequences which would, in our opinion, result to every maritime State, and to none more than Great Britain, from it being held that nothing short of complete legal proof of guilt or the actual commission of crime, at the moment of capture, will justify a national ship of war in capturing a vessel under such circumstances as those in which the *Cagliari* was captured." There was no doubt the ship had been concerned in the insurrectionary movement, and the captors could not be expected to institute a full inquiry on the high seas, for the purpose of ascertaining whether the actual crew found on board had participated in this or not.

The case, however, was materially altered when it came before the Prize Court at Naples. The evidence clearly showed that



the captain and crew had acted under compulsion, and that the owners of the ship were entirely innocent. Nor was any complicity proved against the two English engineers. Naples ought, therefore, to have immediately surrendered the ship to Sardinia, and liberated the crew. The only justifiable grounds for such a seizure were on the supposition that the *Cagliari* was a rebel vessel, and not entitled to carry the Sardinian flag. An insurrection may be carried on by sea as well as by land, and the Government may capture ships of its revolted subjects on the high seas. But as no war existed at the time, Naples had no belligerent right of search, or of bringing foreign vessels for adjudication before a Prize Court. A Prize Court was not the proper tribunal to hear the case. If the *Cagliari* was to be adjudicated on at all, it should have been before a municipal Court, and her crew should have been tried as rebels or pirates. As it was proved that she was entitled to carry the Sardinian flag, every claim to her detention thereupon disappeared, since no ship of a foreign State can be seized on the high seas during peace. An indemnity of £3,000 was paid to England on behalf of Watts and Park, but no compensation was made to the Sardinian Government (f).

Another case occurred in 1873. The *Virginius* was registered as a vessel of the United States in 1870. She then left the United States and made several voyages without returning there, but she preserved her American papers, and carried the American flag when in foreign ports. In October, 1873, and while an insurrection was raging in Cuba, she cleared from Kingston, in Jamaica, with her crew and about 108 passengers. Certain arms and ammunition she had brought into Kingston were seized and forfeited under the customs laws, and she left that port apparently without any arms. She sailed from Kingston ostensibly for Port Limon, in Costa Rica, but in reality proceeded towards Cuba. While on the high seas, and flying the American flag, she was chased by a Spanish ship of war, and being captured was carried into Santiago de Cuba. On arriving there the Spanish authorities tried the passengers and crew by court-martial, and shot thirty-seven of them. Of these sixteen were British subjects. It appeared that the majority of the passengers and crew were Cubans, and that their real intention was to assist in the Cuban insurrection. But some of them, including some of the British

The case of  
*The Virginius*.

(f) See Parl. Papers, 1857. Correspondence respecting the *Cagliari*. p. 209. Annual Reg. 1858, pp. 63—66, and p. 181.  
Annuaire des deux mondes, 1857-8,

subjects who were shot, had shipped on the supposition that the *Virginus* was going on a *bonâ fide* voyage to Costa Rica. When these executions became known, England and America promptly interfered, and called upon the Spanish Government to prevent any further slaughter of their subjects. Matters became very serious between Spain and the United States, and at one time war seemed imminent. Spain, however, was willing to make reasonable concessions, and at a conference held at Washington, she agreed to restore the *Virginus* and the survivors of her passengers and crew, and to salute the United States flag, unless before the 25th December, 1873, Spain could prove to the satisfaction of the American Government that the *Virginus* was not entitled to carry their flag. The ship was accordingly given up to a United States ship of war, with the survivors, but it being shown before the appointed time that the *Virginus* was not legally entitled to the American flag, the salute was dispensed with. England also demanded and obtained compensation for the families of the executed British subjects (*g*). The *Virginus* was not a pirate. She was, no doubt, on her way to assist in an insurrection, but at the time she was captured she was on the high seas, and had not as yet committed any overt acts implicating her in the revolt. Spain was entitled, perhaps, to treat her own subjects as she pleased, but the execution of foreigners found on board a foreign ship, upon the mere supposition that they were going to assist rebels, was wholly unjustifiable.

The case of  
The *Huascar*.

One of the most curious cases occurred in 1877 off the coast of Peru. Pierola, an insurgent leader, seized upon the Peruvian turret ship *Huascar*, and established himself on board with all his adherents. The revolt had no basis of operation on land, and consequently could not by any possibility amount to a war. The *Huascar* cruised about the coast, and stopped several British ships, in one case demanding any despatches there might be for the Peruvian Government, in another asking if there were any troops on board, in another seizing on a quantity of coal. A British subject was also detained on board, and compelled to act as engineer. No actual violence was resorted to, as no resistance was in any case offered, but the demands were made by officers armed with swords and pistols. The British admiral (*h*) commanding on the Pacific station, on hearing of these acts, called upon the *Huascar* to surrender, and offered, if this was done

(*g*) See Parl. Papers. Correspondence respecting the *Virginus* (Cd. 991), Spain (No. 3), 1874. Annual

Reg. 1873, p. 253. U. S. Dipl. Cor. 1874.

(*h*) Rear-Admiral De Horsey.



without resistance, to land the crew at some neutral place within reasonable distance. The *Huascar* refused, and thereupon the admiral attacked her, not far from the shore, with two English wooden vessels, the *Shah* and the *Amethyst*. Great gallantry was displayed on both sides in the action, but no lives were lost. After a time the *Huascar* retired into shallow water, and an expedition was fitted out from the British ships to blow her up at night with a torpedo. She, however, eluded this, and shortly after surrendered to the Peruvian Government. That Government had previously disclaimed all connection with, or responsibility for, the acts of the *Huascar*. In the discussion in Parliament upon this case, the Attorney-General said: "The ship had committed acts which made her an enemy of Great Britain; and that, therefore, the admiral in command of the *Shah* was justified in the course which he took. The *Huascar* was not in a position to claim belligerent rights, in that she was a ship in the hands of insurgents who had not reached a position entitling them to say that they were, or were likely to be, able to supplant the Government against which they had rebelled, and to conduct the affairs of the country. As a matter of fact, the *Huascar* was simply a rover of the sea, and she had committed acts which entitled Admiral De Horsey, in command of one of her Majesty's ships, to make war upon her. Sir W. Harcourt had asked in the House, whether, if the *Huascar* had been taken by the admiral, he (the Attorney-General) would have advised a prosecution for piracy against the crew. In strictness they were pirates, and might have been treated as such, but it was one thing to assert that they had been guilty of acts of piracy, and another to advise that they should be tried for their lives and hanged at Newgate. This vessel, the *Huascar*, was under no commission of any sort. She was roving the seas without a commission, having been taken possession of by a mutinous crew. . . . What right had the *Huascar* to stop a British merchant vessel and demand to see whether she had any despatches on board?" He concluded that the reasons given by the admiral for his acts were perfectly just and proper (*i*). The Peruvian Government expressed their intention of asking reparation from England (*k*); but as the law officers gave it as their opinion that Admiral De Horsey's proceedings were in law justifiable, and as the Lords of the Admiralty, although of opinion that it would have been better first to en-

(*i*) See the Times, Aug. 13th, 1877, 1877, on this subject, No. 369.  
 p. 7; Hansard, 3rd series, vol. cxxxvi. (*k*) Parl. Papers, 1877, Peru (No. 1),  
 pp. 787 seq. And see Parl. Papers, p. 18.



deavour to obtain redress by means of remonstrances, nevertheless approved of what he did, it did not seem probable that England would accord any reparation to Peru (*l*). Nor was any due. The Peruvian Government had expressly disclaimed all connection with the vessel, and refused to be responsible for her acts. Nor were they, indeed, capable of controlling her. As soon, therefore, as she had molested British commerce, there was no other course open to the British admiral but to take the matter into his own hands.

Insurgents  
and belli-  
gerency.

With regard to the position of insurgents whose belligerency is unrecognised, there is some difference of opinion. Thus, in the case of the *United States v. The Ambrose Light* (1885) (*m*), it was held that a vessel found on the high seas in the hands of insurgents whose belligerency was not recognised by any sovereign State is technically a piratical vessel, so that any State not immediately affected may lawfully seize and condemn her. This view is by no means widely accepted (*n*). The better opinion, conformably to principle and actual usage, is that insurgent vessels, acting for political objects and not molesting the ships and subjects of other nations, are not piratical. Thus, in 1887, the *Montezuma*, a Spanish vessel, was seized by Cuban insurgents, and attacked Spanish merchantmen in the Rio de la Plata. Spain requested the Brazilian Government to regard her as a pirate; but it was held that a vessel in the possession of insurgents confining their hostile operations to the State against which the insurrection is directed could not be treated as a pirate by a foreign Power (*o*). A similar view was adopted by Great Britain, France and Germany when the Spanish Government declared to be piratical the Spanish squadron at Carthagena that had been seized by insurgents. In 1893, when a part of the Brazilian fleet rebelled and attacked forts and batteries in the harbour of Rio de Janeiro, the commanders of the British, American, French, Italian, and Portuguese naval forces there notified the insurgent admiral that they would not interfere with his operations, provided no injury was done to the lives and property of their respective countrymen in the city. Again in 1905, a Russian warship, the *Kniaz Potemkin*, was seized by her crew, in connection with a revolutionary movement in Russia, and afterwards entered a Roumanian port. The insurgents were refused provisions, but they were not treated as pirates.

(*l*) Parl. Papers, 1877, Peru (No. 1), pp. 14, 24.  
(*m*) 25 Fed. Rep. 408.  
(*n*) Cf. Wharton, Digest, vol. iii.

pp. 465 seq.

(*o*) Scott, Cases, p. 351, note; Snow, Cases, pp. 206 seq. Cf. Calvo, vol. i. § 502.

The African slave-trade, though prohibited by the municipal laws of most nations, and declared to be piracy, by the statutes of Great Britain (1821) and the United States (1820), and since the treaty of 1841, with Great Britain, by Austria, Prussia, and Russia, is not such by the general international law; and its interdiction cannot be enforced by the exercise of the ordinary right of visitation and search. That right does not exist, in time of peace, independently of special compact (*p*).

Slave-trade, whether prohibited by the law of nations.

The African slave-trade, once considered not only a lawful, but desirable branch of commerce, a participation in which was made the object of wars, negotiations, and treaties between different European States, is now denounced as an odious crime by the almost universal consent of nations. This branch of commerce was, in the first instance, successively prohibited by the municipal laws of Denmark, the United States, and Great Britain, to their own subjects. Its final abolition was stipulated by the treaties of Paris, Kiel, and Ghent, in 1814, confirmed by the declaration of the Congress of Vienna of the 8th of February, 1815, and reiterated by the additional Article annexed to the treaty of peace concluded at Paris on the 20th November, 1815 (*q*). The accession of Spain and Portugal to the principle of the abolition was finally obtained by the treaties between Great Britain and those Powers of the 23rd September, 1817, and the 22nd January, 1815. And by a convention concluded with Brazil in 1826, it was made piratical for the subjects of that country to be engaged in the trade after the year 1830.

By the treaties of the 30th November, 1831, and 22nd May, 1833, between France and Great Britain, to which nearly all the maritime Powers of Europe subsequently acceded, the mutual right of search was conceded, within certain geographical limits, as a means of suppressing the slave-trade. The provisions of these treaties were extended to a wider range by the Quintuple Treaty, concluded on the 20th December, 1841, between the five great European Powers, and subsequently ratified between them, except by France, which Power still remained only bound by her treaties of 1831 and 1833 with Great Britain. By the treaty concluded at Washington, the 9th August, 1842, between the United States and Great Britain, referring to the 10th Article of the Treaty of Ghent, by which it had been agreed that both the contracting parties should use their best endeavours to promote

Treaties to suppress the slave-trade.

(*p*) *Le Louis* (1817), 2 Dods. Ad. 210; *La Jeune Eugénie*, 10 Wheaton, 66. (q) See Hertslet, Map of Europe by Treaty, vol. i. pp. 60, 695.



the entire abolition of the traffic in slaves, it was provided, Article 8, that "the parties mutually stipulate that each shall prepare, equip, and maintain in service, on the coast of Africa, a sufficient and adequate squadron, or naval force of vessels, of suitable numbers and descriptions, to carry in all not less than eighty guns, to enforce, separately and respectively, the laws, rights, and obligations of each of the two countries, for the suppression of the slave-trade, the said squadrons to be independent of each other, but the two Governments stipulating, nevertheless, to give such orders to the officers commanding their respective forces, as shall enable them most effectually to act in concert and co-operation, upon mutual consultation, as exigencies may arise, for the attainment of the true object of this Article; copies of all such orders to be communicated by each Government to the other, respectively." By the Treaty of the 29th May, 1845, between France and Great Britain, new stipulations were entered into between the two Powers, by which a joint co-operation of their naval forces on the coast of Africa, for the suppression of the slave-trade, was substituted for the mutual right of search, provided by the previous treaties of 1831 and 1833.

By the middle of the nineteenth century Great Britain had concluded some fifty treaties for the suppression of the slave-trade (r).

Treaty of  
1862 between  
England and  
the United  
States.

By a treaty concluded between England and the United States on the 7th April, 1862, it was agreed that the high contracting parties mutually consent that those ships of their respective navies, which shall be provided with special instructions, may visit such merchant vessels of the two nations as may upon reasonable grounds be suspected of having been fitted out for, or being engaged in the slave-trade. This right of search is only to be exercised by authorized vessels of war, and only as regards merchant vessels; nor may it be put in force within the limits of a settlement or port, or within the territorial waters of the other party. The mode in which the search is to be conducted, and the geographical limits within which the right may be enforced, are defined by the treaty (namely, within 200 miles of the African coast and 30 leagues of the coast of Cuba). On February 17th, 1863, a further provision was made which extended this reciprocal right of search to waters within 30 leagues of the islands of Madagascar, Porto Rico, and Santo Domingo (s). An additional convention concluded on the 3rd June, 1870, abolished certain courts

(r) Cf. Phillimore, vol. i. § 308.

(s) U. S. Statutes at Large, vol. xii. p. 279.



that had been established in Africa to adjudicate on vessels alleged to be slavers, and provides that suspected vessels shall be brought before the nearest Prize Court of their own country, or handed over to one of its cruisers, if one should be near the scene of capture. Instructions for the ships of each country employed in this service are annexed to the treaty. (*t*).

By Article 9 of the General Act of the Berlin Conference, which was signed at Berlin 26th February, 1885, Great Britain, Germany, Austria-Hungary, Belgium, Denmark, Spain, the United States (*u*), France, Italy, the Netherlands, Portugal, Russia, Sweden and Norway, and Turkey, solemnly declared that trading in slaves is forbidden in conformity with the principles of international law as recognised by those Powers, and that the operations, which, by sea or land, furnish slaves to trade, ought likewise to be forbidden. And each of the Powers bound itself to employ all the means at its disposal for putting an end to this trade, and for punishing those who engage in it. This declaration was followed up by an Anti-Slavery Conference held, at the suggestion of Great Britain (*x*), at Brussels, in 1890, at which all the above enumerated Powers, together with the Congo State, Persia and Zanzibar, were represented. The General Act of the Conference, ratified eventually by all the Powers there present, contains in a hundred Articles an elaborate series of regulations for "counteracting" the slave-trade in the interior of Africa, for repressing it at sea, for liberating escaped slaves, and for preventing the introduction of gunpowder and firearms into districts infested by the slave-raiders (*y*).

As a result of the Brussels Conference, and the numerous conventions concluded to prevent and punish those who engage in the slave-trade, it may now be said that the traffic, though not piracy *jure gentium* and not condemned by the customary law of nations, is contrary to written international law.

Long before the definitive international convention of 1890 was established, the general concert of nations to extinguish the traffic gave rise to the opinion, that, though once tolerated, and even protected and encouraged by the laws of every maritime country, it ought henceforth to be considered as interdicted by the international code of Europe and America. This opinion

General Act  
of Berlin  
Conference.

Decisions of  
British and  
American  
Courts.

(*t*) *Ibid.* vol. xvi. p. 777.

(*u*) But *vide supra*, p. 100.

(*x*) Brit. Parl. Papers, Africa, No. 7 (1890).

(*y*) Hertslet, Map of Africa by

Treaty, Nos. 20 and 22. See Brit. Parl. Papers, Treaty Series, No. 7 (1892). Supplement to the American Journal of International Law, vol. iii. (1909), pp. 29 *seq.*

*The Amédie.*

first received judicial countenance from the judgment of the Lords of Appeal in Prize Causes, pronounced in the case of an American vessel, the *Amédie*, in 1807, the trade having been previously abolished by the municipal laws of the United States and of Great Britain. The judgment of the Court was delivered by Sir William Grant, in the following terms (z):—"This ship must be considered as being employed, at the time of capture, in carrying slaves from the coast of Africa to a Spanish colony. We think that this was evidently the original plan and purpose of the voyage, notwithstanding the pretence set up to veil the true intention. The claimant, however, who is an American, complains of the capture, and demands from us the restitution of property, of which he alleges that he has been unjustly dispossessed. In all the former cases of this kind which have come before this Court, the slave-trade was liable to considerations very different from those which belong to it now. It had, at that time, been prohibited (so far as respected carrying slaves to the colonies of foreign nations) by America, but by our own laws it was still allowed. It appeared to us, therefore, difficult to consider the prohibitory law of America in any other light than as one of those municipal regulations of a foreign State of which this Court could not take any cognizance. But by the alteration which has since taken place, the question stands on different grounds, and is open to the application of very different principles. The slave-trade has since been totally abolished by this country, and our legislature has pronounced it to be contrary to the principles of justice and humanity. Whatever we might think, as individuals, before, we could not, sitting as judges in a British court of justice, regard the trade in that light while our own laws permitted it. But we can now assert that this trade cannot, abstractedly speaking, have a legitimate existence. When I say 'abstractedly speaking,' I mean that this country has no right to control any foreign legislature that may think fit to dissent from this doctrine, and to permit to its own subjects the prosecution of this trade; but we have now a right to affirm that *primâ facie* the trade is illegal, and thus to throw on claimants the burden of proof, that, in respect of them, by the authority of their own laws, it is otherwise. As the case now stands, we think we are entitled to say that a claimant can have no right, upon principles of universal law, to claim the restitution in a

(z) The decisions of this case and subsequent cases are here given, as they possess a wider interest than that immediately relating to the slave-trade.

Prize Court of human beings carried as slaves. He must show some right that has been violated by the capture, some property of which he has been dispossessed, to which he ought to be restored. In this case, the laws of the claimant's country allow of no property such as he claims. There can, therefore, be no right to restitution. The consequence is, that the judgment must be affirmed" (a).

In the case of *The Fortuna*, determined in 1811, in the High Court of Admiralty, Lord Stowell, in delivering the judgment of the Court, stated that "an American ship, *quasi* American, was entitled, upon proof, to immediate restitution; but she might forfeit, as other neutral ships might, that title, by various acts of misconduct, by violations of belligerent rights most clearly and universally recognised. But though the Prize Court looked primarily to violations of belligerent rights as grounds of confiscation in vessels not actually belonging to the enemy, it had extended itself a good deal beyond considerations of that description only. It had been established by recent decisions of the Supreme Court, that the Court of Prize, though properly a Court purely of the law of nations, has a right to notice the municipal law of this country in the case of a British vessel which, in the course of a prize-proceeding, appears to have been trading in violation of that law, and to reject a claim for her on that account. That principle had been incorporated into the prize-law of this country within the last twenty years, and seemed now fully incorporated. A late decision in the case of *The Amédie* seemed to have gone the length of establishing a principle, that any trade contrary to the general law of nations, although not tending to, or accompanied with, any infraction of the law of that country whose tribunals were called upon to consider it, might subject the vessels employed in that trade to confiscation. The *Amédie* was an American ship, employed in carrying on the slave-trade; a trade which this country, since its own abandonment of it, had deemed repugnant to the law of nations, to justice, and humanity; though without presuming so to consider and treat it where it occurs in the practice of the subjects of a State which continued to tolerate and protect it by its own municipal regulations; but it put upon the parties the burden of showing that it was so tolerated and protected, and in failure of producing such proof, proceeded to condemnation, as it did in the case of that vessel. How far that judgment has been universally concurred in and approved is not for me to inquire.

(a) *The Amédie* (1807), 1 Acton, 240.



If there be those who disapprove of it, I certainly am not at liberty to include myself in that number, because the decisions of that Court bind authoritatively the conscience of this; its decisions must be conformed to, and its principles practically adopted. The principle laid down in that case appears to be, that the slave-trade, carried on by a vessel belonging to a subject of the United States, is a trade which, being unprotected by the domestic regulations of their legislature and government, subjects the vessel engaged in it to a sentence of condemnation. If the ship should therefore turn out to be an American, actually so employed—it matters not, in my opinion, in what stage of the employment, whether in the inception, or the prosecution, or the consummation of it—the case of *The Amédie* will bind the conscience of this Court to the effect of compelling it to pronounce a sentence of confiscation” (b).

*The Diana.*

In a subsequent case, that of *The Diana*, Lord Stowell limited the application of the doctrine invented by Sir W. Grant, to the special circumstances which distinguished the case of *The Amédie*. The *Diana* was a Swedish vessel, captured by a British cruiser on the coast of Africa whilst actually engaged in carrying slaves to the Swedish West India possessions. The vessel and cargo were restored to the Swedish owner, on the ground that Sweden had not then prohibited the trade by law or convention, and still continued to tolerate it in practice. It was stated by Lord Stowell, in delivering the judgment of the High Court of Admiralty in this case, that England had abolished the trade as unjust and criminal; but she claimed no right of enforcing that prohibition against the subjects of those States which had not adopted the same opinion; and England did not mean to set herself up as the legislator and *custos morum* for the whole world, or presume to interfere with the commercial regulations of other States. The principle of the case of *The Amédie* was, that where the municipal law of the country to which the parties belonged had prohibited the trade, British tribunals would hold it to be illegal upon general principles of justice and humanity; but they would respect the property of persons engaged in it under the sanction of the laws of their own country (c).

The above three cases arose during the continuance of the war, and whilst the laws and treaties prohibiting the slave-trade were incidentally executed through the exercise of the belligerent right of visitation and search.

*The Louis.*

In the case of *The Diana*, Lord Stowell had sought to distin-

(b) *The Fortuna* (1811), 1 Dods. Ad. Rep. 81.

(c) *The Diana* (1812), 1 Dods. Ad. Rep. 95.

guish the circumstances of that case from those of *The Amédie*, so as to raise a distinction between the case of the subjects of a country which had already prohibited the slave-trade, and that of those whose Governments still continued to tolerate it. At last came the case of the French vessel called the *Louis*, captured after the general peace, by a British cruiser, and condemned in the inferior Court of Admiralty. Lord Stowell reversed the sentence in 1817, discarding altogether the authority of *The Amédie* as a precedent, both upon general reasoning, which went to shake that case to its very foundations, and upon the special ground, that even admitting that the trade had been actually prohibited by the municipal laws of France (which was doubtful), the right of visitation and search (being an exclusively belligerent right) could not consistently with the law of nations be exercised, in time of peace, to enforce that prohibition by the British Courts upon the property of French subjects. In delivering the judgment of the High Court of Admiralty in this case, Lord Stowell held that the slave-trade, though unjust and condemned by the statute law of England, was not piracy, nor was it a crime by the universal law of nations. A court of justice, in the administration of law, must look to the legal standard of morality—a standard which, upon a question of this nature, must be found in the law of nations as fixed and evidenced by general, ancient, and admitted practice, by treaties, and by the general tenor of the laws, ordinances, and formal transactions of civilized States; and looking to these authorities, he found a difficulty in maintaining that the transaction was legally criminal. To make it piracy or a crime by the universal law of nations, it must have been so considered and treated in practice by all civilized States, or made so by virtue of a general convention. The slave-trade, on the contrary, had been carried on by all nations, including Great Britain, until a very recent period, and was still carried on by Spain and Portugal, and not yet entirely prohibited by France. It was not, therefore, a criminal act by the consuetudinary law of nations; and every nation, independently of special compact, retained a legal right to carry it on. No nation could exercise the right of visitation and search upon the common and unappropriated parts of the ocean, except upon the belligerent claim. No one nation had a right to force its way to the liberation of Africa by trampling on the independence of other States; or to procure an eminent good by means that are unlawful; or to press forward to a great principle by breaking through other great principles that stand in the way. The right of visitation and search on the high seas did not exist in time of peace. If it belonged to



one nation it equally belonged to all, and would lead to gigantic mischief and universal war. Other nations had refused to accede to the British proposal of a reciprocal right of search in the African seas, and it would require an express convention to give the right of search in time of peace (*d*).

*Madrazo v. Willes.*

The leading principles of this judgment were confirmed in 1820 by the Court of King's Bench, in the case of *Madrazo v. Willes*, in which the point of the illegality of the slave-trade, under the general law of nations, came incidentally in question. The Court held that the British statutes against the slave-trade were applicable to British subjects only. The British Parliament could not prevent the subjects of other States from carrying on the trade out of the limits of the British dominions. If a ship be acting contrary to the general law of nations, she is thereby subject to condemnation; but it was impossible to say that the slave-trade is contrary to the law of nations. It was, until lately, carried on by all the nations of Europe; and a practice so sanctioned could only be rendered illegal on the principles of international law, by the consent of all the Powers. Many States had so consented, but others had not; and the adjudged cases had gone no farther than to establish the rule, that ships belonging to countries that had prohibited the trade were liable to capture and condemnation, if found engaged in it (*e*).

*The Antelope.*

A similar course of reasoning was adopted by the Supreme Court of the United States in the case of Spanish and Portuguese vessels captured by American cruisers whilst the trade was still tolerated by the laws of Spain and Portugal. It was stated, in the judgment of the Court, that it could hardly be denied that the slave-trade was contrary to the law of nature. That every man had a natural right to the fruits of his own labour, was generally admitted; and that no other person could rightfully deprive him of those fruits, and appropriate them against his will, seemed to be the necessary result of this admission. But, from the earliest times, war had existed, and war conferred rights in which all had acquiesced. Among the most enlightened nations of antiquity one of these rights was, that the victor might enslave the vanquished. That which was the usage of all nations could not be pronounced repugnant to the law of nations, which was certainly to be tried by the test of general usage. That which had received the assent of

(*d*) *The Louis* (1817), 2 Dods. Ad. Rep. 210.

(*e*) *Madrazo v. Willes* (1820), 3 Barn. & Ald. 353. See also *Santos v. Illidge* (1859), 6 C. B. N. S. 841;

29 L. J. C. P. 348; *R. v. Zulueta* (1843), 1 C. & K. 215; *Pinner v. Arnold*, C. M. & R. 613; *Esposito v. Bowden* (1857), 7 E. & B. 763.



all must be the law of all. Slavery, then, had its origin in force; but as the world had agreed that it was a legitimate result of force, the state of things which was thus produced by general consent could not be pronounced unlawful. Throughout Christendom this harsh rule had been exploded, and war was no longer considered as giving a right to enslave captives. But this triumph had not been universal. The parties to the modern law of nations do not propagate their principles by force; and Africa had not yet adopted them. Throughout the whole extent of that immense continent, so far as we know its history, it is still the law of nations that prisoners are slaves. The question then was, could those who had renounced this law be permitted to participate in its effects by purchasing the human beings who are its victims? Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution in those principles which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself a part, and to whose law the appeal is made. If we resort to this standard as the test of international law, the question must be considered as decided in favour of the legality of the trade. Both Europe and America embarked in it; and for nearly two centuries it was carried on without opposition and without censure. A jurist could not say that a practice thus supported was illegal, and that those engaged in it might be punished, either personally or by deprivation of property. In this commerce, thus sanctioned by universal assent, every nation had an equal right to engage. No principle of general law was more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which was vested in all by the consent of all, could be divested only by consent; and this trade, in which all had participated, must remain lawful to those who could not be induced to relinquish it. As no nation could prescribe a rule for others, no one could make a law of nations; and this traffic remained lawful to those whose governments had not forbidden it. If it was consistent with the law of nations, it could not in itself be piracy. It could be made so only by statute; and the obligation of the statute could not transcend the legislative power of the State which might enact it. If the trade was neither repugnant to the law of nations, nor piratical, it was almost superfluous to say in that Court that the right of bringing in for adjudication in time of peace, even where the vessel belonged to a nation

which had prohibited the trade, could not exist. The Courts of justice of no country executed the penal laws of another; and the course of policy of the American Government on the subject of visitation and search, would decide any case against the captors in which that right had been exercised by an American cruiser, on the vessel of a foreign nation not violating the municipal laws of the United States. It followed that a foreign vessel engaged in the African slave-trade, captured on the high seas in time of peace, by an American cruiser, and brought in for adjudication, would be restored to the original owners (f).

*Buron v. Denman.*

The subsequent case of *Buron v. Denman* (g), places the matter in a still clearer light. A treaty was entered into between Commander Denman, of H.M.S. *Wanderer*, and King Sciacca, the sovereign of Gallinas, a territory near Sierra Leone, for the abolition of slavery in his dominions. Acting upon this treaty, Commander Denman destroyed certain barracoons of the slave dealers, and liberated the slaves, whom he conveyed to Sierra Leone. Some of these slaves belonged to Buron, the plaintiff. Baron Parke, in summing up, directed the jury, that the proceedings of Commander Denman, at the time of their execution, had been wrongful, and would have entitled the plaintiff to recover for the loss of his goods and slaves, were it not that the defendant had acted under the authority of a political treaty, which had been subsequently ratified by the home Government, whereby his acts had become acts of State, for which the Government, and not its officer, was responsible.

These cases establish beyond controversy, that the tribunals of England recognise the right of property of the owner in the slave, so long as the slave is in the country by the law of which the owner's right is upheld (h). It has also been held in a recent case in the Supreme Court of the United States, that a promissory note given as the price of slaves in a State where slavery was at the time lawful, could be enforced after the abolition of slavery throughout the Union (i).

Fugitive slaves.

Another question which has caused great difficulty with regard to slaves is that of their position after quitting a country where they are held in bondage, and then returning to it. No one will deny that a slave is justified in escaping from his master, if he can do so without having recourse to violence, and no country

(f) *The Antelope* (1825), 10 Wheaton, 66. See *The Slavers*, 2 Wallace, 350.

(g) (1848), 3 Exch. 167, and State Trials, N. S. vi. 526; and see *Forbes*

*v. Cochrane* (1824), 2 B. & C. 448.

(h) Report of Comm. on Fugitive Slaves, 1875, p. 54.

(i) *Boyce v. Tabb*, 18 Wallace, 546.



would give him up to his owner in such a case. It has, however, been asserted, that when a slave has once set foot on British soil, he becomes at once and for ever a free man, and that his owner's rights thereupon cease to exist. Such a position cannot be supported. The law of England recognises the right of an owner in a slave-owning State over his slaves, and therefore British law cannot impress the quality of freedom upon a slave who has violated his master's right, so as to make the slave able to continue free on his return to the owner's country. In a case decided by Lord Stowell, Grace, a slave in Antigua, accompanied her mistress to England, and then returned with her to Antigua. She was there seized by the waiter of the Customs, as forfeited for having been imported into the island, contrary to a statute prohibiting the further importation of slaves. Her owner put in a claim for her, and Lord Stowell decided in his favour, on the ground that while in England she was free, but that her liberty had been placed "into a sort of parenthesis," and as she had returned to Antigua, her owner's rights over her revived, and he was therefore entitled to her (*k*). Lord Chief Justice Cockburn expressed his approval of this decision (*l*); and the same principle is to be found in other cases (*m*). Mr. Justice Story also expressed his concurrence with this judgment (*n*), and the decisions of the American Courts are to the same effect (*o*).

Case of the  
slave Grace.

The mode in which the question is most likely to present itself at the present time, is by slaves escaping on to the ships of war of foreign States. To give back a slave to his master, knowing that he will be maltreated, and made to suffer for having attempted to regain his liberty, is repugnant to the feelings of human nature; and yet to protect him and carry him off to some country where slavery does not exist, is a violation of his owner's rights. The instructions of the Admiralty to the commanders of British ships of war, recommend that as a rule fugitive slaves should not be received on board, but the commanders are instructed that "In any case in which you have received a fugitive slave into your ship, and taken him under the protection of the British flag, whether within or beyond the territorial waters of any State, you will not admit or entertain any demand made upon you for his surrender, on the ground of slavery. No rule is, or can be laid down, as to

Slaves  
escaping to  
ships of war.

British  
Admiralty  
instructions.

(*k*) *The Slave Grace*, 2 Hagg. Ad. 131.

(*l*) See Report on Fugitive Slaves, 1875, p. xlviii.

(*m*) *Forbes v. Cochrane* (1824), 2

B. & C. 448; *Williams v. Brown*, 3 Bos. & Pul. 69.

(*n*) *Life of Story*, vol. i. p. 552.

(*o*) *Strader v. Graham*, 10 Howard, 52; *Dred Scot v. Sandford* (1856), 19 Howard, 393.



General Act  
of the  
Brussels  
Conference.

when a fugitive is to be received on board or not." And now by the terms of the General Act of the Brussels Conference, any slave who may have taken refuge on board a ship of war flying the flag of one of the signatory Powers, within the maritime zone there defined, shall be immediately and definitely freed. Such freedom, however, is not to withdraw him from the competent jurisdiction if he has committed a crime or offence at common law. By another Article of the Act it is further provided that any fugitive slave claiming on the African continent the protection of the signatory Powers shall obtain it, and be received in the camps and stations officially established by them, or on board Government vessels plying on the lakes and rivers. Private stations and vessels are only permitted to exercise the right of asylum subject to the previous sanction of the State (*p*).

Slavery in the  
United States.

While slavery existed in some of the States of the American Union, it was held by the Supreme Court, that laws made by any of the States to prevent or even to assist, the arrest of fugitive slaves, were unconstitutional and void (*q*). However, the Civil War resulted in the total abolition of slavery throughout the Union. The Thirteenth Amendment to the Constitution provides that, "1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. 2. Congress shall have power to enforce this Article by appropriate legislation" (*r*).

Extent of the  
judicial power  
as to property  
within the  
territory.

II. The judicial power of every State extends to all civil proceedings, *in rem*, relating to real or personal property within the territory.

This follows, in respect to real property, as a necessary consequence of the rule relating to the application of the *lex loci rei sitæ*. As every thing relating to the tenure, title, and transfer of real property ('immobilia') is regulated by the local law, so also the proceedings in Courts of justice relating to that species of property, such as the rules of evidence and of prescription, the forms of action and pleadings, must necessarily be governed by the same law (*s*).

Distinction  
between the

A similar rule applies to all civil proceedings *in rem*, respecting

(*p*) The subject is fully considered in the Report of the Royal Commission on Fugitive Slaves, 1875; and see Arts. vii., xxi., xxviii. of the General Act of the Brussels Conference; Hertslet, Map of Africa by Treaty, No. 22.

(*q*) *Prigg v. Pennsylvania*, 16 Peters, 539, 622.

(*r*) Thirteenth Amendment to the Constitution of the U. S. See *Memor v. Happersett*, 21 Wallace, 162.

(*s*) *Vide supra*, p. 134.

personal property ('mobilia') within the territory, which must also be regulated by the local law, with this qualification, that foreign laws may furnish the rule of decision in cases where they apply, whilst the forms of process and rules of evidence and prescription are still governed by the *lex fori*. Thus the *lex domicilii* forms the law in respect to a testament of personal property or succession *ab intestato*, if the will is made, or the party on whom the succession devolves resides, in a foreign country; whilst at the same time the *lex fori* of the State in whose tribunals the suit is pending determines the forms of process and the rules of evidence and prescription.

rule of decision and the rule of procedure as affecting cases *in rem*.

Though the distribution of the personal effects of an intestate is to be made according to the law of the place where the deceased was domiciled, it does not therefore follow that the distribution is in all cases to be made by the tribunals of that place to the exclusion of those of the country where the property is situate. Whether the tribunal of the State where the property lies is to decree distribution, or to remit the property abroad, is a matter of judicial discretion to be exercised according to the circumstances. It is the duty of every Government to protect its own citizens in the recovery of their debts and other just claims; and in the case of a solvent estate it would be an unreasonable and useless comity to send the funds abroad, and the resident creditor after them. But if the estate be insolvent, it ought not to be sequestered for the exclusive benefit of the subjects of the State where it lies. In all civilized countries, foreigners, in such a case, are entitled to prove their debts and share in the distribution (*t*).

Succession to personal property *ab intestato*.

Though the forms in which a testament of personal property made in a foreign country is to be executed are regulated by the *lex domicilii*, such a testament cannot be carried into effect in the State where the property lies, until, in the language of the law of England, probate has been obtained in the proper tribunal of such State, or, in the language of the civilians, it has been 'homologated,' or registered, in such tribunal (*u*).

Foreign will, how carried into effect in another country.

So also a foreign executor, constituted such by the will of the testator, cannot exercise his authority in another State without taking out letters of administration in the proper local court. Nor can the administrator of a succession *ab intestato*, appointed *ex officio* under the laws of a foreign State, interfere with the

(*t*) Kent, Commentaries on American Law (5th ed.), vol. ii. pp. 431, 432, and the cases there cited. Foote, Priv. Int. Jurisp. (1914), pp. 271 *seq.* Dicey, Conflict of Laws (1908),

pp. 664 *seq.* Williams, Executors and Administrators (1905), vol. i. p. 271.

(*u*) *Armstrong v. Lear*, 12 Wheaton, 169. Code Civil, liv. iii. tit. 2, Art. 1000. Foote, p. 267.

personal property in another State belonging to the succession, without having his authority confirmed by the local tribunal.

Probate of wills in England.

If the testator died without leaving any personal property in England, generally speaking, his will need not be proved in any Court of Probate in England (*x*). But if a foreign executor should find it necessary to institute a suit in this country, to recover a debt due to his testator, he must then prove the will here, or a personal representative must be constituted by the Court of Probate here to administer *ad litem* (*y*). The English Court of Probate generally follows the decision of the foreign court, when a will proved abroad also requires probate in England. The Court should, however, be satisfied, either that the will was valid by the law of the testator's domicile, or that a court of the foreign country has acted upon it, and given it efficiency (*z*).

Conclusiveness of foreign sentences *in rem*.

The judgment or sentence of a foreign tribunal of competent jurisdiction proceeding *in rem*, such as the sentences of Prize Courts under the law of nations, or Admiralty and Exchequer, or other revenue courts, under the municipal law, are conclusive as to the proprietary interest in, and title to, the thing in question, wherever the same comes incidentally in controversy in another State (*a*).

Whatever doubts may exist as to the conclusiveness of foreign sentences in respect of facts collaterally involved in the judgment, the peace of the civilized world, and the general security and convenience of commerce, obviously require that full and complete effect should be given to such sentences, wherever the title to the specific property, which has been once determined in a competent tribunal, is again drawn in question in any other court or country.

English and American decisions.

The English courts endeavour to uphold all decisions of foreign tribunals, when such decisions have been rightly obtained. Mr. Justice Story lays down the rule as regards foreign judgments *in rem* in very explicit terms. He says the judgment is conclusive "when there have been proceedings *in rem* as to movable property within the jurisdiction of the court pronouncing the judgment (*b*). Whatever it settles as to the right or title, or whatever disposition

(*x*) Williams, Executors and Administrators (1905), vol. i. p. 269; *Jauncey v. Sealey* (1686), 1 Vernon, 397.

(*y*) Williams, Executors, *ibid.*; *Attorney-General v. Bowens* (1838), 4 M. & W. 193; *Price v. Dewhurst* (1837), 4 M. & Cr. 80.

(*z*) Williams, Executors and Administrators (1905), vol. i. p. 338.

*In the goods of Des Hais* (1865), 34 L. J. P. M. & A. 58; Foote, pp. 273 *seq.* With regard to the probate in England of Scotch and Irish wills, see 21 & 22 Vict. c. 56, s. 12; 20 & 21 Vict. c. 79, s. 95; Foote, pp. 277, 278.

(*a*) Foote, pp. 537 *seq.*

(*b*) *Rose v. Himely* (1808), 4 Cranch, 241.



it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country where the question comes directly or indirectly in judgment before any other foreign tribunal. But this doctrine, however, is always to be understood with this limitation, that the judgment has been obtained *bonâ fide* and without fraud; for if fraud has intervened, it will doubtless avoid the force and validity of the sentence<sup>(c)</sup>. So it must appear that there have been regular proceedings to found the judgment or decree; and that the parties in interest *in rem* have had notice or an opportunity to appear and defend their interests, either personally or by their proper representatives, before it was pronounced; for the common justice of all nations requires that no condemnation should be pronounced before the party has an opportunity to be heard" <sup>(d)</sup>. "We think the inquiry is," said Mr. Justice Blackburn, in giving an opinion in the House of Lords <sup>(e)</sup>, "first, whether the subject-matter was so situated as to be within the lawful control of the State, under the authority of which the court sits; and, secondly, whether the sovereign authority of that State has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world." The judgment is binding even though it appears that the foreign court based its decision on a mistaken idea of English law <sup>(f)</sup>.

How far a bankruptcy declared under the laws of one country will affect the real and personal property of the bankrupt situate in another State, is a question of which the usage of nations, and the opinions of civilians, furnish no satisfactory solution. Even as between co-ordinate States, belonging to the same common empire, it has been doubted how far the assignment under the bankrupt laws of one country will operate a transfer of property in another. In respect to real property, which generally has some indelible characteristics impressed upon it by the local law, these difficulties are enhanced in those cases where the *lex loci rei sitæ* requires some formal act to be done by the bankrupt or his attorney, specially constituted, in the place where the property lies, in order to consummate the transfer. In those countries

Transfer of property under foreign bankrupt proceedings.

<sup>(c)</sup> *Williams v. Amroyd* (1813), 7 Cranch, 423. Cf. Foote, pp. 520, 541.

<sup>(d)</sup> Story, Conflict of Laws, § 592. Boyd, The Merchant Shipping Laws, p. 459. *Monroe v. Douglas*, 4 Sandford, 126; *Sawyer v. Maine Fire Ins. Co.*, 12 Massachusetts, 298; *Colliss v.*

*Hector* (1875), L. R. 19 Eq. 334; *Abouloff v. Oppenheimer* (1882), 10 Q. B. D. 295.

<sup>(e)</sup> *Casirique v. Imrie* (1870), L. R. 4 H. L. 429.

<sup>(f)</sup> *Ibid.* p. 414.

where the theory of the English bankrupt system, that the assignment transfers all the property of the bankrupt, wherever situate, is admitted in practice, the local tribunals would probably be ancillary to the execution of the assignment by compelling the bankrupt, or his attorney, to execute such formal acts as are required by the local laws to complete the conveyance (*g*).

The practice of the English Court of Chancery in assuming jurisdiction incidentally over questions affecting the title to lands in the British colonies, in the exercise of its jurisdiction *in personam*, where the party resides in England, and thus compelling him, indirectly, to give effect to its decrees as to real property situate out of its local jurisdiction, seems very questionable on principle, unless where it is restrained to the case of a party who has fraudulently obtained an undue advantage over other creditors by judicial proceedings instituted without personal notice to the defendant (*h*).

But whatever effect may, in general, be attributed to the assignment in bankruptcy as to property situate in another State, it is evident that it cannot operate where one creditor has fairly obtained by legal diligence a specific lien and right of preference, under the laws of the country where the property is situate (*i*).

Extent of the  
judicial  
power over  
foreigners  
residing  
within the  
territory.

III. The judicial power of every State may be extended to all controversies respecting personal rights and contracts, or injuries to the person or property, when the party resides within the territory, wherever the cause of action may have originated.

This general principle is entirely independent of the rule of decision which is to govern the tribunal. The rule of decision may be the law of the country where the judge is sitting, or it may be the law of a foreign State in cases where it applies; but that does not affect the question of jurisdiction, which depends, or may be made to depend, exclusively upon the residence of the party.

Depends upon  
municipal  
regulations.

The operation of the general rule of international law, as to civil jurisdiction, extending to all persons who owe even a temporary allegiance to the State, may be limited by the positive institutions of any particular country. It is the duty, as well as the right, of every nation to administer justice to its own citizens; but there is no uniform and constant practice of nations, as to

(*g*) See Lord Eldon's observations in *Selkrigg v. Davis* (1814), 2 Rose, 291, at p. 311; *Banfield v. Solomon*, 9 Vesey, 77; *Re Levy's Trusts* (1885), 30 Ch. D. 119.

(*h*) See, as to this practice, *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34,

40, per Lord Selborne, L. C.; Foote, *Priv. Int. Jurisp.* pp. 178 *seq.*

(*i*) Kent, *Comment. on American Law*, vol. ii. pp. 405—408 (5th ed.); *Banco de Portugal v. Waddell* (1880), 5 App. Cas. 161.

taking cognizance of controversies between foreigners. It may be assumed or declined, at the discretion of each State, guided by such motives as may influence its juridical policy. All real and possessory actions may be brought, and indeed must be brought, in the place where the property lies; but the law of England, and of other countries where the English common law forms the basis of the local jurisprudence, considers all personal actions, whether arising *ex delicto* or *ex contractu*, as transitory; and permits them to be brought in the domestic forum, whoever may be the parties, and wherever the cause of action may originate. This rule is supported by a legal fiction, which supposes the injury to have been inflicted, or the contract to have been made, within the local jurisdiction. In the countries which have modelled their municipal jurisprudence upon the Roman civil law, the maxim of that code, 'actor sequitur forum rei,' is generally followed, and personal actions must therefore be brought in the tribunals of the place where the defendant has acquired a fixed domicile.

Law of  
England and  
America.

Under the French Civil Code, foreigners who have established their domicile in the country by special license ('autorisation') of the sovereign authority, are entitled to all civil rights, and, among others, to that of suing in the local tribunals as French subjects. Under other circumstances, these tribunals have jurisdiction where foreigners are parties in the following cases only:—

French law.

1. Where the contract is made in France, or elsewhere, between foreigners and French subjects.

2. In commercial matters, on all contracts made in France, with whomsoever made, where the parties have elected a domicile, in which they are liable to be sued, either by the express terms of the contract, or by necessary implication resulting from its nature.

3. Where foreigners voluntarily submit their controversies to the decision of the French tribunals, by waiving a plea to the jurisdiction.

In all other cases, where foreigners not domiciled in France by special license of the king are concerned, the French tribunals decline jurisdiction, even when the contract is made in France (*k*).

Some writers consider this jurisprudence, which deprives a foreigner, not domiciled in France, of the faculty of bringing a suit in the French tribunals against another foreigner, as incon-

(*k*) Code Civil, Art. 13, 14, 15. Code de Commerce, Art. 631. Discussions sur le Code Civil, tom. i. p. 48. Pothier, Procédure Civile, Partie I. ch. i.

p. 2. Valin, Sur l'Ord. de la Marine, tom. i. pp. 113, 253, 254. Pardessus, Droit Commercial, Pt. VI. tit. 7, ch. 1, § 1.



sistent with the European law of nations. The Roman law had recognised the principle, that all contracts the most usual among men arise from the law of nations, 'ex jure gentium'; in other words, these contracts are valid, whether made between foreigners, or between foreigners and citizens, or between citizens of the same State. This principle has been incorporated into the modern law of nations, which recognises the right of foreigners to contract within the territorial limits of another State. This right necessarily draws after it the authority of the local tribunals to enforce the contracts thus made, whether the suit is brought by foreigners or by citizens (*l*).

Proceedings  
against absent  
parties.

The practice which prevails in some countries, of proceeding against absent parties, who are not only foreigners, but have not acquired a domicile within the territory, by means of some formal public notice, like that of the *viis et modis* of the Roman civil law, without actual personal notice of the suit, cannot be reconciled with the principles of international justice (*m*). So far, indeed, as it merely affects the specific property of the absent debtor within the territory, attaching it for the benefit of a particular creditor, who is thus permitted to gain a preference by superior diligence, or for the general benefit of all the creditors who come in within a certain fixed period, and claim the benefit of a rateable distribution, such a practice may be tolerated; and in the administration of international bankrupt law it is frequently allowed to give a preference to the attaching creditor, against the law of what is termed the *locus concursus creditorum*, which is the place of the debtor's domicile.

Distinction  
between the  
rule of  
decision and  
rule of pro-  
ceeding, in  
cases of  
contract.

Where the tribunal has jurisdiction, the rule of decision is the law applicable to the case, whether it be the municipal or a foreign code; but the rule of proceeding is generally determined by the *lex fori* of the place where the suit is pending. But it is not always easy to distinguish the rule of decision from the rule of proceeding. It may, however, be stated in general, that whatever belongs to the obligation of the contract is regulated by the *lex domicilii*, or the *lex loci contractus*, and whatever belongs to the remedy for enforcing the contract is regulated by the *lex fori* (*n*).

(*l*) Fœlix, Droit International Privé, §§ 122, 123.

(*m*) Cf. *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155; but see *Sirdar Singh v. Rajah of Faridkote*, (1894) A. C. 670. The former of these cases is said by Professor Dicey to afford an example of legislative and judicial excess of authority. "The

English Courts, under an Act of the English Legislature, were authorised, and indeed bound, to exercise a jurisdiction which English judges did not believe that foreign Courts would admit to be within the proper authority of the British Sovereign." *Conflict of Laws*, p. 29, n.

(*n*) See p. 148, *ante*.

If the tribunal is called upon to apply to the case the law of the country where it sits, as between persons domiciled in that country, no difficulty can possibly arise. As the obligation of the contract and the remedy to enforce it are both derived from the municipal law, the rule of decision and the rule of proceeding must be sought in the same code. In other cases it is necessary to distinguish with accuracy between the obligation and the remedy.

The obligation of the contract, then, may be said to consist of the following parts:—

1. The personal capacity of the parties to contract.
2. The will of the parties expressed, as to the terms and conditions of the contract.
3. The external form of the contract.

The personal capacity of parties to contract depends upon those personal qualities which are annexed to their civil condition, by the municipal law of their own State, and which travel with them wherever they go, and attach to them in whatever foreign country they are temporarily resident. Such are the privileges and disabilities conferred by the *lex domicilii* in respect to majority and minority, marriage and divorce, sanity or lunacy, and which determine the capacity or incapacity of parties to contract, independently of the law of the place where the contract is made, or that of the place where it is sought to be enforced.

It is only those universal personal qualities, which the laws of all civilized nations concur in considering as essentially affecting the capacity to contract, which are exclusively regulated by the *lex domicilii*, and not those particular prohibitions or disabilities, which are arbitrary in their nature and founded upon local policy; such as the prohibition in some countries of noblemen and ecclesiastics from engaging in trade and forming commercial contracts. The qualities of a major or minor, of a married or single woman, &c., are universal personal qualities, which, with all the incidents belonging to them, are ascertained by the *lex domicilii*, but which are also everywhere recognised as forming essential ingredients in the capacity to contract (*o*).

How far bankruptcy ought to be considered as a privilege or Bankruptcy. disability of this nature, and thus be restricted in its operation to the territory of that State, under whose bankrupt code the proceedings take place, is, as already stated, a question of difficulty in respect to which no constant and uniform usage prevails among

(*o*) Pardessus, *Droit Commercial*, Pt. VI. tit. 7, ch. 2, § 1. *Cooper v. Cooke's Trusts* (1887), 56 L. J. Ch. 637; *Viditz v. O'Hagan*, (1900) 2 Ch. *Cooper* (1888), 13 App. Cas. 88; *Re* 87.

nations. Supposing the bankrupt code of any country to form a part of the obligation of every contract made in that country with its citizens, and that every such contract is subject to the implied condition, that the debtor may be discharged from his obligation in the manner prescribed by the bankrupt laws, it would seem, on principle, that a certificate of discharge ought to be effectual in the tribunals of any other State where the creditor may bring his suit. If, on the other hand, the bankrupt code merely forms a part of the remedy for a breach of the contract, it belongs to the *lex fori*, which cannot operate extra-territorially within the jurisdiction of any other State having the exclusive right of regulating the proceedings in its own courts of justice; still less can it have such an operation where it is a mere partial modification of the remedy, such as an exemption from arrest, and imprisonment of the debtor's person on a *cessio bonorum*. Such an exemption being strictly local in its nature, and to be administered, in all its details, by the tribunals of the State creating it, cannot form a law for those of any foreign State. But if the exemption from arrest and imprisonment, instead of being merely contingent upon the failure of the debtor to perform his obligation through insolvency, enters into and forms an essential ingredient in the original contract itself, by the law of the country where it is made, it cannot be enforced in any other State by the prohibited means. Thus by the law of France, and other countries where the 'contrainte par corps' is limited to commercial debts, an ordinary debt contracted in that country by its subjects cannot be enforced by means of personal arrest in any other State, although the *lex fori* may authorise imprisonment for every description of debts (p).

Remedy for wrongs committed in a foreign country.

There is no doubt of the general rule that when an action is brought in one country for acts which have taken place in another, the rights and merits of the case are to be decided by the law of the place where the acts occurred. There is, however, a limitation to the rule when the case is one, not of contract, but of tort. The civil liability arising out of a wrong derives its birth from the law of the place where the wrong was committed, and its character is determined by that law; but in order that a wrong committed abroad should give a remedy in England, it is essential that the wrong should be of such a character that it would give a cause of action if committed in England;(q). Thus a collision occurred

(p) *Mélan v. The Duke of Fitz-James* (1797), 1 B. & P. 131. See *Frith v. Wollaston* (1852), 21 L. J.

Ex. 108.

(q) *The Halley* (1867), L. R. 2 P. C. 193; *Phillips v. Eyre* (1870),



in the Scheldt between a British ship and a Norwegian barque, in which the latter was damaged by the fault of the British ship. By the law of Belgium, the British ship was compelled to take a pilot on board while navigating the Scheldt, but, though the pilotage was compulsory, the law of Belgium did not free the master from responsibility while the ship was in the pilot's charge. By the law of England, a master is not responsible for damage occasioned by the fault or incapacity of a qualified pilot, when the employment of such a pilot is compulsory by law (*r*). It being proved that the collision occurred through the fault of the pilot on board the British ship, the Privy Council refused to hold the owner liable in England, although he might be so in Belgium (*s*).

The obligation of the contract consists of the will of the parties, expressed as to its terms and conditions. Obligation of a contract.

The interpretation of these depends, of course, upon the *lex loci contractus*, as do also the nature and extent of those implied conditions which are annexed to the contract by the local law or usage (*t*). Thus, the rate of interest, unless fixed by the parties, is allowed by the law as damages for the detention of the debt, and the proceedings to recover these damages may strictly be considered as a part of the remedy. The rate of interest is, however, regulated by the law of the place where the contract is made, unless, indeed, it appears that the parties had in view the law of some other country. In that case, the lawful rate of interest of the place of payment, or to which the loan has reference, by security being taken upon property there situate, will be controlled by the *lex loci contractus* (*u*).

The external form of the contract constitutes an essential part of its obligation. Form of a contract.

This must be regulated by the law of the place of celebration or performance (*lex loci celebrationis* or *solutionis*) of the contract, which determines whether it must be in writing, or under seal, or executed with certain formalities before a notary, or other public officer, and how attested. A want of compliance with these requisites renders the contract void *ab initio*, and being void by the

L. R. 6 Q. B. 28; *The M. Mozhan* (1876), 1 P. D. 111; *Chartered Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q. B. D. 521, 536, 537.

(*r*) 17 & 18 Vict. c. 104, s. 388. See Boyd, *The Merchant Shipping Laws*, p. 345.

(*s*) *The Halley* (1867), L. R. 2

P. C. 193. See also *Smith v. Condry* (1843), 1 Howard, 28, where similar principles were applied in America.

(*t*) See p. 148, *ante*.

(*u*) Kent, *Comm. on American Law*, vol. ii. p. 459 (5th ed.). Félix, *Droit International Privé*, § 85. Foote, pp. 372, 408, 425.

law of the place, it cannot be carried into effect in any other State. But a mere fiscal regulation does not operate extra-territorially; and therefore the want of a stamp, required by the local law to be impressed on an instrument, cannot be objected where it is sought to be enforced in the tribunals of another country.

There is an essential difference between the form of the contract and the extrinsic evidence by which the contract is to be proved. Thus the *lex loci contractus* may require certain contracts to be in writing, and attested in a particular manner, and a want of compliance with these forms will render them entirely void. But if these forms are actually complied with, the extrinsic evidence by which the existence and terms of the contract are to be proved in a foreign tribunal, is regulated by the *lex fori* (*x*).

Conclusive-  
ness of foreign  
judgments in  
personal  
actions.

The most eminent public jurists concur in asserting the principle, that a final judgment, rendered in a personal action, in the courts of competent jurisdiction of one State, ought to have the conclusive effect of a *res adjudicata*, in every other State, wherever it is pleaded in bar of another action for the same cause (*y*).

But no sovereign is bound, unless by special compact, to execute within his dominions a judgment rendered by the tribunals of another State; and if execution be sought by suit upon the judgment or otherwise, the tribunal in which the suit is brought, or from which execution is sought, is, on principle, at liberty to examine into the merits of such judgment, and to give effect to it or not, as may be found just and equitable (*z*). The general comity, utility, and convenience of nations have, however, established a usage among most civilized States, by which the final judgments of foreign courts of competent jurisdiction are reciprocally carried into execution, under certain regulations and restrictions, which differ in different countries (*a*).

English law  
as to foreign  
judgments.

By the law of England, the judgment of a foreign tribunal of competent jurisdiction, is conclusive where the same matter comes incidentally in controversy between the same parties; and full effect is given to the *exceptio rei judicatee*, where it is pleaded in bar of a new suit for the same cause of action. A foreign judgment is *primâ facie* evidence, where the party claiming the benefit of it applies to the English Courts to enforce it, and it lies on the defendant to impeach the justice of it, or to show that it was irregularly obtained. If this is not shown, it is received as evi-

(*x*) Nelson, 257—261; Foote, pp. 351  
*seq.*

(*y*) Vattel, liv. ii. ch. vii. §§ 84, 85.  
Martens, Droit des Gens, §§ 93, 94,  
95. Klüber, Droit des Gens, § 59.

Das Deutsche Bundesrecht, § 366.

(*z*) Kent, Comm., vol. ii. p. 119  
(5th ed.).

(*a*) Fœlix, §§ 292—311.

dence of a debt, for which a new judgment is rendered in the English Court, and execution awarded. But if it appears by the record of the proceedings, on which the original judgment was founded, that it was unjustly or fraudulently obtained, without actual personal notice to the party affected by it; or if it is clearly and unequivocally shown, by extrinsic evidence, that the judgment has manifestly proceeded upon false premises or inadequate reasons, or upon a palpable mistake of local or foreign law; it will not be enforced by the English tribunals<sup>(b)</sup>.

A foreign judgment *in personam*, to be recognised in England, must be final and conclusive between the parties litigating the same issue in England, and must be for a debt or a definite sum of money. And the plaintiff in England cannot, when he relies on the foreign judgment as his cause of action, obtain a greater benefit here than the foreign judgment gave him abroad. In an action on a foreign judgment not impeached for fraud, the original cause of action is not reinvestigated here, if the judgment was pronounced by a competent tribunal having jurisdiction over the litigating parties; and a foreign judgment, subject as above, will be regarded in an English Court as final and conclusive, though it is subject to an appeal, and though an appeal against it is actually pending in the foreign country where it was given. For the Courts of this country do not sit to hear appeals from foreign tribunals, and if the judgment of a foreign Court is erroneous, the regular mode, provided by every system of jurisprudence, of procuring it to be examined and reversed, or re-heard, ought to be followed. But no judgment will be recognised in England which was obtained by the fraud of the party relying on it here; or if the foreign Court, although it affected to decide on the merits, was, in view of English law, without jurisdiction<sup>(c)</sup>.

The same jurisprudence prevails in the United States of America, in respect to judgments and decrees rendered by the tribunals of a State foreign to the Union. As between the different States of the Union itself, a judgment obtained in one State has the same credit and effect in all the other States, which it has

American  
law.

<sup>(b)</sup> *Frankland v. McGusty* (1830), 1 Knapp, P. O. 274; *Novelli v. Rossi* (1831), 2 Barn. & Adol. 757; *Becquet v. M'Carthy* (1831), 3 Barn. & Adol. 951.

<sup>(c)</sup> *Dicey, Conflict of Laws*, pp. 411 seq. *Re Henderson, Nouvion v. Freeman* (1887), 15 App. Cas. 1; *Hawksford v. Giffard* (1886), 12 App. Cas.

122; *Re Trufort* (1887), 36 Ch. D. 600; *Abouloff v. Oppenheimer* (1882), 10 Q. B. D. 295; *Voinet v. Barrett* (1885), 55 L. J. Q. B. 39; *Godard v. Gray* (1870), L. R. 6 Q. B. 139; *Schibsby v. Westenholtz* (1870), L. R. 6 Q. B. 155; *Nelson, Private International Law*, pp. 338 et seq.; *Footte*, pp. 510 seq., and cases there cited.



by the laws of that State where it was obtained; that is, it has the conclusive effect of a domestic judgment (*d*).

Law of  
France.

The law of France restrains the operation of foreign judgments within narrower limits. Judgments obtained in a foreign country against French subjects are not conclusive, either where the same matter comes again incidentally in controversy, or where a direct suit is brought to enforce the judgment in the French tribunals. And this want of comity is even carried so far, that, where a French subject commences a suit in a foreign tribunal, and judgment is rendered against him, the exception of *lis finita* is not admitted as a bar to a new action by the same party, in the tribunals of his own country. If the judgment in question has been obtained against a foreigner, subject to the jurisdiction of the tribunal where it was pronounced, it is conclusive in bar of a new action in the French tribunals, between the same parties. But the party who seeks to enforce it must bring a new suit upon it, in which the judgment is *primâ facie* evidence only; the defendant being permitted to contest the merits, and to show not only that it was irregularly obtained, but that it is unjust and illegal (*e*).

The execution of foreign judgments *in personam* is reciprocally allowed, by the law and usage of the European continent in general, except Spain, Portugal, Russia, Sweden, Norway, France, and the countries whose legislation is based on the French civil code (*f*).

Foreign  
divorces.

A decree of divorce obtained in a foreign country, by a fraudulent evasion of the laws of the State to which the parties belong, would seem, on principle, to be clearly void in the country of their domicile, where the marriage took place, though valid under the laws of the country where the divorce was obtained. Such are divorces obtained by parties going into another country for the sole purpose of obtaining a dissolution of the nuptial contract, for causes not allowed by the laws of their own country, or where those laws do not permit a divorce *à vinculo* for any cause whatever. This subject has been thrown into almost inextricable confusion, by the contrariety of decisions between the tribunals of England and Scotland; the Courts of the former refusing to recog-

(*d*) *Mills v. Duryee*, 7 Cranch, pp. 481—484; *Hampton v. M'Connel*, 3 Wheaton, 234. Story (Bigelow, ed. 8), p. 829, note (*a*).

(*e*) Code Civil, Arts. 2123, 2128. Code de Procédure Civil, Art. 546. Pardessus, Droit Commercial, Pt. VI.

tit. 7, ch. 2, § 2, No. 1488. Merlin, Répertoire, tom. vi. tit. *Jugement*. Questions de Droit, tom. iii. tit. *Jugement*. Toullier, Droit Civil Français, tom. x. Nos. 76—86.

(*f*) Félix, Droit International Privé, §§ 293—311.

nise divorces *à vinculo* pronounced by the Scottish tribunals, between English subjects who had not acquired a *bonâ fide* permanent domicile in Scotland; whilst the Scottish Courts persist in granting such divorces in cases where, by the law of England, Ireland, and the colonies connected with the United Kingdom, the authority of parliament alone is competent to dissolve the marriage, so as to enable either party, during the lifetime of the other, again to contract lawful wedlock (*g*).

In *Warrender v. Warrender* (1835), the House of Lords, sitting as a Court of Appeal in a case coming from Scotland, and considering itself bound to administer the law of Scotland, determined that the Scottish Courts had, by the law of that country, a rightful jurisdiction to decree a divorce between parties actually domiciled in Scotland, notwithstanding the marriage was contracted in England. But the Court did not decide what effect such a divorce would have, if brought directly in question in an English court of justice (*h*).

In the United States, the rule appears to be conclusively settled that the *lex loci* of the State in which the parties are *bonâ fide* domiciled, gives jurisdiction to the local courts to decree a divorce, for any cause recognised as sufficient by the local law, without regard to the law of that State where the marriage was originally contracted (*i*). This, of course, excludes such divorces as are obtained in fraudulent evasion of the laws of one State, by parties removing into another for the sole purpose of procuring a divorce (*k*).

A marriage is regarded in England as indissoluble by a foreign Court when it is an English domiciled marriage *ab initio* down to the time of the foreign decree. And where the domicile of the husband is English at the time of the sentence in the foreign Court, such sentence is ineffective in England. But the English Courts will recognise as valid the decision of a foreign tribunal dissolving a marriage celebrated in England between a man, domiciled at the date of the marriage and thenceforward till the date of the decree in the country where such tribunal exercises jurisdiction, and an Englishwoman, although the sentence is for a cause insufficient by the law of England. And a domicile of the husband acquired after marriage but before decree, and without

Validity of a foreign divorce in England.

(*g*) *Tovey v. Lindsay* (1813), 1 Dow, 117, 124; *Lolley's Case* (1812), 2 Clark & Fin. 567. See Fergusson's Reports of Decisions in the Consistorial Courts of Scotland, *passim*.

(*h*) *Warrender v. Warrender* (1835),

9 Blyth, 89; *S. C.*, 2 Clark & Fin. 488.

(*i*) *Dorsey v. Dorsey*, Chandler's Law Reporter, vol. i. p. 287.

(*k*) Kent, Comm., vol. ii. p. 107 (5th ed.). Story, p. 308, note (*a*).

ulterior motive, is probably enough to found the foreign jurisdiction so that the foreign sentence may be allowed here. When neither the domicile or place of celebration is or has been English, a sentence pronounced by a Court of the matrimonial domicile will be deemed of effect here, and a sentence of a Court of the place of celebration is sufficient if so regarded by the law of the domicile. A foreign sentence in a matrimonial cause, as any other foreign judgment, is vitiated by fraud or collusion (*l*).

Divorce  
should be  
decided in the  
country of  
domicile.

The only fair and satisfactory rule to adopt as regards jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes that should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An adherence to this principle will preclude the scandal which arises when a man and woman are held to be man and wife in one country, and strangers in another (*m*). Though there can be no doubt of the soundness of this principle, it cannot, unfortunately, be considered as absolutely established in English law (*n*); but after the decision of the Judicial Committee of the Privy Council in *Le Mesurier v. Le Mesurier* (*o*), it may be assumed that the House of Lords will, when the opportunity is afforded them, overrule the judgment of the Court of Appeal in *Niboyet v. Niboyet*. In the former case the Privy Council decided that the permanent domicile of the spouses within a territory is necessary to give to its Courts jurisdiction so to divorce *à vinculo*, that its decree to that effect shall, by the general law of nations, possess extra-territorial authority. Nor would it, even if firmly established, in every case prevent collision between the courts of different countries, because there would still, in each case, remain the fact of domicile to be established; and as all countries do not adopt the same rules of evidence, the evidence on this question

(*l*) *Harvey v. Farnie* (1880), 8 App. Cas. 43; *Turner v. Thompson* (1888), 13 P. D. 37; *Dolphin v. Robins* (1859), 7 H. L. C. 391; *Scott v. Att.-Gen.* (1886), 11 P. D. 128; *Briggs v. Briggs* (1880), 5 P. D. 163; *Lolley's Case* (1812), R. & Ry. 237. See also *Green v. Green*, (1893) P. 89; *The King v. Earl Russell*, (1901) A. C. 446. Cf. Foote, pp. 109 *seq.*, and the cases

there cited.

(*m*) *Wilson v. Wilson* (1872), L. R. 2 P. & D. 442.

(*n*) *Niboyet v. Niboyet* (1878), 4 P. D. 1.

(*o*) (1895) A. C. 517. In *Armytage v. Armytage*, (1898) P. 178, Barnes, J., treated *Niboyet v. Niboyet* as being no longer law.



might be very different in one country from what it would be in another (*p*).

Their lordships further held, in *Le Mesurier v. Le Mesurier*, that a so-called "matrimonial domicile," said to be created by a *bonâ fide* residence of the spouses within the territory, of a less degree of permanence than is required to fix their true domicile, cannot be recognised as creating such jurisdiction. This ruling may be considered as setting at rest the doubts expressed by Lord Colonsay in the House of Lords in 1868 as to whether a domicile *for all purposes* is necessary to give a foreign Court such jurisdiction as will ensure the recognition of the divorce in England (*q*). It was not necessary to decide the point, because in the case before the Court the domicile of the parties was English; the husband had committed adultery in England, and both parties had then gone to Scotland, and remained forty days there, simply to give the Scotch Court jurisdiction. The divorce was therefore an evasion of English law. "The result is," said Lord Westbury, "that a sentence of divorce under such circumstances may be binding in Scotland, although of no validity in the territory of England. . . . But this disgraceful anomaly can only be removed by the Legislature" (*r*). The present state of the law as evolved out of a long series of contests between the English and Scotch Courts is summed up by Professor Dicey as follows: "The Scotch Courts, as represented by the House of Lords, would appear to have surrendered the claim to dissolve the marriage of persons not domiciled in Scotland, or at least to look with great doubt on the doctrine that either the *locus delicti* or residence for forty days gives jurisdiction in matters of divorce (*s*). . . . As the English Courts have now conceded that an English marriage may be dissolved by the tribunals of any country where the parties are domiciled at the time of their divorce (*t*), it follows that a Scotch divorce will be held valid in England if the parties to the marriage are at the time of the divorce domiciled in Scotland, and unless they are so domiciled will in general not be held valid" (*u*).

Domicile necessary to give jurisdiction to divorce.

An interesting case regarding the effect to be attributed to the second marriage of a woman in Germany, who had been previously married in France, where divorce was not then permitted, occurred

Case of the Princess Bibesc.

(*p*) *Wilson v. Wilson* (1872), L. R. 2 P. & D. 442.

(*q*) *Shaw v. Gould* (1868), L. R. 3 H. L. 96. See also *Brodie v. Brodie* (1861), 2 Sw. & Tr. 259; *Shaw v. Att.-Gen.* (1870), L. R. 2 P. & D. 156; *Briggs v. Briggs* (1880), 5 P. D. 163; *Harvey v. Farnie* (1880), 5 P. D. 153, 157; 6 P. D. 35, 50, 51; 8 App.

Cas. 43, 56.

(*r*) *Shaw v. Gould* (1868), L. R. 3 H. L. at p. 88.

(*s*) *Pitt v. Pitt* (1864), 4 Macq. 627; *Jack v. Jack* (1862), 24 D. 467; *Ringer v. Churchill* (1840), 2 D. 302.

(*t*) *Bater v. Bater*, (1906) P. 209 (C. A.).

(*u*) *Conflict of Laws*, p. 800.

in 1875. The Princess de Bauffremont was married in France to a Frenchman, and in August, 1874, obtained a 'séparation de corps' from the French Courts. In May, 1875, she was naturalized at Saxe-Altenburg, and became a subject of the German Empire. She then domiciled herself near Dresden, and in October, 1875, married the Prince Bibesco, at Berlin, according to the laws of Germany. The opinion of Prof. Holtzendorff, of Munich, was asked as to the effect of this second marriage, and he fully considers the subject in his reply (*x*). By the law of Germany, naturalization will not be conferred unless the applicant is capable of contracting by the law of his own country (*y*). This refers to a general incapacity to contract, and the incapacity of a French subject to marry after a 'séparation de corps' is a special incapacity, and one not contemplated in the German law. Hence the naturalization of the Princess was valid in Germany. The French code (*z*) provides, without any limitation, that the quality of French subject is lost by naturalization abroad, and by the common law of Germany a 'séparation de corps' is looked upon as equivalent to a divorce (*a*). Thus Prof. Holtzendorff argued that the Princess, having rightfully ceased to be a French, and having become a German subject, also acquired the right of marrying again, and that the marriage was certainly valid in Germany. Whether the marriage would be recognised in France appears to be an open question, but there is some authority for supposing that it would (*b*).

*Scott v.  
Att.-Gen.*

And in a case where the husband and wife, both domiciled in Ireland, were married in that country, and there resided for about two years, and subsequently acquired a domicile at the Cape, and the wife was divorced from her husband by a sentence of the proper Court at the Cape, and later came to England with the intention of remaining here, and contracted a marriage here; it was held by the English Court that this second marriage was valid, although the law prevailing in the colony prohibited the re-marriage of a guilty party as long as the innocent party remained unmarried (as the facts were). For, it was said, the wife having become by the foreign divorce an unmarried person, she was free to acquire, and had acquired, a new domicile, by which her capacity to re-marry was to be regulated (*c*).

(*x*) See *Revue de Droit International*, 1876, p. 205.

(*y*) Law of 1st June, 1870.

(*z*) Code Civil, Art. 17.

(*a*) Schulte, *Handbuch des Katholischen Eherechts* (ed. 1855), p. 596.

(*b*) Merlino, *Questions de Droit*, Di-

voice, § 11, p. 350. Story, § 214.

(*c*) *Scott v. Att.-Gen.* (1886), 11 P. D. 128; and see *Warter v. Warter* (1890), 15 P. D. 152; Story, p. 117, note (*a*); *Moore v. Hegeman*, 92 N. Y. 521; *Thorp v. Thorp*, 90 N. Y. 602.

## CHAPTER III.

## NATIONAL CHARACTER AND DOMICILE.

QUESTIONS relating to national character and domicile are of such importance in private international law, and have so frequently arisen since Wheaton published the last additions to his text, that some account of the present state of the law on these points seems necessary. The question of domicile as it affects the property of merchants during war is considered in a subsequent part of this work (*a*). It has been distinguished from domicile *jure gentium* during peace (*b*).

Distinctions between national character, domicile, and allegiance.

It is necessary at the outset to distinguish clearly what is meant by the terms national character and domicile. The distinction was explained by Lord Westbury in the House of Lords as follows:—"The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions; one, by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political status; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status. The political status may depend on different laws in different countries; whereas the civil status is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil status (*c*). For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage succession, testacy or intestacy must depend" (*d*). The political status of the individual is called his national character, his civil status is referred to by the term domicile. Domicile and residence are two distinct

(*a*) See *post*, pp. 443 *seq.*

(*b*) Per Dr. Lushington in *Hodgson v. De Beauchesne* (1858), 12 Moo. P. C. 313. The two are very different; the distinction between them has been demonstrated, and they have been accurately and carefully contrasted by Professor Dicey, Conflict

of Laws (1908), Appendix, Note 7, pp. 740 *seq.*, on commercial domicile in time of war.

(*c*) It is the criterion in English and American law, and in that of many other countries, but not in all.

(*d*) *Udny v. Udny* (1869), L. R. 1 Sc. & Div. 457.



things. Residence is a matter of fact, although it is difficult to define what amounts to it (*e*), but domicile is an idea of law. It is a relation which the law creates between an individual and a particular country in which the individual is said to have his domicile (*f*). National character is also an idea of law, but it is quite distinct from domicile. A person may be invested with the national character of one country and be domiciled in another (*g*). Allegiance is a term synonymous with national character. By it is understood the obligations of fidelity and obedience, which an individual owes to the State whose national character he bears (*h*).

Definitions of domicile.

It is remarkable that no definition of domicile has as yet been universally accepted (*i*). It has been said to be "A residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time" (*k*). This explains what constitutes a domicile, perhaps better than it can otherwise be expressed, but is not strictly a definition. The actual fact of residence makes it probable the party is domiciled there, but on the other hand a person may be domiciled in a country he seldom visits. In its ordinary acceptance a person's domicile means the country where he lives and has his home (*l*), and if he has been married and has not been separated from his wife, the country of his domicile will probably be the one where his wife lives—that is, where his chief establishment for the purposes of habitation is. But the presumption thus created may be repelled by evidence that it was not the person's intention to remain there for an indefinite time (*m*). Two ingredients are essential to domicile. There must be the fact that an abode which can in some shape or other be considered a home exists in the country, and there must be the intention that this abode shall not cease to be the home within any definite period. The domicile of a wife during

(*e*) *Walcot v. Botfield* (1854), Kay, 534; *King v. Foxwell* (1876), 3 Ch. D. 520; *Briggs v. Briggs* (1880), L. R. 5 P. D. 163.

(*f*) *Bell v. Kennedy* (1868), L. R. 1 Sc. & Div. 307; *Abd-ul-Messih v. Farra* (1887), 13 App. Cas. 431, 439.

(*g*) Per Lord Chancellor Hatherley in *Udny v. Udny* (1869), L. R. 1 Sc. & Div. 452; *Re Grove* (1887), 40 Ch. D. 216. Cf. Foote, Priv. Int. Jurisp. (1914), pp. 21, 62.

(*h*) Foote, *ibid.*

(*i*) *Maltass v. Maltass* (1844), 1 Robertson, 74. Dicey, Conflict of Laws (1908), Appendix, Note 6, pp. 731—740, criticises the various definitions of domicile. The one he adopts in

his text (p. 82) runs as follows: "The domicile of any person is, in general, the place or country which is in fact his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home as a rule of law." Cf. Foote, p. 48.

(*k*) *Guyer v. Daniel*, 1 Binney, 349, note; *Mitchell v. U. S.*, 21 Wallace, 352.

(*l*) Story, Conflict of Laws, § 41; and see *Craignish v. Hewitt*, (1892) 3 Ch. 180.

(*m*) *Forbes v. Forbes* (1854), Kay, 364; *Aitchison v. Dixon* (1870), L. R. 10 Eq. 589; *D'Etchegoyen v. D'Etchegoyen* (1888), 13 P. D. 132.

coverture is that of her husband (*n*); and the fact that the husband and wife live apart by agreement, without being judicially separated, does not enable the wife to acquire a separate domicile. It is an open question whether, even after a judicial separation, a wife can acquire a domicile different from that of her husband (*o*).

It is a settled principle that no man shall be without a domicile, and to secure this result the law attributes to every individual as soon as he is born the domicile of his father, if the child be legitimate, and the domicile of the mother if the child be illegitimate or posthumous (*p*). This has been called the domicile of origin, and is involuntary. The mother of fatherless infants has a power of changing their domicile vested in her for their welfare (*q*). Other domiciles, including domicile by operation of law, as on marriage, are domiciles of choice. For as soon as an individual is *sui juris*, it is competent to him to elect and assume another domicile, the continuance of which depends upon his act and will. When another domicile is put on, the domicile of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicile of choice; but as the domicile of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed, to suppose that it is capable of being by the act of the party entirely obliterated and extinguished. It revives and exists whenever there is no other domicile, and it does not require to be regained or reconstituted *animo et facto*, in the manner which is necessary for the acquisition of a domicile of choice.

Domicile of origin and of choice.

Domicile 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

Domicile of choice.

(*n*) Story, § 46; *Firebrace v. Firebrace* (1878), 47 L. J. P. D. & M. 41; *Harvey v. Farnie* (1880), 8 App. Cas. 43, 50, 51.

(*o*) *Dolphin v. Robins* (1859), 7 H. of L. 390, per Lord Kingsdown at p. 420. *Le Sueur v. Le Sueur* (1876), 1 P. D. 139, is apparently in contradiction to this, but Sir R. Phillimore was there careful to say that the petitioner's "*bonâ fide* domicile, so far as the law allows it, is in this country." It is to be noted that in *Ogden v. Ogden*, (1908) P. 46, C. A. at p. 82, it was suggested that if the country of the husband's domicile refuses to recognise the validity of a marriage, and consequently declines to hear a divorce petition against him, a wife who has been left in the country of

her original domicile where the marriage was celebrated and its validity recognised may be deemed to have a domicile in her own country for the purpose of supporting a petition. Cf. *Stathatos v. Stathatos*, (1913) P. 46; *De Montaignu v. De Montaignu*, (1913) P. 154.

(*p*) As to an illegitimate child, see *Urquhart v. Butterfield* (1887), 37 Ch. D. 357 (C. A.); as to a posthumous child, see *Van Matre v. Sankey* (1893), 39 Amer. State Rep. 196. But if the paternity of the illegitimate child is determined, by acknowledgment or otherwise, it acquires the domicile of the father; see *Re Wright's Trusts* (1856), 2 K. & J. 595.

(*q*) *In re Beaumont*, (1893) 3 Ch. 490.



reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, not a definition of the term. There must be a residence freely chosen and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed, not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case, so soon as the change of purpose or *animus manendi* can be inferred, the fact of domicile is established.

The domicile of origin may be extinguished by act of law, as, for example, by sentence of death or exile for life, which puts an end to the *status civilis* of the criminal; but it cannot be destroyed by the will or act of the party.

Domicile of choice, as it is gained *animo et facto*, so it may be put an end to in the same manner. When put an end to the domicile of origin revives and continues until the individual acquires another domicile of choice. Suppose a natural born Englishman to settle in Holland and acquire a Dutch domicile. After a time he quits Holland and travels in France or Italy without settling anywhere. As soon as he quits Holland, his English domicile of origin revives, and continues till he acquires another domicile of choice (*r*).

What is a man's domicile is a question of fact; the consequences of being invested with it, when ascertained, are a question of law. The intention of a person to acquire a domicile of choice must be collected from various *indicia* incapable of precise definition (*s*). When a domicile has been acquired it is presumed to continue until it is shown to be renounced, and when a change is alleged, the burden of proof rests upon the party making the allegation (*t*). Mere length of residence in a foreign country will not of itself confer a new domicile, but it raises a presumption that it was the intention of the party to acquire such domicile (*u*). This presumption may be rebutted by evidence showing that there was not

(*r*) See judgment of Lord Westbury in *Udny v. Udny* (1869), L. R. 1 Sc. & Div. 457—9; *Lauderdale Peerage Case* (1885), 10 App. Cas. 692; *Bradford v. Young* (1884), 29 Ch. D. 617, 623; *Re Marrett* (1887), 36 Ch. D. 400; *Re Cooke's Trusts* (1887), 56 L. J. Ch. 637; *Urquhart v. Butterfield* (1887), 37 Ch. D. 357, 381.

(*s*) *Forbes v. Forbes* (1854), Kay,

353; and see *In re de Almida*, W. N. (1901) 142. Cf. Foote, pp. 55 *seq.*, 60 *seq.*

(*t*) *Desmare v. U. S.*, 3 Otto, 605; *Crookenden v. Fuller* (1859), 1 Sw. & Tr. 442; *Mitchell v. U. S.*, 21 Wallace, 350.

(*u*) *Brunel v. Brunel* (1871), L. R. 12 Eq. 300.



such an intention. It may also be presumed that a person is less likely to relinquish a domicile of origin than a domicile of choice; greater proof of intention is required in the former than in the latter case (*x*). This is so especially when the party is connected with the country of his domicile of origin by some specific ties, such as being a peer of the realm, or serving in some public capacity, such as the army or civil service (*y*).

To change his domicile of origin a person must choose a new domicile—the word “choose” indicates that the act is voluntary on his part—he must choose a new domicile by fixing his sole or principal residence in a new country with the intention of residing there for a period not limited as to time (*z*). To change a domicile of choice it need only be relinquished, without any new domicile of choice being necessarily chosen.

The intention required for a change of domicile, as distinguished from the action embodying it, is not necessarily an intention to change a civil status; that is, an intention to cease to be subject to the laws of one country, and to place oneself under the laws of another. It is sufficient to work the change, if there be an intention to settle in a new country as a permanent home. If this intention exists, and is sufficiently carried into effect by acts, certain legal consequences follow, whether such consequences were intended or not, and perhaps even though the person in question may have intended the exact contrary. To prove such intention (in the absence of any express declaration), the evidence must lead to the inference that if the question had been formally submitted to the person whose domicile was in question, he would have expressed his wish in favour of a change (*a*).

Intention to  
change  
domicile.

There is a strong presumption against an American or European acquiring a domicile in a country with political, social, and religious institutions in radical conflict with Western ideas. And as domicile is the relation which the law creates between an individual and a particular locality, residence in a foreign State as a privileged member of an extraterritorial community, although it

Residence in  
extraterritorial  
community.

(*x*) *Bell v. Kennedy* (1868), L. R. 1 Sc. & Div. 307; *Shaw v. Shaw*, 98 Massachusetts, 158; *Whicker v. Hume* (1858), 7 H. of L. Cas. 124; *Lauderdale Peerage* (1885), 10 App. Cas. 692; *Re Marrett* (1887), 36 Ch. D. 400; *Briggs v. Briggs* (1880), 5 P. D. 163; *Concha v. Concha*, (1892) 11 App. Cas. 541, 563; *Ex parte Cunningham* (1884), 13 Q. B. D. 418; *Ex parte Barne* (1886), 16 Q. B. D. 522. Wharton, Conflict of Laws, § 55.

(*y*) *Hamilton v. Dallas* (1875), 1 Ch. D. 257; *Hodgson v. De Beauchesne* (1858), 12 Moo. P. C. 285; *Sharpe v. Crispin* (1869), L. R. 1 P. & M. 611; *Niboyet v. Niboyet* (1878), 3 P. D. 52.

(*z*) *King v. Foxwell* (1876), 3 Ch. D. 520.

(*a*) *Douglas v. Douglas* (1871), L. R. 12 Eq. 644—5; *Haldane v. Eckford* (1869), L. R. 8 Eq. 631.

might be effectual to destroy a residential domicile acquired elsewhere, is ineffectual by English law to create a new domicile of choice, even though such residence be of a person enjoying, or among a community enjoying, the *de facto* protection of the Crown (b).

According to the French code the domicile of every Frenchman "est le lieu où il a son principal établissement" (c).

Acquisition of domicile and national character.

Domicile depends almost entirely upon the will of the individual. He is invested with a domicile of origin at his birth, and this is involuntary, but he may by his own act change this and cause it to be inoperative while the new domicile subsists, by locating himself in any country he pleases with the intention of settling there. National character, on the other hand, depends upon the will of the State. To divest himself of the national character he acquired at the time of his birth, an individual must in many cases obtain the consent of his own Government, and to acquire a new national character the consent of the country of his adoption is always necessary (d).

Incidents of national character.

National character confers benefits, and imposes duties on the individual. It entitles him to the protection of his country wherever he may be, but it requires him to fulfil the duties of supporting the State, or defending it against its enemies. The extent to which States will protect their subjects, or claim their allegiance when abroad, depends entirely upon the discretion and municipal laws of each. A Government can always refuse to protect one of its subjects, if it considers that his conduct has shown an intention of renouncing all ties and fulfilling no duties towards his country. It may, also, in case he comes within its jurisdiction, force him to fulfil any obligations incurred before he quitted it. If he has acquired another national character, without his native State renouncing its authority over him, the claims of each State to him can only be determined by treaty, if any exist, or by diplomatic action between the Governments concerned (e).

Permanent residence in foreign countries.

The fact of establishing a permanent residence in a foreign country, without being naturalized in it, places a person in a different position towards his native country from that he occupies

(b) *Re Tootal's Trusts* (1883), 23 Ch. D. 532; *Abd-ul-Messih v. Farra* (1887), 13 App. Cas. 431; *Abdallah v. Rickards* (1888), 4 T. L. R. 622.

(c) Code Civil, Art. 102.

(d) Westlake, *Priv. Int. Law* (1912), pp. 377 *seq.* Dacey (1908), pp. 166 *seq.* *Inglis v. Sailors' Snug Harbour* (1830), 3 Peters, 125.

(e) This subject is fully considered in the Report of the Naturalization Commission, 1869, and Sir A. Cockburn on Nationality. The Report is, to a great extent, reprinted in the U. S. Diplomatic Correspondence, 1873. Appendix, Wharton, Digest, §§ 181, 182.



while only quitting it as a traveller. He does not thereby lose the right to its protection, but it renders the invocation of it less reasonable. He cannot claim to be exempt from taxes and other burdens not imposed on a simple stranger, and he has no ground of complaint if its municipal laws invest him with both the benefits and disabilities of a native (*f*). If the country is invaded, and his property is injured or destroyed by some act of war, he has no claim to any special protection from his native country so long as his position is no worse than that of the other inhabitants. Numerous applications were made to England to protect the property of British subjects resident in France from the requisitions of the Franco-German war of 1870-71, but Lord Granville replied, that such British subjects must bear the same burdens as the other inhabitants (*g*).

Down to the year 1870, England invariably denied the right of her subjects to expatriate themselves; the maxim was 'nemo potest exuere patriam.' She placed no restrictions whatever on emigration, but maintained that her subjects carried their national character with them wherever they went, and were always liable to be treated as subjects on their return (*h*). This claim has now been abandoned. It is expressly provided by Act of Parliament, that "Any British subject who has at any time before, or may at any time after the passing of this Act, when in any foreign State and not under any disability, voluntarily become naturalized in such State, shall from and after the time of his so having become naturalized in that foreign State, be deemed to have ceased to be a British subject and be regarded as an alien." It is also provided that if naturalized abroad before the passing of the Act, he yet wishes to remain a British subject, he shall make a declaration to that effect, and take the oath of allegiance, and he will then be deemed to have been continually a British subject, except in the State where he was naturalized, as long as he remains a subject of it (*i*). Natural born British subjects include not only persons born in British dominions, but also the children and grand-children of British subjects, born out of the ligeance of his Majesty, unless the father was at the time of the child's birth outlawed or attainted for treason. Such persons are, therefore, entitled to claim British

Expatriation by the law of England.

Who are natural born British subjects.

(*f*) Phillimore, vol. ii. p. 6.  
 (*g*) Annual Register, 1871; Pub. Docts. p. 259.  
 (*h*) As to the impressment of seamen, see *ante*, p. 174.  
 (*i*) The Naturalization Act, 1870,

33 & 34 Vict. c. 14, s. 6. This Act must now be read subject to the British Nationality and Status of Aliens Act, 1914 (which came into force Jan. 1, 1915).



protection unless they have been naturalized in some other country, or unless they have ceased to be British subjects by reason of that part of his Majesty's once dominions in which they continue resident ceasing to belong to the Crown of England by division of succession, as Hanover in 1837, or by reason of the operation of any treaty concluded between his Majesty and some foreign State, or through the operation of any cession of any part of his Majesty's dominions and the provisions made in that behalf (*k*). But if they were born abroad and have thereby become the subjects of some other State, it seems that England will not protect them against that State (*l*).

Law of the  
United  
States as to  
expatriation.

The question of expatriation is one of vital importance in the United States. It was estimated in 1868 that upwards of six million persons had emigrated to that country since 1790, and that they and their descendants numbered more than twenty millions (*m*). The position of the Government was, therefore, most anomalous if that number of its subjects were to owe allegiance to foreign States, and it is remarkable that under such circumstances the law should have so long continued doubtful. The Executive Government had always claimed an unlimited right of expatriation for the subjects of all other countries, but when the question presented itself in the Supreme Court, not one of the judges affirmed, while several denied, the right for its own citizens (*n*). To remedy this an Act of Congress was passed in 1868, which provides that "Any declaration, instruction, order, or decision of any officer of the United States, which denies, restricts, impairs, or questions the right of expatriation is declared inconsistent with the fundamental principles of the Republic" (*o*). This Act is, however, only declaratory, and no provision is made in it respecting what is to be considered an act of expatriation. It furnishes no rule for the Executive to determine whether a person is still an American citizen or not, although it subsequently declares that "All naturalized citizens of the United States, while in foreign countries, are entitled to, and shall receive from, the

(*k*) 7 Anne, c. 5, s. 3; 4 Geo. II. c. 21, s. 1; 13 Geo. III. c. 21, s. 1. *Isaacson v. Durant* (1886), 17 Q. B. D. 54; *De Geer v. Stone* (1882), 22 Ch. D. 243; *Re Willoughby* (1885), 30 Ch. D. 324. Cf. Foote, pp. 9 *seq.*

(*l*) Lord Russell to Sir J. Crampton, 9th July, 1862. Naturalization Comm. Rep. p. 74.

(*m*) Report of U. S. Committee on Foreign Affairs, 1868.

(*n*) Opinions of Attorneys-General, vol. viii. p. 139. Kent, Comm. vol. ii. p. 49. *Inglis v. Sailors' Smug Harbour* (1830), 3 Peters, 125. Cf. Moore, Digest, vol. iii. § 532; and see *ibid.* § 431, for the earlier American authorities.

(*o*) Act of July, 1868, c. 249, s. 1. U. S. Revised Statutes, tit. xxv. Citizenship, sec. 1999.

Government the same protection of persons and property which is accorded to native-born citizens" (p).

Two laws exist for determining who is a citizen. The Act of Congress of the 10th of February, 1855, provides that "persons heretofore born, and hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were, or shall be at the time of their birth, citizens of the United States, shall be deemed and considered, and are hereby declared to be citizens of the United States: Provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States" (q). The Fourteenth Amendment to the Constitution declares "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States" (r).

Who are citizens of the United States.

The law thus states distinctly who are citizens, but the right of expatriation being admitted, it becomes a matter of difficulty to determine when individuals cease to be citizens, or at all events when they cease to be entitled to the protection of the United States.

United States' citizens abroad.

"The American citizen," said Chief Justice Marshall, "who goes into a foreign country, although he owes local and temporary allegiance to that country, yet, if he performs no other act changing his position, is entitled to the protection of our Government; and if without the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the American Government in his favour would be considered a justifiable interposition. But his situation is completely changed, where, by his own act, he has made himself the subject of a foreign Power. Although this act may not be sufficient to rescue him from punishment for any crime committed against the United States, a point not intended to be decided, yet it certainly places him out of the protection of the United States while within the territory of the sovereign to whom he has sworn allegiance" (s).

In 1873, Mr. Fish, the Secretary of State, issued instructions to the American Minister in France, in which, after quoting the above dictum of Chief Justice Marshall, he thus explains the

(p) *Ibid.* s. 2; sec. 2000. As to naturalization in the United States, Congress has passed several Acts, beginning with that of 1790. The present law was laid down in 1906; Statutes at Large, vol. xxxiv. p. 596. Cf. F. Van Dyne, *Treatise on the Law of Naturalization of the United States*

(Washington, 1907). See *infra*, p. 252.

(q) U. S. Statutes at Large, vol. x. p. 604.

(r) Ratified, 20th June, 1868. U. S. Statutes at Large, vol. xv. p. 706.

(s) (*The Charming Betsey*) *Murray v. The Charming Betsey* (1804), 2 Cranch, 119.

principles upon which the American Government now acts in protecting its subjects abroad. "If on the one hand the Government assumes the duty of protecting his rights and privileges, on the other hand the citizen is supposed to be ever ready to place his fortune and even his life at its service, should the public necessities demand such a sacrifice. If, instead of doing this, he permanently withdraws his person from the national jurisdiction; if he places his property where it cannot be made to contribute to the national necessities; if his children are born and reared upon a foreign soil, with no purpose of returning to submit to the jurisdiction of the United States, then, in accordance with the principles laid down by Chief Justice Marshall, and recognised in the 14th Amendment, and in the Act of 1868, he has so far expatriated himself as to relieve this Government from the obligation of interference for his protection.

"Each case as it arises must be decided on its own merits. In each the main fact to be determined will be this,—has there been such a practical expatriation as removes the individual from the jurisdiction of the United States?

"If there has not been, the applicant will be entitled to protection" (*t*).

What amounts to expatriation of an American citizen.

Although the American Government may refuse to protect any individual citizen who is abroad without an apparent intention of returning, it does not follow that such a person is necessarily expatriated. If he is naturalized abroad this will amount to an act of expatriation, and the same effect may be attributed to the acceptance of public or military employment in a foreign State without naturalization. Naturalization is without doubt the highest, but not the only evidence of expatriation (*u*). But the mere fact of residence abroad without an intention of returning does not of itself amount to an act of expatriation (*x*).

Not until 1907 did the United States Government definitely lay down by an Act the conditions under which an American citizen shall be held to have expatriated himself. Thus the law of 1907 says: "(1) That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign State in conformity with its laws, or when he has taken an oath of allegiance to any foreign State. (2) When any naturalized citizen shall have resided for two years in the foreign State

(*t*) Mr. Fish to Mr. Washburne, 28th June, 1873. U. S. Dipl. Cor. 1873, p. 259. See also *ibid.*, 1875, p. 489 and p. 563.

vol. xiv. p. 296.

(*u*) Opinions of Att.-Gen. (U. S.),

(*x*) *Ibid.* vol. ix. p. 359. But see next paragraph as to the residence abroad of naturalized citizens of the United States.



from which he came, or for five years in any other foreign State, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during the said years. *Provided*, however, that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of the State may prescribe; and *provided*, also, that no American citizen shall be allowed to expatriate himself when his country is at war." The Act thus prescribes four means of effecting expatriation, viz., by naturalization in a foreign State, by taking the oath of allegiance to a foreign State, by residence of a naturalized citizen of the United States in a foreign country, by the marriage of an American woman to a foreigner. In addition to these four modes, a fifth may be mentioned, viz., desertion from the army or navy (*y*).

At one time few States allowed their respective citizens to expatriate themselves; now nearly all countries allow them to do so, but the permission is discretionary and does not proceed from any obligatory rule of international law. The Argentine Republic appears to be a conspicuous exception, in that it does not allow its citizens to put off their nationality. In the case of Russia and Turkey, before expatriation can be duly effected the permission of the authorities must be obtained.

Expatriation  
in other  
States.

A Frenchman may, by the law of France, divest himself of his nationality in several ways, amongst which are the following:—by naturalization abroad; by accepting a public office under a foreign Government without permission of his own Government; by accepting military service under a foreign Government without the authorization of his own Government, but here he remains subject to penalties to which he may be liable by French law. (Emigration with a view to evading military service will also subject the emigrant to penalties if he returns to France within a certain period.)

German nationality may be lost:—by express deprivation for not performing military service; by residing abroad and failing to return when notified in time of war; by ten years' uninterrupted residence abroad without registering at a German consulate; by entering the service of a foreign State and not renouncing it on demand of the home Government.

In Austria citizens who emigrate with permission are deemed to be foreigners; those who do so without leave lose their Austrian

(*y*) Cf. Van Dyne, *Treat. on the Law of Naturalization*, chap. 5; Moore, *Digest*, vol. iii. §§ 466 *seq.*

citizenship, but their rights as naturalized aliens appear to be disregarded.

A Hungarian loses his nationality by release from his allegiance, or by unauthorized continuous absence for ten years.

Italian citizenship is lost by renouncing it and emigrating, by naturalization in a foreign country without permission, and by entering foreign military service.

Spanish nationality is lost by naturalization with leave of the Spanish Government; naturalization without leave will not necessarily relieve a Spaniard of obligations to Spain. (In the majority of countries naturalization abroad liberates the emigrant from obligations towards his mother country (z).)

American  
certificates of  
naturalization.

Certificates of naturalization are issued in America when the requirements for becoming a citizen have been complied with. No provision was made, however, for a uniform system of registration of such certificates, and as there are about 3,000 Federal and State courts that had power to grant them, great difficulties sometimes arose in proving naturalization, which is, in the United States, a judicial act. But when a certificate, valid on the face of it, and founded on the decree of a competent court, was produced, it could not be questioned except through judicial proceedings instituted for the purpose (a).

By the Act of 1906 it was provided as follows:—(1) An alien desiring to be naturalized in the United States “shall declare on oath before the clerk of any court authorized by this Act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is his *bonâ fide* intention to become a citizen of the United States, and to renounce for ever all allegiance and fidelity to any foreign prince, potentate, State, or sovereignty, and particularly, by name, to the prince, potentate, State, or sovereignty, of which the alien may at the time be citizen or subject.” (2) After the lapse of two years, but not more than seven years, from the date of this declaration, he must file a petition attested by the affidavits of at least two credible witnesses, being citizens of the United States, stating that “he is not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government, a

(z) Cf. Hall, *Foreign Jurisdiction*,  
§ 23; Moore, *Digest*, vol. iii. §§ 441  
*seq.*; Hall, *Int. Law* (1909), pp. 227

*seq.*

(a) See case of the *Kastellans*.  
U. S. Dipl. Cor. 1875, p. 577.

polygamist or believer in the practice of polygamy, . . . and that it is his intention to reside permanently in the United States. . . ." (3) Further, he must "declare in open court that he will support the Constitution of the United States"; prove that "he has resided continuously within the United States five years at least, and within the State or territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States . . ."; and, finally, that he renounces any hereditary title or order of nobility which he may have held in the country of his origin. Another section lays down that if a naturalized alien returns to his native country or takes up permanent residence in a foreign country within five years after his certificate of citizenship was issued, it will be deemed *prima facie* evidence that he did not originally intend to become a permanent citizen of the United States, and so, in the absence of evidence to the contrary, will operate to cancel his certificate.

Only "white persons" and "persons of African descent" are capable of naturalization in the United States; Chinese, Japanese, Burmese, Hawaiians, and American Indians are excluded (*b*).

Alien women, married or unmarried, may be naturalized on the same conditions as men. The naturalization of the husband confers citizenship also on the wife, if she is a "white person" or "of African descent"; the naturalization of the father extends the same privileges to his minor children "dwelling in the United States." Before 1907 the status of an American woman married to an alien was not clearly determined. Now, by sect. 3 of the Act of 1907, "any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or if residing in the United States at the termination of the marital relation, by continuing to reside therein." As to an alien woman becoming naturalized by marriage, sect. 4 says that "any foreign woman who acquires American citizenship, by marriage to an American, shall be assumed to retain the same after the termination of the marital relation if she continue to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, or if she resides abroad she may

(*b*) Cf. Moore, Digest, vol. iii. § 383.



retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation."

Naturalization Treaty between England and America.

Such is the present state of the law in England and America (*c*). The probability of future disputes between the two countries on the subject of allegiance was reduced to a minimum, by a convention concluded between them on the 13th May, 1870, by which it was agreed that citizens of either country naturalized as citizens or subjects of the other, were to be treated in all respects as citizens or subjects of such country. This naturalization might, however, be renounced, and the former nationality of the individual resumed on compliance with certain formalities (*d*). Treaties more or less similar exist between the United States and most other civilized countries (*e*).

Former discussion between England and America as to the allegiance of their subjects.

The claims of both England and America, before the laws of each assumed their present shape, either to protect their subjects or to require their services when abroad, have caused endless discussions. In 1848 and 1866, Irish agitators resorted to the United States for the purpose of organizing plots against the British Government. The Habeas Corpus Act was suspended on both occasions, and several persons were arrested in Ireland on suspicion of having been concerned in treasonable acts either in the United States or in Ireland. Of the right of England to punish her subjects for treason, wherever committed, there could be no doubt; nor could the right to punish native-born Americans for acts against the Government committed in the British Isles be disputed (*f*). The cases which presented any difficulty were those of native-born British subjects who had been naturalized in America, and had only conspired there without committing overt acts in Great Britain. At that time the doctrine of perpetual allegiance was strongly insisted on in England. The maxim 'nemo potest exuere patriam' was considered a fundamental one in English law. The United States maintained that their naturalized citizens were to all intents and purposes as much entitled to

(*c*) In 1873 the President addressed a series of questions on this subject to the heads of the various American State departments. The past and the then existing American law is fully discussed in the answers. See U. S. Dipl. Cor. 1873, pp. 1150 *et seq.* See further, Wharton, Digest, §§ 171—200. The present law was enacted in 1906; U. S. Statutes at Large, vol. xxxiv. pp. 595 *seq.*

(*d*) The Naturalization Act, 1872, Schedule. Also U. S. Statutes at Large, vol. xvi. p. 775.

(*e*) See Analysis of U. S. Naturalization Treaties. U. S. Dipl. Cor. 1873, p. 1274. Wharton, Digest, § 171, pp. 309, 310.

(*f*) Mr. Seward to Mr. Adams, 10th March, 1867. U. S. Dipl. Cor. 1867, p. 74.

protection abroad as native-born Americans (*g*), and that such persons could not, therefore, be arbitrarily imprisoned under a suspension of the Habeas Corpus Act, but were entitled to a trial. To this Lord Palmerston replied, that native-born British subjects who were naturalized abroad and returned to the United Kingdom, were as amenable to British law as any other subjects of her Majesty (*h*). In the cases of Warren and Costello, tried in Ireland, in 1867, the judges refused a jury *de medietate linguæ*, on the ground that, although the prisoners had been naturalized in America, they had been native-born British subjects, and, being once under the allegiance of the British sovereign, they remained so for ever (*i*). Most of the persons arrested who could prove their naturalization in America were, however, liberated at the request of the American Government, unless treasonable acts were proved to have been committed by them in Ireland (*k*).

During the American Civil War the protection of England was frequently demanded against conscription in the United States army. Lord Lyons was instructed 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 (*l*). But her Majesty's Government would not consent to British subjects being compelled to serve in the armies of either party, where, besides the ordinary incidents of battle, they would be exposed to be treated as traitors or rebels in a quarrel in which, as aliens, they had no concern; and on their return to England would incur the penalties imposed on British subjects for having taken part in the war (*m*). All who could prove their British nationality were accordingly exempted from military service (*n*). But if a British subject had become naturalized in America, England refused to protect him so long as he remained there (*o*). Individuals who had declared their intention of becoming naturalized, but had not completed the necessary formalities, were also treated as aliens, and exempted (*p*); but her Majesty's Government declined to interfere in their behalf if they had voted at elections, or in any other

British subjects in America during the Civil War.

(*g*) Mr. Buchanan to Mr. Bancroft, 28th Oct. 1848. Hertslet, State Papers, vol. xlvi. p. 1236.

(*h*) 16th August, 1849.

(*i*) Report of Naturalization Commission, 1868, p. 49 and p. 90.

(*k*) *Ibid.* pp. 48 *et seq.*

(*l*) To Lord Lyons, No. 76, April 4th, 1861.

(*m*) To Lord Lyons, No. 349, 7th Oct. 1861. Parl. Papers, N. America (No. 13), 1864, p. 34.

(*n*) Lord Lyons, No. 379, 29th July, 1861.

(*o*) To Lord Lyons, No. 259, 7th June, 1862.

(*p*) Mr. Seward to Mr. Stuart, Aug. 20th, 1862.

way exercised any of the exclusive privileges of a citizen (*q*). In 1863 an Act of Congress was passed, specially including "intended" citizens in a further enrolment of the militia (*r*); and a proclamation of the President allowed sixty-five days to such persons to leave the country, or become liable to be enrolled by remaining. To this Great Britain acquiesced, the period allowed for departure being deemed sufficient (*s*). It was regarded as an established principle that a Government might, by an *ex post facto* law, include in its conscription any persons permanently resident in its territory, provided it allowed them reasonable time and facilities for departure on the promulgation of such a law (*t*).

Prussian laws.

The Prussian military laws, which have now been introduced throughout the German empire (*u*), declare that every German subject is liable to military service, and cannot have that service performed by deputy (*x*). The right to emigrate is, however, not restricted, except as regards the performance of military service (*y*). Permission to emigrate may be obtained, but this permission, when granted, destroys the quality of Prussian or German subject (*z*). It is not to be granted to males between the ages of seventeen and twenty-five, without a certificate from the military commission of their district, or to actual soldiers or officers before their discharge, or to persons convoked for military service (*a*). If anyone does emigrate without permission, and to avoid performing his military service, he becomes liable to a fine or imprisonment, nor does the infliction of the penalty relieve him from performing the military duties (*b*).

Numerous cases have occurred of Prussians evading these duties by going abroad, and then returning to Prussia and claiming to be under the protection of some foreign State. Johann Knocke, a native-born Prussian, was naturalized in America, and on returning to Prussia claimed exemption from military service. Mr. Wheaton, then American Minister at Berlin, told him that as long as he was in any other country but Prussia he would be protected, "but having returned to the country of your birth, your

(*q*) Consular Circular from Mr. Stuart, No. 99, 25th July, 1862.

(*r*) U. S. Statutes at Large, vol. xii. p. 731.

(*s*) To Lord Lyons, No. 485, 31st Aug. 1863.

(*t*) Parl. Papers, 1863, N. America (No. 13), p. 34. To Lord Lyons, No. 293, 27th Nov. 1862. As regards this matter of military service there was, apparently, no difference between the views of the United States and

those entertained by her Majesty's Government. Wharton, Digest, § 202.

(*u*) Constitution of the Empire, Art. 61. Hertslet, Map of Europe, vol. iii. p. 1947.

(*x*) Art. 57.

(*y*) Prussian Constitution, 1850, tit. i. Art. i.

(*z*) Law of 31st Dec. 1842, § 15.

(*a*) *Ibid.*, § 17.

(*b*) Penal Code, April 14th, 1851.



native domicile and national character revert (so long as you remain in Prussian dominions), and you are bound to obey the laws as if you had never emigrated" (c). This rule was observed in similar cases until 1859, when the United States endeavoured to protect Hofer from the conscription. Mr. Cass asserted that "the moment a foreigner becomes naturalized, his allegiance to his native country is severed for ever" (d). This pretension, however, was not persisted in, nor did it meet with the approval of all American jurists (e). And the rule now established in America is that, if a subject of a foreign State has left military duty accrued due and unperformed, he may lawfully be held to it if he return after naturalization, but that he is not liable for subsequent duty; for duty, that is, which was not then owing by him when he left the foreign country (f). During the civil war, it being found that many persons quitted the United States to escape the conscription there, and then applied to that Government to save them from serving in the Prussian army, Mr. Judd, American Minister in Prussia, was instructed not to interfere on behalf of such "worthless citizens" (g). On the 22nd February, 1868, a treaty was signed between the United States and the North German Confederation, containing terms similar to that between the United States and England, except that residence for five years in the country adopted is required in order to entitle the individual to its protection (h). Other treaties have been at various times concluded with separate German sovereignties. Owing to the events of 1870—71, the existing treaties were, apart from other defects, not co-extensive with the limits of the German Empire, and their revision, on the basis of extending the North German treaty, with some explanation, to the whole empire, was desired by the United States Government. But the response at Berlin was not, it would appear, altogether in accordance with American feeling (i).

England has acted upon similar principles respecting Prussians who have claimed exemption on the ground of being British subjects. In 1862, Mr. Crossthwaite, her Majesty's Consul at Cologne, who had naturalized himself in Prussia, was informed by

British  
subjects in  
Prussia.

(c) U. S. Senate Documents, 1859—60, vol. ii. p. 6. See other cases, *ibid.* pp. 9—57, p. 1364; and Naturalization Comm. Rep. p. 53.

(d) *Ibid.* p. 133.

(e) Halleck, *Int. Law* (1908), vol. i. pp. 440 *seq.*

(f) Wharton, *Digest*, §§ 181, 182.

(g) U. S. Dipl. Cor. 1863, Pt. II. p. 1020.

(h) U. S. Statutes at Large, vol. xv. p. 615; and see Nat. Comm. Rep. p. 149.

(i) Wharton, *Digest*, §§ 178, 179.

her Majesty's Government that his sons were liable to military service while they remained in Prussia. (*k*).

Conditions of  
naturaliza-  
tion in  
Germany.

A foreigner is not permitted to naturalize himself in Germany (where the privilege is granted only by the high administrative authorities) unless (1) by the law of his former country he is permitted to change his nationality; (2) by the law of his own country he is capable of contracting, or if incapable, has obtained the consent of his parent or guardian; (3) unless his conduct has been irreproachable; (4) unless he will be received and find an abode at the place where he proposes to settle; (5) and unless he will be able to live so as to support himself and family. The privileges resulting from naturalization of the husband extend to his wife and to children under the parental power. (*l*).

Naturaliza-  
tion in  
France.

In order to be naturalized in France an alien must, as a rule, be of full age and get permission to become domiciled; after three years' domicile he may obtain a certificate of naturalization. Other methods of acquiring French citizenship are (1) by ten years' continuous residence; or (2) by marriage with a Frenchwoman and one year's authorized domicile; or (3) by rendering important service to the State and one year's authorized domicile. The effects of naturalization apply also to infant children, who may, however, within one year after attaining their majority, renounce French nationality (*m*).

The rules of naturalization such as obtain in Great Britain, the United States, Germany, France, and other countries, are not universally adopted with the same particularity and the same sharp distinctions. In some States, for example, the naturalization laws impose the local nationality on those who become domiciled therein or acquire landed property there, regardless of any expressed intention on their part to renounce their former allegiance (*n*).

Imperfect  
naturaliza-  
tion and  
domicile.  
Cases of  
Martin Koszta  
and Simon  
Tousig.

The cases of Martin Koszta and Simon Tousig were instances of Austrian subjects leaving their country, and claiming the protection of the United States, after having only declared their intention of being naturalized in America. Koszta was a Hungarian refugee of 1848-9. He went to Turkey and was imprisoned there, but released on condition of leaving the country. He then went to America and declared his intention of being

(*k*) Naturalization Comm. Rep. p. 73.

(*l*) Nationality Law of 1st June, 1870. See *Revue de Droit Int.* 1876, p. 206.

(*m*) Code Civil, I. i. 8, 12.

(*n*) As to the methods and effects of naturalization in foreign countries, cf. *British Parliamentary Papers, Nationality and Naturalization, Miscell.*, 1893, No. 3; 1894, No. 1; 1895, No. 1.

naturalized. In 1853 he went to Smyrna, and obtained from the United States Consul a travelling pass, stating he was entitled to American protection. While there, he was seized by some persons in the pay of Austria, who took him out in a boat and threw him into the sea, whence he was picked up by the *Hussar*, an Austrian ship of war. The American Consul demanded his release, but this being refused, an American ship of war, the *St. Louis*, was sent to take him by force if his detention was still insisted on. The matter was compromised by Koszta being shipped off to the United States, while Austria reserved the right to proceed against him if he returned to Turkey. Mr. Marcy, the Secretary of State, in his despatch to the Austrian Government, justly affirmed that whether Koszta was entitled to American protection or not, Austria had no right to seize him upon Turkish soil, and in spite of the protests of the Turkish Government (*o*). Simon Tousig on returning to Austria was arrested for offences committed before he had left that country. Mr. Marcy declined to interfere for him, on the ground that "having once been subject to the laws of Austria, and while under her jurisdiction violated those laws, his withdrawal from that jurisdiction and acquiring a different national character would not exempt him from their operation whenever he again chose to place himself under them" (*p*). Another case occurred in 1873. François A. Heinrich was born in New York of Austrian parents, who were not naturalized in the United States, and three or four years after his birth he was taken to Austria. On becoming of age he claimed to be exempt from serving in the Austrian army, but the United States declined to interfere on his behalf, as he was held to have expatriated himself (*q*).

Case of  
Tousig.

Case of  
Heinrich.

The law of France requires every Frenchman to perform military service in person (*r*), and imposes a penalty on anyone who emigrates without having served his time in the army. The requirements of universal service have been the guiding principle in modifications of the law which now enforces French citizenship on those born within the territory of the Republic with a greater rigour than is to be found in the corresponding laws of any other State. By comparatively recent legislation, every individual who

Military  
service in  
France.

Laws of 28th  
June, 1889,

(*o*) State Papers, vol. xlv. pp. 925 p. 929. Cf. Moore, Digest, vol. iii. —1042. Wheaton (Dana), p. 146. p. 838.  
Westlake, § 54. Cf. Moore, Digest, (*q*) U. S. Dipl. Cor. 1873, p. 78.  
vol. iii. §§ 490, 491; Wharton, Digest, (*r*) Law of 27th July, 1872, tit. i.  
vol. ii. §§ 175, 198. § 1.

(*p*) Wheaton (Lawrence), App.



and 23rd July, 1893.

has been born in France of a foreigner, and who, at the time of his majority, is domiciled in France, is a Frenchman; unless, during the year that follows his majority, as regulated by French law, he has declined to be French, and has proved that he has preserved the nationality of his parents by a certificate in due form from his Government, which will remain annexed to his declaration; and unless he has also produced, if there is occasion so to do, a certificate proving that he has complied with the call to serve under the flag in compliance with the military laws of his country, always excepting cases provided for in treaties (s).

(s) See Hall, *Foreign Jurisdiction of the British Crown*, pp. 56—60, Cogordan, *La Nationalité*; and P. Webster, *The Law of Naturalization in the United States of America and in other Countries* (Boston, 1895). (This latter book contains an exceedingly useful synopsis of the laws of

nationality throughout the civilized world). The latter may be supplemented by the more recent works of P. E. Lehr, *La Nationalité dans les principaux États du Globe* (Paris, 1909), and Sir F. T. Piggott, *Nationality, &c.*, 2 vols. (1907).

## CHAPTER IV.

## RIGHTS OF EQUALITY.

SOVEREIGN States, possessing legal personality as members of the society of nations, enjoy equality before international law. All such States, irrespective of their size, population, and power, possess the same legal rights and obligations, and are therefore expected to recognise the legal equality of each other. It was in this sense that Vattel said that a small republic is as much a sovereign State as the most powerful republic<sup>(a)</sup>; and Chief Justice Marshall said: "Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another"<sup>(b)</sup>.

Legal  
equality  
of States.

From the political point of view it cannot, of course, be said that all the States of the world are equal. Thus, in Europe the Concert of the six great Powers, and on the American continent the United States, exercise a leadership which, in each case, is real and possesses the greatest weight, though it is not determined by definite rules. The more important position in the councils of the world, held by these seven great Powers, together with Japan, was emphasized by the fact that they assembled at the remarkable Naval Conference in London, where it was attempted to modify and consolidate a great portion of the law of naval warfare. (It is true that for certain reasons Spain and Holland were invited to this Conference, but they did not attend as great Powers.) Not long ago the European Concert might have been regarded as occupying a position of distinct superiority with regard to the States of the world generally; but considering recent events, such as the extraordinary rise of Japan, the establishment of the Chinese Republic, the holding of the Hague Conferences, at the latter of which forty-four States were represented and possessed equal power to vote on the resolutions submitted, it may be said that it is a World Concert that has come into being.

The equality of sovereign States may be modified by positive compact, or by consent implied from constant usage, so as to entitle one State to superiority over another in respect to certain

Equality of  
States  
modified by  
compact and  
usage.

(a) Droit des Gens, Prélim. § 18.

(b) *The Antelope* (1825), 10 Wheaton, 66, at p. 122.

external objects, such as rank, titles, and other ceremonial distinctions.

Royal honours.

Thus, by international practice, certain States, including the great empires, kingdoms, and republics, enjoy what are called 'royal honours.' These royal honours entitle the States that possess them to precedence over all others which do not enjoy the same rank, with the exclusive right of sending to other States public ministers of the first rank, as ambassadors, together with certain other distinctive titles and ceremonies.

Only in recent times has the United States exercised the right in certain cases of conferring on her public ministers to foreign courts the rank of ambassadors, and of receiving at Washington ministers of a corresponding dignity. She is now represented by ambassadors in several States of the world, including Great Britain, France, Germany, Russia, Austria-Hungary, Italy. (Similarly Great Britain sends ambassadors extraordinary and plenipotentiary to nine Powers.) This step was not taken in the United States without much debate, and with grave apprehensions as to its consequence. "The Department," wrote the Secretary of State, January 31st, 1884, "cannot, in justice to its ministers abroad, ask Congress to give them higher rank with their present salaries; neither could it with propriety appeal to Congress for an allowance commensurate with the necessary mode of life of an ambassador." And, July 2nd, 1885, Mr. Bayard informed Mr. Phelps that the question of sending and receiving ambassadors had been frequently considered, but that "the inconvenience which in a simple social democracy might attend the reception of an extraordinary foreign privileged class" had hitherto been found an insuperable bar (c).

Precedence among princes and States enjoying royal honours.

Among the princes who enjoy this rank, the Catholic Powers conceded the precedence to the Pope, or sovereign pontiff; but Russia, and the Protestant States of Europe considered him as bishop of Rome only, and a sovereign prince in Italy, and such of them as enjoy royal honours refused him the precedence. But in 1870 the temporal power of the Pope was abolished, and his legates or nuncios are no longer public ministers (d).

The Emperor of Germany, under the former constitution of the empire, was entitled to precedence over all other temporal princes, as the supposed successor of Charlemagne and of the Cæsars in the

(c) Vattel, *Droit des Gens*, tom. i. liv. ii. ch. 3, § 38. Martens, *Précis du Droit des Gens Moderne de l'Europe*, liv. iii. ch. 2, § 129. Klüber, *Droit*

*des Gens Moderne*, pt. ii. tit. i. ch. 3, §§ 91, 92. Heffter, § 28. Wharton, *Digest*, 2nd ed. § 88.

(d) See *supra*, p. 56.



empire of the West; but since the dissolution of the late Germanic constitution, and the abdication of the titles and prerogatives of its head by the Emperor of Austria, the precedence of this sovereign over other princes of the same rank was considered questionable (*e*).

The various contests between crowned heads for precedence are matter of curious historical research as illustrative of European manners at different periods; but the practical importance of these discussions has been greatly diminished by the progress of civilization, which no longer permits the serious interests of mankind to be sacrificed to such vain pretensions.

The text-writers commonly assigned to what were called the 'great republics,' which were entitled to royal honours, a rank inferior to crowned heads of that class; and the United Netherlands, Venice, and Switzerland, certainly did formerly yield the precedence to emperors and reigning kings, though they contested it with the electors and other inferior princes entitled to royal honours. But disputes of this sort have commonly been determined by the relative power of the contending parties, rather than by any general rule derived from the form of government. Cromwell knew how to make the dignity and equality of the English Commonwealth respected by the crowned heads of Europe; and in the different treaties between the French Republic and other Powers, it was expressly stipulated that the same ceremonial as to rank and etiquette should be observed between them and France which had subsisted before the revolution (*f*).

The great Republics.

Those monarchical sovereigns who are not crowned heads, but who enjoy royal honours, concede the precedence on all occasions to emperors and kings.

Monarchs not crowned and semi-sovereigns.

Monarchical sovereigns who do not enjoy royal honours yield the precedence to those princes who are entitled to these honours.

Semi-sovereign or dependent States rank below sovereign States (*g*).

Semi-sovereign States, and those under the protection or

(*e*) Martens, § 132. Klüber, § 95. This claim was always contested by England. 24 Hen. 8, c. 12. It was as "The Emperor," not "The Emperor of Germany," that the Hapsburgs and their predecessors claimed to occupy the same position in the secular as the Pope in the spiritual world. The Empire of Austria is in no sense the successor of the Holy Roman Empire dissolved by Napoleon in 1806. (See Bryce, *The Holy Roman Empire*.) In strictness there is no "Emperor of

Germany," though French diplomatic language speaks of *sa Majesté l'Empereur d'Allemagne*; the correct title is *Seine Majestät der Deutsche Kaiser*, that is the "German Emperor."

(*f*) Treaty of Campo Formio, Art. 23, and of Lunéville, Art. 17, with Austria. Treaties of Basle with Prussia and Spain. Schoell, *Histoire des Traités de Paix*, tom. i. p. 610 (ed. Bruxelles).

(*g*) Klüber, § 98.

suzerainty of another sovereign State, necessarily rank below that State on which they are dependent. But where third parties are concerned, their relative rank must be determined by other considerations; and they may even take precedence of States completely sovereign, as was the case with the electors under the former constitution of the Germanic empire, in respect to other princes not entitled to royal honours (*h*).

These different points respecting the relative rank of sovereigns and States have never been determined by any positive regulation or international compact: they rest on usage and general acquiescence. An abortive attempt was made at the Congress of Vienna to classify the different States of Europe, with a view to determine their relative rank. At the sitting of the 10th December, 1814, the plenipotentiaries of the eight Powers who signed the treaty of peace at Paris, named a committee to which this subject was referred. At the sitting of the 9th February, 1815, the report of the committee, which proposed to establish three classes of Powers, relatively to the rank of their respective ministers, was discussed by the Congress; but doubts having arisen respecting this classification, and especially as to the rank assigned to the great republics, the question was indefinitely postponed, and a regulation established determining merely the relative rank of the diplomatic agents of crowned heads (*i*).

Usage<sup>of</sup> the  
'alternat.'

Where the rank between different States is equal or undetermined, different expedients have been resorted to for the purpose of avoiding a contest, and at the same time reserving the respective rights and pretensions of the parties. Among these is what is called the usage of the 'alternat,' by which the rank and places of different Powers are changed from time to time, either in a certain regular order, or one determined by lot. Thus, in drawing up public treaties and conventions, it is the usage of certain Powers to alternate, both in the preamble and the signatures, so that each Power occupies, in the copy intended to be delivered to it, the first place. The regulation of the Congress of Vienna, above referred to, provides that in acts and treaties between those Powers which admit the 'alternat,' the order to be observed by the different ministers shall be determined by lot (*k*).

Alphabetical  
order.

Another expedient which has frequently been adopted to avoid controversies respecting the order of signatures to treaties and

(*h*) Heffter, Das Europäische Völkerrecht, § 28, No. iii.

(*i*) Klüber, Acten des Wiener Con-

gresses, tom. viii. pp. 98, 102, 108, 116. See *infra*, p. 332.

(*k*) Annexe, xvii. à l'Acte du Congrès de Vienne, Art. 7.

other public acts, is that of signing in the order assigned by the French alphabet to the respective Powers represented by their ministers (*l*). This device was made use of, for example, at the last Hague Conference, where the Powers, through their delegates, signed the various conventions in alphabetical order, which was also the order of the places they occupied at the Congress.

The primitive equality of nations authorizes each nation to make use of its own language in treating with others, and this right is still, in a certain degree, preserved in the practice of some States. But general convenience early suggested the use of the Latin language in the diplomatic intercourse between the different nations of Europe. Towards the end of the fifteenth century, the preponderance of Spain contributed to the general diffusion of the Castilian tongue as the ordinary medium of political correspondence. This, again, was superseded by the language of France, which, since the age of Louis XIV., has become the almost universal diplomatic idiom of the civilized world. Those States which still retain the use of their national language in treaties and diplomatic correspondence, usually annex to the papers transmitted by them a translation in the language of the opposite party, wherever it is understood that this comity will be reciprocated. Such is the usage of the Germanic Powers, of Spain, and the Italian courts. Those States which have a common language, generally use it in their transactions with each other. Such is the case between the German Empire and its different members, and between the respective members themselves; between the different States of Italy; and between Great Britain and the United States of America.

All sovereign princes or States may assume whatever titles of dignity they think fit, and may exact from their own subjects these marks of honour. But their recognition by other States is not a matter of strict right, especially in the case of new titles of higher dignity, assumed by sovereigns. Thus, the royal title of King of Prussia, which was assumed by Frederick I. in 1701, was first acknowledged by the Emperor of Germany, and subsequently by the other princes and States of Europe. It was not acknowledged by the Pope until the reign of Frederick William II. in 1786, and by the Teutonic knights until 1792, this once famous military order still retaining the shadow of its antiquated claims to the Duchy of Prussia until that period (*m*). So, also,

Language used in diplomatic intercourse.

Titles of sovereign princes and States.

(*l*) Klüber, Uebersicht der diplomatischen Verhandlungen des Wiener Congresses, § 164.

(*m*) Ward, History of the Law of

Nations, vol. ii. pp. 245—248. Klüber, Droit des Gens Moderne de l'Europe, pt. ii. tit. i. ch. 2, § 107, note (*c*).



the title of Emperor of all the Russias, which was taken by the Czar, Peter the Great, in 1701, was successively acknowledged by Prussia, the United Netherlands, and Sweden in 1723, by Denmark in 1732, by Turkey in 1739, by the emperor and the empire in 1745-6, by France in 1745, by Spain in 1750, and by the Republic of Poland in 1764. In the recognition of this title by France, a reservation of the right of precedence claimed by that crown was insisted on, and a stipulation entered into by Russia in the form of a 'Réversale,' that this change of title should make no alteration in the ceremonies observed between the two courts. On the accession of the Empress Catherine II. in 1762, she refused to renew the stipulation in that form, but declared that the imperial title should make no change in the ceremonial observed between the two courts. This declaration was answered by the court of Versailles in a counter declaration, renewing the recognition of that title, upon the express condition, that, if any alteration should be made by the court of St. Petersburg in the rules previously observed by the two courts as to rank and precedence, the French Crown would resume its ancient style, and cease to give the title of Imperial to that of Russia (*n*).

The title of Emperor, from the historical associations with which it is connected, was formerly considered the most eminent and honourable among all sovereign titles; but it was never regarded by other crowned heads as conferring, except in the single case of the former Emperor of Germany, any prerogative or precedence over those princes.

Maritime  
ceremonials.

The usage of nations has established certain maritime ceremonials to be observed, either on the ocean or those parts of the sea over which a sort of supremacy was claimed by a particular State.

Among these is the salute by striking the flag or the sails, or by firing a certain number of guns on approaching a fleet or a ship of war, or entering a fortified port or harbour.

Every sovereign State has the exclusive right, in virtue of its independence and equality, to regulate the maritime ceremonial to be observed by its own vessels towards each other, or towards those of another nation, on the high seas, or within its own territorial jurisdiction. It has a similar right to regulate the ceremonial to be observed within its own exclusive jurisdiction by the vessels of all nations, as well with respect to each other, as towards its own fortresses and ships of war, and the reciprocal

(*n*) Flissan, Histoire de la Diplomatie Française, tom. vi. liv. iii. pp. 328—364.

honours to be rendered by the latter to foreign ships. These regulations are established either by its own municipal ordinances, or by reciprocal treaties with other maritime Powers (o).

Where the dominion claimed by the State was contested by foreign nations, as in the case of Great Britain in the Narrow Seas, the maritime honours to be rendered by its flag were also the subject of contention. The disputes on this subject have not unfrequently formed the motives or pretexts for war between the Powers asserting these pretensions, and those by whom they were resisted. The maritime honours required by Denmark, in consequence of the supremacy claimed by that Power over the Sound and Belts, at the entrance of the Baltic Sea, have been regulated and modified by different treaties with other States, and especially by the convention of the 15th of January, 1829, between Russia and Denmark, suppressing most of the formalities required by former treaties. This convention is to continue in force until a general regulation shall be established among all the maritime Powers of Europe, according to the protocol of the Congress of Aix-la-Chapelle, signed on the 9th November, 1818, by the terms of which it was agreed, by the ministers of the five great Powers, Austria, France, Great Britain, Prussia, and Russia, that the existing regulations observed by them should be referred to the ministerial conferences at London, and that the other maritime Powers should be invited to communicate their views of the subject in order to form some such general regulation (p).

(o) Bynkershoek, *De Dominio Maris*, cap. 2, 4. Martens, *Précis du Droit des Gens Moderne de l'Europe*, liv. iv. ch. 4, § 159. Klüber, *Droit des Gens Moderne de l'Europe*, pt. ii. tit. 1, ch. 3, §§ 117—122. See U. S. Dipl. Cor. 1872, p. 202, where the United States complained of the Canadian flag being hoisted over the Union flag, on board a United States vessel captured for violating the fishing laws.

(p) J. H. W. Schlegel, *Staatsrecht des Königreichs Dänemark*, 1 Theil, p. 412. Martens, *Nouveau Recueil*, tom. viii. p. 73. Ortolan, *Diplomatie de la Mer*, t. i. liv. 2, ch. 15. With regard to the rules relating to military and maritime ceremonial, cf. also Phillimore, vol. ii. pt. v. chap. 5; Calvo, *Droit Int.*, vol. i. §§ 231 *seq.*; Halleck, *Int. Law* (1893), vol. i. chap. 5.

## CHAPTER V.

## RIGHTS OF PROPERTY.

National  
proprietary  
rights.

THE exclusive right of every independent State to its territory and other property, is founded upon the title originally acquired by occupancy, conquest, or cession, and subsequently confirmed by the presumption arising from the lapse of time, or by treaties and other compacts with foreign States.

Public and  
private  
property.

This exclusive right includes the public property or domain of the State, and those things belonging to private individuals, or bodies corporate, within its territorial limits.

Eminent  
domain.

The right of the State to its public property or domain is absolute, and excludes that of its own subjects as well as other nations. The national proprietary right, in respect to those things belonging to private individuals, or bodies corporate, within its territorial limits, is absolute, so far as it excludes that of other nations; but, in respect to the members of the State, it is paramount only, and forms what is called the eminent domain (*a*); that is, the right, in case of necessity or for the public safety, of disposing of all the property of every kind within the limits of the State.

Prescription.

The earlier writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called prescription (*b*), is justly applicable, as between nation and nation; but the constant and approved practice of nations shows that, by whatever name it be called, the uninterrupted possession of territory, or other property, for a certain length of time, by one State, excludes the claim of every other; in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property

(*a*) Vattel, *Droit des Gens*, liv. i. ch. 20, §§ 235, 244. Rutherford, *Inst. of Natural Law*, vol. ii. ch. 9, § 6. Heffter, *Das Europäische Völkerrecht*, §§ 64, 59, 70.

(*b*) Oppenheim, *International Law* (1912), vol. i. § 242, defines prescription as "the acquisition of sovereignty

over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order."



in question. This rule is founded upon the supposition, confirmed by constant experience, that every person will naturally seek to enjoy that which belongs to him; and the inference fairly to be drawn from his silence and neglect, of the original defect of his title, or his intention to relinquish it, (c).

Some modern writers have denied that a valid title to territorial property may be grounded on presumption (d); but the great majority of jurists and publicists accept it as a principle that is essential to the maintenance of international order and stability. The rules of international law, however, have not prescribed any definite time limit that is to operate as a bar to any claims to territory in the possession of a State. But in the case of disputes, an agreement is sometimes made by the contestants as to the minimum period giving a prescriptive right. Thus, in the boundary dispute between Great Britain and Venezuela, the treaty of Washington (1897) laid down the following rule for the guidance of the arbitral tribunal: "Adverse holding or prescription during a period of fifty years shall make a good title. The arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription" (e). It may be added, by way of judicial authority, that in a case before the Judicial Committee of the Privy Council it was held that Conception Bay in Newfoundland must be considered to have become by prescription part of British territory, on the ground that Great Britain had in fact long exercised dominion over it, and the acquiescence of other nations showed her exclusive occupation of it (f).

The title of almost all the nations of Europe to the territory now possessed by them, in that quarter of the world, was originally derived from conquest, which has been subsequently confirmed by long possession and international compacts, to which all the European States have successively become parties. Their claim to the possessions held by them in the New World, discovered by Columbus and other adventurers, and to the territories which they

Conquest and discovery confirmed by compact and the lapse of time.

(c) Grotius, *De Jur. Bel. ac Pac.* lib. ii. cap. 4. Pufendorf, *Jus Naturæ et Gentium*, lib. iv. cap. 12. Vattel, *Droit des Gens*, tome i. liv. ii. ch. 11. Rutherford, *Inst. of Natural Law*, vol. i. ch. 8; vol. ii. ch. 9, §§ 3, 6. Calvo (*Droit International*, vol. i. § 211) thinks acquisition by prescription more necessary for States than individuals. The latter can appeal to courts of law to decide upon their

title, while the former too often resort to arms for the settlement of such differences.

(d) For example, Heffter, § 12; Klüber, §§ 6, 125; G. F. de Martens, *Précis du Droit des Gens*, §§ 70, 71.

(e) Hall, *Int. Law*, p. 118; Moore, *Digest*, vol. i. § 88.

(f) *The Direct United States Cable Co. v. The Anglo-American Telegraph Co.* (1877), L. R. 2 App. C. 394.

have acquired on the continents and islands of Africa and Asia, was originally derived from discovery, or conquest and colonization, and has since been confirmed in the same manner, by positive compact. Independently of these sources of title, the general consent of mankind has established the principle, that long and uninterrupted possession by one nation excludes the claim of every other. Whether this general consent be considered as an implied contract, or as positive law, all nations are equally bound by it; since all are parties to it, since none can safely disregard it without impugning its own title to its possessions, and since it is founded upon mutual utility, and tends to promote the general welfare of mankind.

Papal Bull of  
1493.

The Spaniards and Portuguese took the lead among the nations of Europe, in the splendid maritime discoveries in the East and the West, during the fifteenth and sixteenth centuries. According to the European ideas of that age, the heathen nations of the other quarters of the globe were the lawful spoil and prey of their civilized conquerors, and as between the Christian Powers themselves, the Sovereign Pontiff was the supreme arbiter of conflicting claims. Hence the famous bull, issued by Pope Alexander VI., in 1493, by which he granted to the united crowns of Castile and Arragon all lands discovered, and to be discovered, beyond a line drawn from pole to pole, one hundred leagues west from the Azores, or Western Islands, under which Spain has since claimed to exclude all other European nations from the possession and use, not only of the lands but of the seas in the New World west of that line. Independent of this papal grant, the right of prior discovery was the foundation upon which the different European nations, by whom conquests and settlements were successively made on the American continent, rested their respective claims to appropriate its territory to the exclusive use of each nation. Even Spain did not found her pretension solely on the papal grant. Portugal asserted a title derived from discovery and conquest to a portion of South America; taking care to keep to the eastward of the line traced by the Pope, by which the globe seemed to be divided between these two great monarchies. On the other hand, Great Britain, France, and Holland disregarded the pretended authority of the papal see, and pushed their discoveries, conquests, and settlements, both in the East and West Indies; until conflicting with the paramount claims of Spain and Portugal, they produced bloody and destructive wars between the different maritime Powers of Europe. But there was one thing in which they all agreed, that of almost entirely disregarding the right of the

native inhabitants of these regions. Thus the bull of Pope Alexander VI. reserved from the grant to Spain all lands, which had been previously occupied by any other *Christian* nation; and the patent granted by Henry VII. of England to John Cabot and his sons, authorized them "to seek out and discover all islands, regions, and provinces whatsoever, that may belong to heathens and infidels"; and "to subdue, occupy, and possess these territories, as his vassals and lieutenants." In the same manner, the grant from Queen Elizabeth to Sir Humphrey Gilbert empowers him to "discover such remote heathen and barbarous lands, countries, and territories, not actually possessed by any Christian prince or people, and to hold, occupy, and enjoy the same, with all their commodities, jurisdictions, and royalties." It thus became a maxim of policy and of law, that the right of the native Indians was subordinate to that of the first Christian discoverer, whose paramount claim excluded that of every other civilized nation, and gradually extinguished that of the natives. In the various wars, treaties, and negotiations, to which the conflicting pretensions of the different States of Christendom to territory on the American continents have given rise, the primitive title of the Indians has been entirely overlooked, or left to be disposed of by the States within whose limits they happened to fall, by the stipulations of the treaties between the different European Powers. Their title has thus been almost entirely extinguished by force of arms, or by voluntary compact, as the progress of cultivation gradually compelled the savage tenant of the forest to yield to the superior power and skill of his civilized invader (*g*).

In the dispute which took place in 1790, between Great Britain and Spain, relative to Nootka Sound, the latter claimed all the north-western coast of America as far north as Prince William's Sound, in latitude 61°, upon the ground of prior discovery and long possession, confirmed by the eighth article of the Treaty of Utrecht, referring to the state of possession in the time of his Catholic Majesty Charles II. This claim was contested by the British Government, upon the principle that the earth is the common inheritance of mankind, of which each individual and each nation has a right to appropriate a share, by occupation and cultivation. This dispute was terminated by a convention between the two Powers, stipulating that their respective subjects should not be disturbed in their navigation and fisheries in the

Dispute  
between  
Great Britain  
and Spain,  
relating to  
Nootka  
Sound.

(*g*) *Johnson v. McIntosh* (1823), 8 Wheaton, 571—605.



Pacific Ocean or the South Seas, or in landing on the coasts of those seas, not already occupied, for the purpose of carrying on their commerce with the natives of the country, or of making settlements there, subject to the following provisions:—

1. That the British navigation and fishery should not be made the pretext for illicit trade with the Spanish settlements, and that British subjects should not navigate or fish within the space of ten marine leagues from any part of the coasts already occupied by Spain.

2. That in all parts of the north-western coasts of North America, or of the islands adjacent, situated to the north of the parts of the said coast already occupied by Spain, wherever the subjects of either of the two Powers should have made settlements since the month of April, 1789, or should thereafter make any, the subjects of the other should have free access, and should carry on their trade without any disturbance or molestation.

3. That with respect to the eastern and western coasts of South America, and the adjacent islands, no settlement should be formed thereafter, by the respective subjects, in such parts of those coasts as are situated to the south of those parts of the same coasts, and of the adjacent islands already occupied by Spain; provided that the respective subjects should retain the liberty of landing on the coasts and islands so situated, for the purposes of their fishery, and of erecting huts and other temporary buildings, for those purposes only (*h*).

Controversy between the United States and Russia, respecting the north-western coast of America.

By an ukase of the Emperor Alexander of Russia, of the 4-16th September, 1821, an exclusive territorial right on the north-west coast of America was asserted as belonging to the Russian Empire, from Behring's Straits to the 51st degree of north latitude, and in the Aleutian Islands, on the east coast of Siberia, and the Kurile Islands, from the same straits to the South Cape in the Island of Oorooop, in 45° 51' north latitude. The navigation and fishery of all other nations were prohibited in the islands, ports, and gulfs, within the above limits; and every foreign vessel was forbidden to touch at any of the Russian establishments above enumerated, or even to approach them, within a less distance than 100 Italian miles, under penalty of confiscation of the cargo. The proprietary rights of Russia to the extent of the north-west coast of America, specified in this decree, were rested

(*h*) Annual Register for 1790 (State Papers), pp. 285—305; 1791, pp. 208, 214, 222—227. Greenhow, History of

Oregon and California, p. 466; Proofs and Illustrations, K. No. 1.

upon the three bases said to be required by the general law of nations and immemorial usage; that is, upon the title of first discovery; upon the title of first occupation; and, in the last place, upon that which results from a peaceable and uncontested possession of more than half a century. It was added, that the extent of sea, of which the Russian possessions on the continents of Asia and America form the limits, comprehended all the conditions which were ordinarily attached to closed seas ('mers fermées'); and the Russian Government might consequently deem itself authorized to exercise upon this sea the right of sovereignty, and especially that of entirely interdicting the entrance of foreigners. But it preferred only to assert its essential rights, by measures adapted to prevent contraband trade within the chartered limits of the American Russian Company.

All these grounds were contested, in point of fact as well as right, by the American Government. The Secretary of State, Mr. John Q. Adams, in his reply to the communication of the Russian Minister at Washington, stated, that from the period of the existence of the United States as an independent nation, their vessels had freely navigated these seas, and the right to navigate them was a part of that independence; as was also the right of their citizens to trade, even in arms and munitions of war, with the aboriginal natives of the north-west coast of America, who were not under the territorial jurisdiction of other nations. He totally denied the Russian claim to any part of America south of the 55th degree of north latitude, on the ground that this parallel was declared, in the charter of the Russian American Company, to be the southern limit of the discoveries made by the Russians in 1799; since which period they had made no discoveries or establishments south of that line, on the coast claimed by them. With regard to the suggestion, that the Russian Government might justly exercise sovereignty over the northern Pacific Ocean, as *mare clausum*, because it claimed territories both on the Asiatic and American coasts of that ocean, Mr. Adams merely observed, that the distance between those coasts on the parallel of 51 degrees, was not less than *four thousand miles*; and he concluded by expressing the persuasion of the American Government, that the citizens of the United States would remain unmolested in the prosecution of their lawful commerce, and that no effect would be given to a prohibition, manifestly incompatible with their rights (*i*).

(*i*) Annual Register, vol. lxiv. pp. 576—584. Correspondence between Mr. Secretary Adams and Mr. Poletica.

Convention of  
1824, between  
the United  
States and  
Russia.

The negotiations on this subject were finally terminated by a convention between the two Governments, signed at Petersburg, on the 5-17th April, 1824, which stipulated that the subjects of either Power should not be disturbed in resorting to the coasts for the purposes of navigation and fishing, or of trading with the natives at points of the coast not already occupied. But United States citizens were not to resort to any point where there was a Russian establishment without the permission of the governor, and *vice versâ*. No United States establishments were to be formed north of  $54^{\circ} 40'$ , and no Russian establishments south of that latitude. During a term of ten years (Article 4) from the signature of the Convention, the vessels of either party might frequent the inland seas, gulfs and creeks of the coastline assigned to the other party for the purpose of fishing and trading with the natives.

Convention of  
1825 between  
Great Britain  
and Russia.

Great Britain had also formally protested against the claims and principles set forth in the Russian ukase of 1821, immediately on its promulgation, and subsequently at the Congress of Verona. The controversy, as between the British and Russian Governments, was finally closed by a convention signed at Petersburg, February 16-28, 1825, which also established a permanent boundary between the territories respectively claimed by them on the continent and islands of North-western America.

This treaty contained stipulations similar to those between the United States and Russia, the line of demarcation being drawn from the southernmost point of Prince of Wales's Island in latitude  $54^{\circ} 40'$  eastwards to Portland Channel, and along the middle of that inlet to latitude  $56^{\circ}$ , whence it should follow the summit of the mountains bordering the coast, within 10 leagues north-westward to Mount St. Elias, and thence north along the 141st meridian west from Greenwich to the frozen ocean. The term of ten years for trading by vessels of either party in the harbours or creeks of the other, was also inserted in this treaty, but trading with the natives in liquors, fire-arms, powder, or warlike stores, was prohibited (*k*).

Expiration of  
the ten years  
period in  
United States  
treaty.

When the ten years period of the United States' treaty expired, the Russian Government claimed the right of excluding American vessels from that part of the coast on which the United States had agreed to form no establishments. A lengthy discussion took place on the construction of the treaty (*l*), but for a very long time

(*k*) British and Foreign State Papers, vol. xii. (1824—1825). Greenhow, Hist. of Oregon, &c., p. 469; Proofs I. No. 5.

(*l*) Mr. Forsyth's letter to Mr. Dallas, Nov. 3, 1837. Congress Documents, Sess. 1838-9, vol. i. p. 36.



no definite understanding was arrived at. Finally the question was set at rest for ever by the purchase by the United States of the whole territory of Alaska from Russia, in 1867, for the sum of 7,200,000 dollars, there being after that no possibility of any dispute as to boundary between the two countries.

The Alaska boundary question, however, was destined to be raised as between the United States and Great Britain in a very acute form, which was settled only recently. From the first days of the American occupation of Alaska, the British and Canadian Governments were insistent in urging upon the United States the necessity of having the boundary line, which had been left in ambiguity by the treaty of 1825, authoritatively marked out. Nothing, however, was done, and much friction and inconvenience was the result. In 1897, the discovery of gold on the Yukon River, in British Columbia, attracted a multitude of settlers to what had hitherto been one of the most deserted quarters of the North-American continent. It was then realised that the United States claimed a boundary line which entirely shut off the mining districts from the sea. This claim, fortified by acts of occupation, was based on the contention that under the treaty of 1825, it was meant that there should remain in the exclusive possession of Russia a continuous fringe or strip of coast on the mainland not exceeding ten marine leagues in width separating the British possessions from the bays, ports, inlets, havens and waters of the ocean. This interpretation of the 3rd and 4th Articles of the treaty was strongly contested by the Canadians, who, with the support of the British Government, maintained that the boundary line, whether running along the crests of the mountains, or in the absence of mountains, at a distance of ten marine leagues from the ocean, was intended to be traced *across* the bays and inlets, and not to run round them. There was also a dispute as to what was "the channel called the Portland Channel" in the 3rd Article of the treaty of 1825, and as to the course to be taken by the southern boundary line of American territory from its commencement to the entrance of Portland Channel.

Alaska  
boundary  
question.

In 1899, a temporary *modus vivendi* was arrived at, and after prolonged negotiations a convention was signed at Washington on Jan. 24, 1903, for the appointment of a tribunal consisting of "six impartial jurists of repute"—three to be appointed by each Power—who were to "consider judicially" the questions submitted to them with regard to the disputed boundary arising out of the treaty of 1825, which they were thus practically asked to con-

strue. The case was argued at great length in London during September and October of the same year, and the award was delivered on October 20. The tribunal found that the point of commencement of the line of demarcation was Cape Muron, and that the Portland Channel was the channel which ran from about 55° 56' N. L., and passed to the north of Pearce and Wales Islands. These islands were thus awarded to Great Britain, but the little islands to the west of them, Sitklan and Kannaghunut, fell to the United States. The tribunal further gave to the United States a continuous strip of coast on the mainland, holding this to be the true construction of a "line parallel to the sinuosities of the coast, and distant therefrom not more than ten marine leagues." The award was signed only by Lord Alverstone, L. C. J., and the three American commissioners, the two Canadian representatives declining to do so; but under the terms of the treaty a bare majority was sufficient (*m*).

On April 21, 1906, Great Britain and the United States entered into a convention, providing for the appointment of a joint commission in order to determine and mark out by visible landmarks that portion of the boundary line which, under the Convention of 1825, had been defined as following the 141st meridian, from its point of intersection with a certain line drawn parallel to the coast to the frozen ocean.

Claim of the  
United States  
to the Oregon  
territory.

The claim of the United States to the territory between the Rocky Mountains and the Pacific Ocean, and between the 42nd degree and 54th degree and 40th minutes of north latitude, was rested by them upon the following grounds:—

1. The first discovery of the mouth of the river Columbia by Captain Gray, of Boston, in 1792; the first discovery of the sources of that river, and the exploration of its course to the sea, by Captains Lewis and Clarke in 1805—6; and the establishment of the first posts and settlements in the territory in question by citizens of the United States.

2. The virtual recognition by the British Government of the title of the United States in the restitution of the settlement of Astoria or Fort George, at the mouth of the Columbia River, which had been captured by the British during the war between the two countries, and which was restored in virtue of the first Article of the treaty of Ghent, 1814, stipulating that

(*m*) British and Foreign State Papers, vol. xvi. (1902—1903). Cf. Wharton, Digest, vol. ii. Art. 131a, p. 21; Cobbett, Cases, vol. i. pp. 96 *seq.*

“all territory, places, and possessions whatever, taken by either party from the other during the war,” &c., “shall be restored without delay.” This restitution was made, without any reservation or exception whatsoever, communicated at the time to the American Government.

3. The acquisition by the United States of all the titles of Spain, which titles were derived from the discovery of the coasts of the region in question, by Spanish subjects, before they had been seen by the people of any other civilized nation. By the 3rd Article of the treaty of 1819, between the United States and Spain, the boundary line between the two countries west of the Mississippi, was established from the mouth of the river Sabine, to certain points on the Red River and the Arkansas, and running along the parallel of 42 degrees north of the South Sea; his Catholic Majesty ceding to the United States “all his rights, claims, and pretensions to any territories east and north of the said line; and” renouncing “for himself, his heirs and successors, all claim to the said territories for ever.” The boundary thus agreed on with Spain was confirmed by the treaty of 1828, between the United States and Mexico, which had, in the meantime, become independent of Spain.

4. Upon the ground of contiguity, which would give to the United States a stronger right to those territories than could be advanced by any other Power. “If,” said Mr. Gallatin, on behalf of the American Government, “a few trading factories on the shores of Hudson’s Bay have been considered by Great Britain as giving an exclusive right of occupancy as far as the Rocky Mountains; if the infant settlements on the more southern Atlantic shores justified a claim thence to the South Seas, and which was actually enforced to the Mississippi; that of the millions of American citizens already within reach of those seas, cannot consistently be rejected. It will not be denied that the extent of contiguous country to which an actual settlement gives a prior right, must depend, in a considerable degree, on the magnitude and population of that settlement, and on the facility with which the vacant adjacent land may, within a short time, be occupied, settled, and cultivated by such population, compared with the probability of its being occupied and settled from any other quarter. This doctrine was admitted to its fullest extent by Great Britain, as appeared by all her charters, extending from the Atlantic to the Pacific, given to colonies established then only on the borders of the Atlantic. How much more natural and stronger the claim, when made by a nation whose population extended to the central parts



of the continent, and whose dominions were by all acknowledged to extend to the Rocky Mountains.”

The exclusive claim of the United States was opposed by Great Britain on the following grounds:—

1. That the Columbia was not discovered by Gray, who had only entered its mouth, discovered four years previously by Lieutenant Mears of the British navy; and that the exploration of the interior borders of the Columbia by Lewis and Clarke could not be considered as confirming the claim of the United States, because, if not before, at least in the same and subsequent years, the British Northwest Company had, by means of their agents, already established their posts on the head waters or main branch of the river.

2. That the restitution of Astoria, in 1818, was accompanied by express reservations of the claim of Great Britain to that territory, upon which the American settlement must be considered an encroachment.

3. That the titles to the territory in question, derived by the United States from Spain through the treaty of 1819, amounted to nothing more than the rights secured to Spain equally with Great Britain by the Nootka Sound Convention of 1790: namely, to settle in any part of those countries, to navigate and fish in their waters, and to trade with the natives.

4. That the charters granted by British sovereigns to colonies on the Atlantic coasts were nothing more than cessions to the grantees of whatever rights the grantor might consider himself to possess, and could not be considered as binding the subjects of any other nation, or as part of the law of nations, until they had been confirmed by treaties.

During the negotiation of 1827, the British plenipotentiaries, Messrs. Huskisson and Addington, presented the claims of their Government in respect to the territory in question in a statement, of which the following is a summary.

“Great Britain claims no exclusive sovereignty over any portion of the territory on the Pacific, between the 42nd and the 49th parallels of latitude. Her present claim, not in respect to any part, but to the whole, is limited to a right of joint occupancy, in common with other States, leaving the right of exclusive dominion in abeyance; and her pretensions tend to the mere maintenance of her own rights, in resistance to the exclusive character of the pretensions of the United States.

“The rights of Great Britain are recorded and defined in the Convention of 1790. They embrace the right to navigate the waters of those countries, to settle in and over any part of them,

Claims of  
England.

Negotiation  
of 1827.

and to trade with the inhabitants and occupiers of the same. These rights have been peaceably exercised ever since the date of that convention; that is, for a period of nearly forty years. Under that convention, valuable British interests have grown up in those countries. It is admitted that the United States possess the same rights, although they have been exercised by them only in a single instance, and have not, since the year 1813, been exercised at all; but beyond those rights they possess none.

“In the interior of the territory in question, the subjects of Great Britain have had, for many years, numerous settlements and trading-posts; several of these posts are on the tributary waters of the Columbia; several upon the Columbia itself; some to the northward, and others to the southward of that river. And they navigate the Columbia as the sole channel for the conveyance of their produce to the British stations nearest to the sea, and for its shipment thence to Great Britain; it is also by the Columbia and its tributary streams that these posts and settlements receive their annual supplies from Great Britain.

“To the interests and establishments which British industry and enterprise have created, Great Britain owes protection; that protection will be given, both as regards settlement, and freedom of trade and navigation, with every attention not to infringe the co-ordinate rights of the United States; it being the desire of the British Government, so long as the joint occupancy continues, to regulate its own obligations by the same rules which govern the obligations of every other occupying party” (n).

By the 3rd Article of the Convention between the United States and Great Britain, in 1818, it was “agreed, that any country that may be claimed by either party, on the north-west coast of America, westward of the Stony Mountains, shall, together with its harbours, bays, and creeks, and the navigation of all rivers within the same, be free and open, for the term of ten years from the date of the signature of the present Convention, to the vessels, citizens, and subjects of the two Powers; it being well understood that this agreement is not to be construed to the prejudice of any claim which either of the two high contracting parties may have to any part of the said country, nor shall it be taken to affect the claims of any other Power or State to any part of the said country; the only object of the high contracting parties, in that respect, being to prevent disputes and differences amongst themselves.”

Conventions  
of 1818 and  
1827.

(n) Congress Documents, 20th Cong. and 1st Sess. No. 199. Greenhow, Proofs and Illustrations, H.

In 1827, another Convention was concluded between the two parties, by which it was agreed:—

“Article 1. All the provisions of the third Article of the Convention concluded between the United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland, on the 20th of October, 1818, shall be, and they are hereby further indefinitely extended and continued in force, in the same manner as if all the provisions of the said Article were herein specifically recited.

“Article 2. It shall be competent, however, to either of the contracting parties, in case either should think fit at any time after the 20th of October, 1828, on giving due notice of twelve months to the other contracting party, to annul and abrogate this Convention; and it shall, in such case, be accordingly entirely annulled and abrogated, after the expiration of the said term of notice.

“Article 3. Nothing contained in this Convention, or in the third Article of the Convention of the 20th of October, 1818, hereby continued in force, shall be construed to impair, or in any manner affect, the claims which either of the contracting parties may have to any part of the country westward of the Stony or Rocky Mountains” (o).

Treaty of  
1846.

The notification provided for by the Convention having been given by the American Government, new discussions took place between the two Governments, which were terminated by a treaty concluded at Washington, in 1846. By the first Article of that treaty it was stipulated, that from the point on the 49th parallel of north latitude, where the boundary laid down in existing treaties and conventions between the United States and Great Britain terminates, the line of boundary shall be continued westward along the said 49th parallel of north latitude to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly through the middle of the said channel, and of Fuca Straits, to the Pacific Ocean; provided, however, that the navigation of the whole of the said channel and straits, south of the 49th parallel of north latitude, remain free and open to both parties. The second Article stipulated for the free navigation of the Columbia River by the Hudson's Bay Company, and the British subjects trading with them, from the 49th degree of north latitude to the ocean. The third Article provided that the possessory rights of the Hudson's Bay Company, and of all other British



subjects, to the territory south of the parallel of the 49th degree of north latitude, should be respected (*p*).

The treaty of 1846 did not, however, completely settle the question. It was only terminated in 1872 by being submitted to the award of the German Emperor as arbitrator. The 34th Article of the Treaty of Washington, 8th of May, 1871, after referring to the Treaty of 1846, and stating that the Commissioners appointed to determine that portion of the boundary which runs southerly through the middle of the channel separating Vancouver's Island from the Continent, and of Fuca Straits to the Pacific Ocean, were unable to agree, provides "that the respective claims of the Government of Her Britannic Majesty, and the Government of the United States, shall be submitted to the arbitration and award of His Majesty the German Emperor, who, having regard to the above-mentioned Article of the said Treaty, shall decide thereupon finally, and without appeal, which of these claims is most in accordance with the true interpretation of the Treaty of June 15, 1846" (*q*).

Arbitration  
before the  
German  
Emperor.

Great Britain contended that the boundary line should be run through the Rosario Strait, while the United States asserted that it should be run through the Canal de Haro. The position of the boundary was a matter of considerable importance, not only in assigning several islands to the successful party, but also in settling the rights of ownership over the navigable channels between Vancouver's Island and the mainland. The whole question turned upon the interpretation to be put on the existing treaties. Cases and counter-cases were submitted by each Government to the German Emperor, and on the 21st October, 1872, His Imperial Majesty awarded that "The claim of the Government of the United States, viz., that the line of boundary between the dominions of Her Britannic Majesty and the United States should be run through the Canal of Haro, is most in accordance with the true interpretation of the Treaty" of 1846 (*r*).

In 1885, the Powers assembled at the Conference of Berlin, that is, all the maritime States of Europe and the United States (*s*), being desirous to obviate the misunderstanding and disputes which might in future arise from new acts of occupation on the coast of

Occupations  
on the  
African coast.  
The West  
African  
Conference.

(*p*) United States Statutes at Large, vol. ix. pp. 109, 869. As to the Oregon controversy, see Moore, Digest, vol. i. §§ 80, 81, 104; vol. v. § 835. Sir T. Twiss, The Law of Nations, vol. i. §§ 125, 126; *Ibid.* The Oregon Question (1846).

(*q*) Parl. Papers, N. America, No. 3 (1873), p. 1. See Appendix C.

(*r*) Parl. Papers, N. America, No. 9 (1873), p. 3. See Cushing, The Treaty of Washington, p. 203.

(*s*) As to the position of the U. S. A., see p. 97, *ante*.

Africa, discussed and adopted a declaration introducing into international relations certain uniform rules with reference to future occupations of that coast. Any Power taking possession of a tract of land outside any possessions it had before is to give notice to the other signatory Powers, in order to enable them, if need be, to make good any claims of their own; and the signatory Powers recognise 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 of transit under the conditions agreed upon in the General Act (*t*).

MARITIME  
TERRITORIAL  
JURISDICTION.

The maritime territory of every State extends to the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands belonging to the same State. The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon shot will reach from the shore along all the coasts of the State. Within these limits, its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation (*u*).

The Case  
of *The*  
*Franconia*.

The extent and nature of the jurisdiction of a State over its territorial waters have been much discussed in recent times. In the well-known case of *The Franconia* the Court held that it had no jurisdiction over a criminal offence committed by a foreigner on board a foreign ship which was on the open sea but within three miles of the coast of England. The difficulty and doubt surrounding the question is shown by the fact that of the fourteen judges who attended during the arguments in *The Franconia* seven pronounced against the jurisdiction, while six claimed it. One who agreed with the majority died before judgment was delivered (*x*). The decision, therefore, could not be considered as altogether satisfactory, and the question has now been set at rest, as far as English law is concerned, by an Act of Parliament known as the Territorial Waters Jurisdiction Act, 1878 (*y*).

Territorial  
Waters

By this Act, after reciting that "the rightful jurisdiction of

(*t*) Arts. 34, 35. Hertslet, Map of Africa by Treaty, p. 20; for notifications under Art. 35, see *ibid.* pp. 10, 47, 315, 327, 358, 772, 811, 1016, 1068, 1069. Cf. British State Papers, Africa, No. 4 (1885), p. 312.

(*u*) Grotius, De Jur. Bel. ac Pac. lib. ii. cap. 3, § x. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 8. De Dominio Maris, cap. 2. Vattel, lib. i.

ch. 23, § 289. Valin, Comm. sur l'Ordonnance de la Marine, liv. v. tit. 1. Azuni, Diritto Marit. pt. i. cap. 2, Art. 3, § 15. Galiani, Dei Doveri dei Principi Neutrali in Tempo di Guerra, liv. i. Life and Works of Sir L. Jenkins, vol. ii. p. 780.

(*x*) *R. v. Keyn (The Franconia)* (1876), 2 Ex. D. 63.

(*y*) 41 & 42 Vict. c. 73.

Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom, and of all other parts of Her Majesty's dominions to such distance as is necessary for the defence and security of such dominions" (z), it is enacted (amongst other things) that, "An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly." "The territorial waters of Her Majesty's dominions,' in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions."

Jurisdiction  
Act, 1878.

Other States may in time adopt a similar course, and claim as their own the three-mile belt of sea for all purposes of jurisdiction, and it is not improbable that in course of time the limit may be extended still further. Norway claims four miles. Spain has, on more than one occasion, put forward a claim to exercise maritime jurisdiction at a distance of two leagues, or six nautical miles from the Spanish coast. Other nations have, however, resisted this claim. In 1874, Lord Derby intimated to the Spanish Government that their pretensions would not be submitted to by Great Britain, and that any attempt to carry them out would lead to very serious consequences (a). Mr. Fish also stated, on the part of the United States Government, "We have always understood and asserted that, pursuant to public law, no nation can rightfully claim jurisdiction at sea beyond a marine league from its coast" (b). The extent of territorial waters was incidentally a disputed point before the Suez Canal Commission which sat at Paris in 1885. The original draft of Article V. of the Convention read "in the territorial waters of Egypt," for which the British

Extension of  
three-mile  
belt.

(z) See *Reg. v. Dudley* (1884), 14 Q. B. D. 273, 281, per Lord Coleridge, L. C. J.

25th Dec. 1874; U. S. Dipl. Cor. 1875, p. 641.

(b) U. S. Dipl. Cor. 1875, p. 649; Wharton, Digest, § 32.

(a) Lord Derby to Mr. Watson,



amendment of three marine miles from the ports of access of the canal was afterwards substituted. Commenting on this amendment M. de Freycinet wrote, "This limit" (namely, three marine miles) "is borrowed from the traditions of international law; nevertheless, it should be observed that at the time when this limit was established, and when it came into usage, it represented approximately cannon range. Since then, the range of cannon having increased, it would be natural to extend proportionately the zone of territorial waters." But the French Government, willing to be conciliatory, waived their contention (*c*).

Extent of the  
term *coasts* or  
*shore*.

The term "coasts" includes the natural appendages of the territory which rise out of the water, although these islands are not of sufficient firmness to be inhabited or fortified; but it does not properly comprehend all the shoals which form sunken continuations of the land perpetually covered with water. The rule of law on this subject is 'terrae dominium ubi finitur armorum vis'; and since the introduction of firearms, that distance has usually been recognised to be about three miles from the shore. In a case before Sir W. Scott (Lord Stowell) respecting the legality of a capture alleged to be made within the neutral territory of the United States, at the mouth of the river Mississippi, a question arose as to what was to be deemed the shore, since there are a number of little mud islands, composed of earth and trees drifted down by the river, which form a kind of portico to the main land. It was contended that these were not to be considered as any part of the American territory—that they were a sort of "no man's land," not of consistency enough to support the purposes of life, uninhabited, and resorted to only for shooting and taking birds' nests. It was argued that the line of territory was to be taken only from the Balize, which is a fort raised on made land by the former Spanish possessors. But the learned judge was of a different opinion, and determined that the protection of the territory was 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 were formed. Their elements were derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the

(*c*) Parl. Papers, Egypt, No. 1 (1888); *infra*, p. 321. A majority of the members of the Institut de Droit International at the Paris meeting of 1894 resolved that a zone of six marine miles from low-water mark ought to

be considered territorial for all purposes. Cf. *Annuaire de l'Institut de Droit International*, vol. xiii. p. 329. See Hall, *International Law* (5th ed.), p. 155.

books of law, 'Quod vis fluminis de tuo prædio detraxerit, et vicino prædio attulerit, palam tuum remanet,' even if it had been carried over to an adjoining territory. Whether they were composed of earth or solid rock would not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil (*d*).

The exclusive territorial jurisdiction of the British crown over the enclosed parts of the sea along the coasts of the island of Great Britain has immemorially extended to those bays called the 'King's Chambers'; *i.e.*, portions of the sea cut off by lines drawn from one promontory to another. Likewise Great Britain holds Conception Bay (in Newfoundland), which has an entrance twenty miles wide, to constitute part of British territory. A similar jurisdiction is also asserted by the United States over the Delaware Bay, which is eighteen miles wide; Chesapeake Bay, which is twelve miles wide at its entrance; Cape Cod Bay, thirty-two miles wide; and other bays and estuaries forming portions of their territory (*e*). Similarly France claims to exercise exclusive jurisdiction over the Bay of Cancale, whose entrance is seventeen miles wide. It has been claimed by some jurists that inlets having an entrance more than ten miles wide cannot be held to be territorial. There is no unanimity of opinion on the question. Thus the Institute of International Law, representing the views of leading jurists, decided in favour of twelve miles, subject to greater extent of jurisdiction established by long-continued usage. Thus, Article 3 of the Rules adopted in 1894 says: "For bays the territorial sea follows the sinuosities of the coast, except that it is measured from a straight line drawn across the bay at the place nearest the opening towards the sea, where the distance between the two sides of the bay is twelve miles in width, at least unless a continuous and secular usage has sanctioned a greater width" (*f*).

The case of *The Direct United States Cable Co. v. The Anglo-American Telegraph Co.* (*g*) may be referred to. This involved the position of Conception Bay in Newfoundland; and Lord Blackburn delivered the judgment of the Privy Council. It was observed that the authority of the English common law on the question was slender and vague; the test suggested by Sir Edward Coke and Sir Matthew Hale was indefinite. In *Reg. v. Cunningham* (*h*), where it was necessary to decide whether a certain spot

The 'King's  
Chambers.'

(*d*) *The Anna* (1805), 5 C. Rob. 385 (*o*).

(*e*) Cf. Moore, Digest, vol. i. pp. 735 *seq.* See the case of *The Grange* (1793), Opinions of U. S. Att.-Gen., vol. i. p. 32; *The Alle-*

*ganean* (1885), Scott, Cases, p. 143, and other cases there cited.

(*f*) *Annuaire de l'Institut de Droit Int.*, vol. xiii. p. 329.

(*g*) (1877), L. R. 2 App. C. 394.

(*h*) (1859), Bell, Cr. C. 86.

in the Bristol Channel was within the county of Glamorgan, it was held that the whole of the inland sea between Glamorgan and Somerset was to be considered as being within those counties by whose shores it was bounded. Whether a branch of the sea was to be treated as part of the adjoining territory depended on established usage. As to the law of nations, said Lord Blackburn, it was universally agreed that harbours, estuaries, and land-locked bays belonged to the territory of the nation that possessed the shores round them; but there was no agreement as to the meaning of "bay" for this purpose. Different suggestions had been made, *e.g.*, defensibility from the shore, a width of cannon-shot from shore to shore (*i.e.*, three miles), some suggested six miles, others ten miles; thus there was no agreement among text-writers. Lord Blackburn held, then, that in the present case the principle of exercise of dominion and acquiescence therein by other nations may be applied as the determining factor; and accordingly Conception Bay may be said to have become by prescription part of the exclusive territory of Great Britain (*i*).

The former  
"Hovering  
Acts."

It appears from Sir Leoline Jenkins, that both in the reigns of James I. and of Charles II. the security of British commerce was provided for by express prohibitions against the roving or hovering of foreign ships of war so near the neutral coasts and harbours of Great Britain as to disturb or threaten vessels homeward or outward bound; and that captures by such foreign cruisers, even of their enemies' vessels, would be restored by the Court of Admiralty if made within the King's Chambers. So also the British "Hovering Acts," passed in 1736 (9 Geo. II. cap. 35) and 1784 (24 Geo. III. cap. 47), assume, for certain revenue purposes, a jurisdiction of four leagues from the coasts, by prohibiting foreign goods to be transhipped within that distance without payment of duties. A similar provision is contained in the revenue laws of the United States (embodied in the Act of 1799); and both these provisions have been declared by judicial authority, in each country, to be consistent with the law and usage of nations (*k*).

Customs  
legislation at  
the present  
time.

The British "Hovering Acts" have been long since repealed. The present Customs legislation makes a distinction as regards the extent of jurisdiction claimed for revenue purposes, between ships

(*i*) See *supra*, p. 268.

(*k*) Life and Works of Sir L. Jenkins, vol. ii. pp. 727, 728, 780. Opinion of the United States Attorney-General on the capture of the British ship *Grange* in the Delaware Bay, 1793. Waite, American State Papers,

vol. i. p. 75; Opinions of U. S. Att.-Gen., vol. i. p. 32. *Le Louis* (1817), 2 Dods. Ad. 245; *Church v. Hubbard* (1804), 2 Cranch, 187. Cf. Vattel, *Droit des Gens*, liv. i. ch. 22, § 281; Moore, *Digest*, vol. i. § 151; Piggott, *Nationality*, vol. ii. pp. 40 *seq.*



belonging to British subjects and ships belonging to foreigners. Thus it is now enacted that "If any ship or boat shall be found or discovered to have been within any port, bay, harbour, river, or creek of the United Kingdom, or the Channel Islands, or within three leagues of the coast thereof, if belonging wholly or in part to British subjects, or having half the persons on board subjects of Her Majesty, or within one league if not British, having false bulkheads, &c.," she shall be liable to forfeiture, or to be dealt with as the statute directs. The distinction is also maintained for individuals; thus every person found to have been on board a ship liable to forfeiture, "within three leagues of the coast if a British subject, or within one league if a foreigner," shall forfeit a sum not exceeding 100*l.* (*l*). Any officer of Customs may go on board any ship after clearance outwards within one league of the coast of the United Kingdom, and demand the ship's clearance, which the master must produce, or be liable to a penalty of 500*l.* (*m*).

The right of fishing in the waters adjacent to the coasts of any nation, within its territorial limits, belongs exclusively to the subjects of the State. The exercise of this right, between Great Britain and France, was regulated by a convention concluded between these two Powers, in 1839; by the 9th Article of which it is provided, that French subjects shall enjoy the exclusive right of fishing along the whole extent of the coasts of France, within the distance of three geographical miles from the shore, at low-water mark, and that British subjects shall enjoy the same exclusive right along the whole extent of the coasts of the British Islands, within the same distance; it being understood, that upon that part of the coasts of France lying between Cape Carteret and the point of Monga, the exclusive right of French subjects shall only extend to the fishery within the limits mentioned in the first Article of the Convention; it being also understood, that the distance of three miles, limiting the exclusive right of fishing upon the coasts of the two countries, shall be measured, in respect to bays of which the opening shall not exceed ten miles, by a straight line drawn from one cape to the other (*n*).

By the treaty of 1783, recognising the independence of the United States, Great Britain permitted American fishermen to

Right of fishery.

Convention between Great Britain and France;

Convention between Great Britain and the United States.

(*l*) The Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 179.

(*m*) The Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 134. As

to what is a clearance, see Parl. Papers, 1873, N. America (No. 2), p. 113.

(*n*) Annales Maritimes et Coloniales, 1839, I<sup>re</sup> Partie, p. 861.

fish on the Grand Bank and other banks and coasts of Newfoundland, in the Gulf of St. Lawrence, and on the coasts, bays, and creeks of other British possessions in North America; and also to land for the purpose of drying their nets and curing fish in the unsettled bays, harbours, and creeks of Nova Scotia, the Magdalen Islands, and Labrador, as long as the same should remain unsettled. After the war of 1812 the question arose whether these concessions had been abrogated by the war. The United States urged that the concessions made in 1783 were not new, but amounted merely to a confirmation of the rights which American citizens had previously enjoyed, so that the war could not affect them. Great Britain claimed that such fishing rights depended solely on convention, which was liable to be abrogated by war, and that the concessions made in 1783 were only temporary. After a good deal of negotiation between the two Governments, a new treaty was concluded between them in 1818. After reciting that "differences have arisen respecting the liberty claimed by the United States, for the inhabitants thereof to take, dry, and cure fish, on certain coasts, bays, harbours, and creeks, of his Britannic Majesty's dominions in America," it was agreed between the contracting parties, "that the inhabitants of the said United States shall have, forever, in common with the subjects of his Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland, which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands; on the shores of the Magdalen Islands; and also on the coasts, bays, harbours, and creeks, from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belleisle, and thence northwardly indefinitely along the coast; without prejudice, however, to any of the exclusive rights of the Hudson Bay Company. And that the American fishermen shall also have liberty, forever, to dry and cure fish in any of the unsettled bays, harbours, and creeks, of the southern part of the coast of Newfoundland, here above described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish, on or within three marine miles of any of the coasts, bays, creeks, or harbours, of his Britannic Majesty's dominions in

America, not included within the above-mentioned limits. Provided, however, that the American fishermen shall be admitted to enter such bays or harbours, for the purpose of shelter, and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them" (o).

Another treaty was negotiated in 1854 on the basis of reciprocity, that is, the subjects of each State were permitted to fish in the waters of the other, and the produce was admitted into both countries free of duty. This treaty came to an end in 1866, through notice of terminating it being given by the United States; and the question was for a time regulated by the Treaty of Washington. By Article XVIII. of the latter convention, the inhabitants of the United States had, in addition to their rights under the treaty of 1818, in common with British subjects, for the term of ten years from the date when the treaty came into force, and further, until after two years' notice of terminating the treaty should be given by either party, the liberty to take fish of every kind, except shell-fish, on the sea-coasts and shores, and in the bays, harbours, and creeks of the Provinces of Quebec, Nova Scotia, and New Brunswick, and the Colony of Prince Edward's Island, and of the several Islands thereunto adjacent, without being restricted to any distance from the shore; with permission to land upon the said coasts and shores and islands, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish. This only applied to sea-fishing; salmon and other river-fishing being reserved exclusively for British fishermen. Article XIX. gave to British subjects corresponding rights, on the same terms, on the eastern sea-coasts and shores of the United States north of the 39th parallel of N. lat. As long as the treaty was in force, fish-oil and fish of all kinds (except fish of the inland lakes, and of the rivers falling into them, and except fish preserved in oil), being the produce of Canadian or United States fisheries, were to be admitted into each country, respectively, free of duty (p). It being asserted that this treaty gave a greater advantage to American than to British subjects, a Commission was appointed to settle what compensation, if any, should be paid by the United States to England; and on the 23rd of November,

Treaty of  
1854.Treaty of  
Washington,  
1871.

(o) British and Foreign State Papers, vol. vi. (1818—1819); Elliot, Diplomatic Code, vol. i. p. 281.

(p) The Treaty of Washington, 1871, Arts. xviii. xix. xxi. See 35 & 36 Vict. c. 45. See also Appendix C.



1877, the Commission, which met at Halifax, awarded that the sum of 5,500,000 dollars in gold be so paid. Some difficulties were raised by the United States as to complying with the award; but the money was ultimately paid (*q*).

The later abrogation by the United States of the fishery articles of the Treaty of Washington (*r*), subjected the relations between the two countries to the stipulation of the Convention of 1818. The provisions of this Convention relating to the right of exclusion were construed very strictly by the Canadian Government; and friction arising between the Dominion, Great Britain, and the United States, commissioners were appointed by the respective Governments with a view to arriving at an amicable settlement (*s*).

Draft Treaty,  
1888.

On 15th February, 1888, a provisional treaty, known as the Chamberlain-Bayard treaty, was signed at Washington. By this treaty it was provided that Great Britain and the United States should appoint a mixed commission to delimit, as in the now stating treaty specified, the waters of Canada and Newfoundland as to which the United States, by the Treaty of 1818, had renounced all liberty to take, cure, or dry fish. The three marine miles mentioned in the 1818 Convention were to be measured seaward from low-water mark; but in every bay, creek, or harbour, not otherwise specially provided for, such miles were to be measured seaward from a straight line drawn across such waters in the part nearest the entrance at the first point where the width does not exceed ten miles. There were other provisions similar in principle to those contained in the Treaty of 1871. The plenipotentiaries exchanged protocols establishing a *modus vivendi* for two years (*t*). On 21st August, 1888, the United States Senate, by the Republican majority, refused to ratify the treaty (*u*); so that the provisions of the convention of 1818 remained applicable.

Further  
fishery  
disputes  
between  
Great Britain  
and the  
United States.

As a result of the concessions granted to American fishermen in 1818, disputes arose between Newfoundland (which had received responsible government in 1855) and the United States; so that Great Britain became involved in them. A provisional settlement was made in 1890, by the Bond-Blaine Convention, but, at the instance of Canada, Great Britain did not ratify it. In 1893 the Newfoundland Legislature passed the Foreign Fishing Vessels Act, which imposed various prohibitions on foreign fish-

(*q*) See London Gazette, 16th Nov. 1878, Supplement.

(*r*) Wharton, Digest, p. 64.

(*s*) Mr. Chamberlain to Lord Salisbury, The Times, 3rd March, 1888.

(*t*) Mr. Chamberlain to Lord Salis-

bury, The Times, 22nd Feb. 1888; *Ibid.* 17th Feb. 1888; Annual Register, 1888.

(*u*) British and Foreign State Papers, vol. lxxix. (1887-1888); Annual Register, 1888, p. 406.

ing vessels, but did not interfere with rights established by treaty. In 1902 the provisional Bond-Hay Treaty was agreed upon, but being "amended to death" by the United States Senate, it was deemed to be rejected. Newfoundland then passed further Acts, in 1905 and in 1906, imposing restrictions on foreign fishermen, whereupon the United States protested and Great Britain intervened. In October, 1906, a *modus vivendi* for the following season was established between Great Britain and the United States, the Newfoundland Act of 1906 being suspended and that of 1905 modified. Negotiations were afterwards renewed (June, 1907), when the American Government proposed a "reference of pending questions under the treaty of 1818 to arbitration before the Hague Tribunal" (which had been constituted by the Hague Peace Conference of 1899). In the meantime, the *modus vivendi*, slightly altered, was renewed, though another was adopted in August, 1908 (v).

There was also a long-standing dispute between Great Britain and France with regard to fishing rights and incidental matters on the Newfoundland shore, arising out of the interpretation to be placed on Article 13 of the Treaty of Utrecht, 1713, and on the arrangements made by the Treaty of Versailles, 1783 (x). In 1890, after much negotiation, a *modus vivendi* between Great Britain and France was arranged, though it failed to satisfy Newfoundland. Eventually, by the Anglo-French Convention (1904), France gave up certain rights conferred by the Treaty of Utrecht and later treaties, but retained the right to fish during the fishing season, equally with British subjects, in the territorial waters of Newfoundland, and to enter any port or harbour and obtain supplies, subject to the local regulations. In return for the abandonment of the former rights, Great Britain agreed to indemnify France, in respect of any loss suffered by her fishermen, to an amount to be determined by an arbitral tribunal.

Fishery  
dispute  
between  
Great Britain  
and France.

Besides those bays, gulfs, straits, mouths of rivers, and estuaries which are enclosed by capes and headlands belonging to the territory of the State, a jurisdiction and right of property over certain other portions of the sea have been claimed by different nations,

Claims to  
other portions  
of the sea on  
the ground of  
prescription.

(v) Cf. British and Foreign State Papers, vol. lxxxiii. (1890—1891); Parl. Papers, United States, No. 1 (1906); Parl. Papers, Newfoundland, 1907. See also Cobbett, Cases, vol. i. pp. 153 *seq.*, and other references there cited. For the decision of the

Hague Court of Arbitration (Sept. 1910), to which the question of the North Atlantic Coast Fisheries was submitted, see Amer. Journ. of Int. Law, vol. iv. (1910), pp. 948 *seq.*

(x) Lord Derby to the Governor of Newfoundland, June 12, 1884.

on the ground of immemorial use. Such, for example, was the sovereignty formerly claimed by the Republic of Venice over the Adriatic. The maritime supremacy claimed by Great Britain over what are called the Narrow Seas has generally been asserted merely by requiring certain honours to the British flag in those seas, which have been rendered or refused by other nations, according to circumstances; but the claim itself has never been sanctioned by general acquiescence (*y*), and is now no longer valid, if it has not, indeed, already been abandoned (*z*).

Straits. Straits are passages communicating from one sea to another. If the navigation of the two seas thus connected is free, the navigation of the channel by which they are connected ought also to be free. Even if such strait be bounded on both sides by the territory of the same sovereign, and is at the same time so narrow as to be commanded by cannon shot from both shores, the exclusive territorial jurisdiction of that sovereign over such strait is controlled by the right of other nations to communicate with the seas thus connected. Such right may, however, be modified by special compact, adopting those regulations which are indispensably necessary to the security of the State whose interior waters thus form the channel of communication between different seas, the navigation of which is free to other nations. Thus the passage of the strait may remain free to the private merchant vessels of those nations having a right to navigate the seas it connects, whilst it is shut to all foreign armed ships in time of peace. In 1879 the United States Government repudiated the exclusive claim to the Straits of Magellan; two years later Chile and the Argentine Republic concluded a treaty whereby the Straits were "neutralized," and free navigation was guaranteed to all nations. If a narrow strait separates the territory of two different States, it is not subject to the exclusive sovereignty of either, but belongs to both, the boundary line running through the mid-channel.

The Black Sea, the Bosphorus, and the Dardanelles.

So long as the shores of the Black Sea were exclusively possessed by Turkey, that sea might with propriety be considered a 'mare clausum'; and there seems no reason to question the right of the Ottoman Porte to exclude other nations from navigating the passage which connects it with the Mediterranean, both shores of this passage being at the same time portions of the Turkish territory; but since the territorial acquisitions made by Russia, and

(*y*) Vattel, *Droit des Gens*, liv. i. ch. 23, § 289. Martens, *Précis du Droit des Gens Moderne de l'Europe*, liv. ii. ch. 1, § 42. *Edinburgh Review*, vol. xi. Art. 1, pp. 17—19. Wheaton,

*Hist. Law of Nations*, pp. 154—157. Klüber, § 132.

(*z*) Cf. Oppenheim, *International Law*, vol. i. §§ 191, 195.



the commercial establishments formed by her on the shores of the Euxine, both that Empire and the other maritime Powers have become entitled to participate in the commerce of the Black Sea, and consequently to the free navigation of the Dardanelles and the Bosphorus. This right was expressly recognised by the seventh Article of the Treaty of Adrianople, concluded in 1829, between Russia and the Porte, both as to Russian vessels and those of other European States in amity with Turkey (*a*).

The right of foreign vessels to navigate the interior waters of Turkey, which connect the Black Sea with the Mediterranean, does not extend to ships of war. The ancient rule of the Ottoman Empire, established for its own security, by which the entry of foreign vessels of war into the canal of Constantinople, including the Strait of the Dardanelles and that of the Black Sea, has been at all times prohibited, was expressly recognised by the treaty concluded at London the 13th July, 1841, between the five great European Powers and the Ottoman Porte (*b*).

By the first Article of this treaty, the Sultan declared his firm resolution to maintain, in future, the principle invariably established as the ancient rule of his empire; and that so long as the Porte should be at peace, he would admit no foreign vessel of war into the said Straits. The five Powers, on the other hand, engaged to respect this determination of the Sultan, and to conform to the above-mentioned principle. By the second Article it was provided, that, in declaring the inviolability of this ancient rule of the Ottoman Empire, the Sultan reserved the faculty of granting, as heretofore, firmans allowing the passage to light-armed vessels employed according to usage, in the service of the diplomatic legations of friendly Powers. By the third Article, the Sultan also reserved the faculty of notifying this treaty to all the Powers in amity with the Sublime Porte, and of inviting them to accede to it (*c*).

The treaty of 1841 was revised by the Treaty of Paris, 1856 (*d*), but the principles contained in the former treaty were re-established with very slight changes. The Sultan, however, agreed to permit the passage of light ships of war, which the contracting parties were authorized to station at the mouths of the Danube, in order to secure the execution of the regulations relative to the liberty of that river (*e*). The Treaty of Paris provided for the

Treaty of  
Paris, 1856.

(*a*) Martens, *Nouveau Recueil*, tom. viii. p. 143.

(*b*) T. E. Holland, *European Concert in the Eastern Question* (1885), pp. 95 *seq.*

(*c*) Wheaton, *Hist. Law of Nations*, pp. 583—585.

(*d*) Art. x. Hertslet, *Map of Europe by Treaty*, vol. ii. p. 1255.

(*e*) Art. iii. *Ibid.* p. 1268.

neutralization of the Black Sea, by excluding from it ships of war of every flag. Russia and Turkey also agreed not to establish any military-maritime arsenals on its coasts (*f*).

London  
Convention of  
1871.

In 1870 Russia seized upon the opportunity afforded her by the Franco-Prussian war to obtain the abrogation of these latter provisions, and a declaration was then made by the Powers assembled at the Congress of London that "the principle of the closing of the Straits, such as it has been established, is maintained," but that power should be given to the Sultan "to open the Straits in time of peace to the vessels of war of friendly and allied Powers, in case the Sublime Porte should judge it necessary in order to secure the execution of the stipulations of the Treaty of Paris, 1856" (*g*). The abrogation of the Article in the Treaty of Paris preventing the building of arsenals, also gave both Turkey and Russia the power of forming such establishments on the coasts of the Black Sea. Article III. of this convention declares that "The Black Sea remains open, as heretofore, to the mercantile marine of all nations."

Berlin  
Congress.

The Treaty of Berlin contains no express mention of the Dardanelles, but in the 18th Protocol Lord Salisbury declared on behalf of England "that the obligations of her Britannic Majesty relating to the closing of the Straits, do not go further than an engagement with the Sultan to respect in this matter his Majesty's independent determinations in conformity with the spirit of existing treaties." The plenipotentiaries of Russia declared, in reply, that "without being able exactly to appreciate the meaning of" Lord Salisbury's proposition, "in their opinion, the principle of the closing of the Straits is a European principle," and that existing stipulations are binding on the part of all the Powers, "not only as regards the Sultan, but also as regards all the Powers signatory to these transactions" (*h*). The intention of the British declaration was, apparently, to reserve liberty to British ships of war to enter the Straits with the consent of the Porte.

During the Russo-Japanese war, 1904, Russia attempted to evade her obligations, by sending through the Straits cruisers (*e.g.*, the *Smolensk* and the *Petersburg*) belonging to her Black Sea Volunteer Fleet, flying the commercial flag, and afterwards em-

(*f*) Arts. xi., xiii. Cf. British and Foreign State Papers, vol. xlvi. (1855—1856).

(*g*) Art. ii. of Convention of 13th March, 1871. Hertslet, Map of Europe by Treaty, vol. iii. p. 1921; and see *ibid.* p. 1892, for the Russian Note

denouncing the Black Sea clauses of the Treaty of Paris. Cf. British and Foreign State Papers, vol. lxi. (1870—1871).

(*h*) Holland, European Concert, p. 226.

ploying them in restraint of neutral trade. A strong protest was made by Great Britain, some of whose merchantmen had been seized by the converted cruisers, on the ground, *inter alia*, that such proceedings constituted a violation of the Treaty of Paris and the Straits convention. Accordingly, Russia abandoned her project.

In 1912, during the Turco-Italian war, the free navigation by neutral merchantmen was for a time impeded by mines laid by Turkey in the Dardanelles to check the advance of the Italian fleet towards Constantinople. After protests from neutral Powers, however, the mines were removed, and the right to peaceful navigation was restored.

The supremacy asserted by the King of Denmark over the Sound and the two Belts which form the outlet of the Baltic Sea into the ocean, is rested by the Danish public jurists upon immemorial prescription, sanctioned by a long succession of treaties with other Powers. According to these writers, the Danish claim of sovereignty has been exercised from the earliest times beneficially for the protection of commerce against pirates and other enemies by means of guard-ships, and against the perils of the sea by the establishment of lights and land-marks. The Danes continued for several centuries masters of the coasts on both sides of the Sound, the province of Scandia not having been ceded to Sweden until the treaty of Roeskild in 1658, confirmed by that of 1660, it which it was stipulated that Sweden should never lay claim to the Sound tolls in consequence of the cession, but should content herself with a compensation for keeping up the lighthouses on the coast of Scandia. The exclusive right of Denmark was recognised as early as 1368, by a treaty with the Hanseatic republics, and by that of 1490, with Henry VII. of England, which prohibits English vessels from passing the Great Belt as well as the Sound, unless in case of unavoidable necessity; in which case they were to pay the same duties at Wyborg as if they had passed the Sound at Elsinore. The treaty concluded at Spire, in 1544, with the Emperor Charles V., which has commonly been referred to as the origin, or at least the first recognition, of the Danish claim to the Sound tolls, merely stipulates, in general terms, that the merchants of the Low Countries frequenting the ports of Denmark should pay the same duties as formerly.

Danish  
sovereignty  
over the  
Sound and  
the Belts.

The treaty concluded at Christianople, in 1645, between Denmark and the united provinces of the Netherlands, is the earliest convention with any foreign Power by which the amount of duties



to be levied on the passage of the Sound and Belts was definitely ascertained. A tariff of specific duties on certain articles therein enumerated was annexed to this treaty, and it was stipulated that "goods not mentioned in the list should pay, according to mercantile usage, and what has been practised from ancient times." A treaty was concluded between the two countries at Copenhagen, in 1701, by which the obscurity in that of Christianople, as to the non-specified articles, was meant to be cleared up. By the third Article of the new treaty it was declared, that as to the goods not specified in the former treaty, "The Sound duties are to be paid according to their value; that is, they are to be valued according to the place from whence they come, and one per centum of their value to be paid." These two treaties of 1645 and 1701, are constantly referred to in all subsequent treaties, as furnishing the standard by which the rates of these duties were to be measured as to 'privileged' nations. Those not privileged paid according to a more ancient tariff for the specified articles, and one and a quarter per cent. on unspecified articles (*i*).

Convention of  
1841.

By the arrangement concluded at London and Elsinore, in 1841, between Denmark and Great Britain, the tariff of duties levied on the passage of the Sound and Belts was revised, the duties on non-enumerated articles were made specific, and others reduced in amount, whilst some of the abuses which had crept into the manner of levying the duties in general were corrected. The benefit of this arrangement, which was to subsist for the term of ten years, was extended to all other nations privileged by treaty (*k*).

Abolition of  
the Sound  
dues.

The rights relating to the navigation of these Straits were afterwards permanently settled. In 1857, a treaty was entered into by Denmark with Great Britain, Austria, Belgium, France, Hanover, Mecklenburg-Schwerin, Oldenburg, the Netherlands, Prussia, Russia, Sweden, and Norway, and the Hanse Towns, by which the King of Denmark agreed (Article I.) not to levy any dues or charges upon any ships belonging to any of the contracting States that passed through the Belts or the Sound, "whether they simply traverse Danish waters, or whether they may be obliged by casualties, or by commercial operations, to anchor or lie to therein. No vessel whatever shall henceforward be subjected under any pretext, to any detention or impediment whatever, in

(*i*) Schlegel, Staatsrecht des Königreichs Dänemark, 1 Th. kap. 7, §§ 27—29. Wheaton, Hist. Law of Nations, pp. 158—161.

(*k*) Scherer, Der Sundzoll, seine Geschichte, sein jetziger Bestand und seine Staatsrechtlich—politische Lösung, Beilage Nr. 8—9.

the passage of the Sound or of the Belts; but His Majesty the King of Denmark expressly reserves to himself the right of regulating by special arrangements, not involving visit or detention, the treatment in regard to duties and customs, of vessels belonging to Powers which are not parties to the present treaty." By Article II. Denmark was to preserve and maintain all existing lighthouses, buoys, &c., and to change or set up such new ones as might become necessary. Pilotage was to be optional, and pilotage charges the same as for Danish vessels. A fixed rate of transit duties on goods was to be established, not exceeding 16 skillings Danish per 500 lbs. Danish. As compensation, the contracting parties engaged, by Article IV., to pay a total sum of 30,476,325 rigs-dollars to Denmark, the sum being assessed in certain proportions among the contracting parties, each party being responsible only for the share placed to its own charge. Separate treaties to the same effect were signed by Denmark with the United States and with Sardinia in 1857, with Portugal and the two Sicilies in 1858, with Turkey in 1859, and with Spain in 1860 (*l*).

The Baltic Sea has sometimes been considered by the maritime Powers bordering on its coasts as 'mare clausum' against the exercise of hostilities upon its waters by other States, whilst the Baltic Powers are at peace. This principle was proclaimed in the treaties of armed neutrality in 1780 and 1800, and by the treaty of 1794, between Denmark and Sweden, guaranteeing the tranquillity of that sea. In the Russian declaration of war against Great Britain of 1807, the inviolability of that sea and the reciprocal guarantees of the Powers that border upon it (guarantees said to have been contracted with the knowledge of the British Government) were stated as aggravations of the British proceedings in entering the Sound and attacking the Danish capital in that year. In the British answer to this declaration it was denied that Great Britain had at any time acquiesced in the principles upon which the inviolability of the Baltic is maintained; however she might, at particular periods, have forborne, for special reasons influencing her conduct at the time, to act in contradiction to them. Such forbearance never could have applied but to a state of peace and real neutrality in the north; and she could not be expected to recur to it after France had been suffered, by the conquest of Prussia, to establish herself in full sovereignty

Whether the  
Baltic Sea  
is 'mare  
clausum'?

(*l*) See Hertslet, Map of Europe by Treaty, vol. ii. p. 1301. State Papers, vol. xlvi. p. 24.

along the whole coast, from Dantzic to Lübeck (*m*). That the Baltic cannot be considered a closed sea was implicitly recognised by the Powers that signed the Treaty of Copenhagen, 1857, and the subsequent treaties.

Controversy  
respecting the  
dominion of  
the seas.

The controversy, how far the open sea or main ocean, beyond the immediate vicinity of the coasts, may be appropriated by one nation to the exclusion of others, which once exercised the pens of the ablest and most learned European jurists, can no longer be considered open. Grotius, in his treatise on the Law of Peace and War, hardly admits more than the possibility of appropriating the waters immediately contiguous, though he adduces a number of quotations from ancient authors, showing that a broader pretension has been sometimes sanctioned by usage and opinion. But he never intimates that anything more than a limited portion could be thus claimed; and he uniformly speaks of 'pars,' or 'portus maris,' always confining his view to the effect of the neighbouring land in giving a jurisdiction and property of this sort (*n*). He had previously taken the lead in maintaining the common right of mankind to the free navigation, commerce, and fisheries of the Atlantic and Pacific Oceans, against the exclusive claims of Spain and Portugal, founded on the right of previous discovery, confirmed by possession and the papal grants. The treatise 'De Mare Libero' was published in 1609. The claim of sovereignty asserted by the kings of England over the British seas was supported by Albericus Gentilis in his 'Advocatio Hispanica' in 1613 (*o*). In 1635, Selden published his 'Mare Clausum,' in which the general principles maintained by Grotius are called in question, and the claim of England more fully vindicated than by Gentilis. The first book of Selden's celebrated treatise is devoted to the proposition that the sea may be made property, which he attempts to show, not by reasoning, but by collecting a multitude of quotations from ancient authors, in the style of Grotius, but with much less selection. He nowhere grapples with the arguments by which such a vague and extensive dominion is shown to be repugnant to the law of nations. And in the second part, which indeed is the main object of his work, he has recourse only to proofs of usage and of positive compact, in order to show that Great Britain is entitled to the sovereignty of what are called the Narrow Seas. Father Paul

(*m*) Annual Register, vol. xlix.; State Papers, p. 773.

(*n*) De Jur. Bel. ac Pac. lib. ii. cap. 3, §§ 8—13.

(*o*) Cf. Phillipson, Article on Gentilis in Great Jurists of the World (1913), pp. 113, 122 *seq.*; and Article on Bynkershoek, *ibid.* pp. 398 *seq.*



Sarpi, the celebrated historian of the Council of Trent, also wrote a vindication of the claim of the Republic of Venice to the sovereignty of the Adriatic (*p*). Bynkershoek examined the general question, in the earliest of his published works, with the vigour and acumen which distinguish all his writings. He admits that certain portions of the sea may be susceptible of exclusive dominion, though he denies the claim of the English crown to the British seas on the ground of the want of uninterrupted possession. He asserts that there was no instance, at the time when he wrote, in which the sea was subject to any particular sovereign, where the surrounding territory did not also belong to him (*q*). Pufendorf lays it down, that in a narrow sea the dominion belongs to the sovereigns of the surrounding land, and is distributed, where there are several such sovereigns, according to the rules applicable to neighbouring proprietors on a lake or river, supposing no compact has been made, "as is pretended," he says, "by Great Britain"; but he expresses himself with a sort of indignation at the idea that the main ocean can ever be appropriated (*r*). The authority of Vattel would be full and explicit to the same purpose, were it not weakened by the concession, that though the exclusive right of navigation or fishery in the sea cannot be claimed by one nation on the ground of immemorial use, nor lost to others by non-user, on the principle of prescription, yet it may be thus established where the non-user assumes the nature of a consent or tacit agreement, and thus becomes a title in favour of one nation against another (*s*).

On reviewing this celebrated controversy it may be affirmed, that if those public jurists who have asserted the exclusive right of property in any particular nation over portions of the sea, have failed in assigning sufficient grounds for such a claim, so also the arguments alleged by their opponents for the contrary opinion must often appear vague, futile, and inconclusive. There are only two decisive reasons applicable to the question. The first is physical and material, which alone would be sufficient; but when coupled with the second reason, which is purely moral, will be found conclusive of the whole controversy. (1) Those things which are

Review of the  
controversy.

(*p*) Paolo Sarpi, *Del Dominio del Mare Adriatico* (Venet. 1676).

(*q*) *De Dominio Maris*, Opera Minora, Dissert V., first published in 1702. *Ibid.* cap. vii. ad finem. Cf. Phillipson, Article on Bynkershoek, *ut sup.* pp. 398 *seq.*

(*r*) *De Jure Naturæ et Gentium*, lib. iv. cap. 5, § 7.

(*s*) *Droit des Gens*, liv. i. ch. 23, §§ 279—286. As to the maritime police which may be exercised by any particular nation, on the high seas, for the punishment of offences committed on board its own vessels, or the suppression of piracy and the African slave trade, *vide supra*, pt. ii. ch. ii. pp. 172, 204.

originally the common property of all mankind, can only become the exclusive property of a particular individual or society of men, by means of possession. In order to establish the claim of a particular nation to a right of property in the sea, that nation must obtain and keep possession of it, which is impossible. (2) In the second place, the sea is an element which belongs equally to all men, like the air. No nation, then, has the right to appropriate it, even though it might be physically possible to do so. It is thus demonstrated, that the sea cannot become the exclusive property of any nation. And, consequently, the use of the sea for these purposes remains open and common to all mankind (t).

The Behring  
Sea dispute.

Claims to exercise exclusive jurisdiction over portions of the open sea or high seas—that is, the parts of the ocean lying outside the territorial limits of the maritime nations of the world—lingered on till the first quarter of the nineteenth century. It was the Behring Sea controversy that brought matters to a head. In 1821, when Alaska and the Aleutian Archipelago belonged to Russia, the Emperor Alexander I. prohibited foreign vessels from approaching within a hundred Italian miles of the Alaskan and Siberian coasts and islands belonging to Russia, on the ground that the seas in question constituted a *mare clausum* by reason of first discovery and possession of the adjacent shores. Great Britain and the United States regarded these waters as part of the open sea, and at once protested against the claim to such maritime dominion. It has already been pointed out that Mr. Adams, the United States Secretary of State, denied the existence of an “exclusive territorial jurisdiction” on the part of Russia, and demanded for American citizens freedom from molestation “beyond the ordinary distance to which the territorial jurisdiction extends,” viz., three miles from low-water mark. As a result of the representations made by the United States and Great Britain, Russia abandoned her pretensions, and entered into conventions to that effect with the two countries in 1824 and 1825 respectively (u).

In 1867 Alaska became American territory (x). In 1870 the Alaska Commercial Company acquired by lease from the American Government the islands of St. Paul and St. George for the purpose of carrying on the fur-seal fishery. The company's operations were soon extended, and the thriving industry began to attract Canadian vessels, which did not confine themselves

(t) Ortolan, Règles Internationales et Diplomatie de la Mer, tom. i. pp. 120—126.

(u) See *supra*, pp. 272 *seq.*

(x) See *supra*, p. 274.

to the limits that had been imposed by the United States on her citizens. On the complaint of the American sealers, the United States authorities seized, in 1886, three Canadian schooners while fishing about seventy miles from shore, and brought them before the District Court at Sitka for breaking the law which prohibited the killing of fur-seals, without authorization, "within Alaska territory or the waters thereof." The vessels and cargoes were confiscated and the crews sentenced to imprisonment, the judge having held that the territorial waters of Alaska comprised an extensive area 1,500 miles by 700 miles. Great Britain's protest resulted in the release of the vessels and crew, though after much delay. In 1887 seizures and protests were again made. In 1889 an Act of Congress was passed applying the previous prohibition to "all the dominions of the United States in the waters of Behring Sea"; and soon afterwards more British vessels were captured. Protests and negotiations followed, but proved fruitless. Accordingly Great Britain declared that further seizures would be resisted by force. In 1891 a *modus vivendi* was arranged, with a view to referring the question to arbitration; and the following year a treaty was concluded at Washington, whereby seven arbitrators were to be appointed, two by each of the contending States, and one each by France, Italy, and Scandinavia. The arbitrators met at Paris and gave their award August 15th, 1893. They found that though Russia claimed extensive jurisdiction by the Czar's ukase of 1821, she admitted soon afterwards that her jurisdiction should be limited to the reach of cannon-shot from the shore, and no longer asserted or exercised exclusive jurisdiction in the Behring Sea, or in the seal fisheries, beyond the ordinary limit of territorial waters. They found, too, that Great Britain had not recognised the earlier Russian claim; and that, after 1867, the United States had no right of protection or property in the fur-seals found outside the three-mile limit. Thus the findings were in favour of Great Britain on all the points of international law involved. Further, in order to prevent the extermination of the seals, rules were drawn up, which proved ineffective to a large extent because Japan and Russia failed to agree to similar regulations. In 1911, however, the four Powers agreed to suspend pelagic sealing for fifteen years. From our present point of view, then, the main result of the Behring Sea arbitration is the definitive recognition of the freedom of the high seas. In accordance therewith, the American representative was authorized to declare, in the case of an arbitration with Russia, 1902, that "the Government of the United States claims, neither



in Behring Sea nor in its other bordering waters, an extent of jurisdiction greater than a marine league from its shores" (*y*).

Territorial  
waters.

We have already seen that, by the generally approved usage of nations, which forms the basis of international law, the maritime territory of every State extends: (1) To the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands, belonging to the same State. (2) To the distance of a marine league along all the coasts of the State. (3) To the straits and sounds, bounded on both sides of the territory of the same State, so narrow as to be commanded by cannon-shot from both shores, and communicating from one sea to another (*z*).

Ports, mouths  
of rivers, &c.

The reasons which forbid the assertion of an exclusive proprietary right to the sea in general, will be found inapplicable to the particular portions of that element included in the above designations.

1. Thus, in respect to those portions of the sea which form the ports, harbours, bays, and mouths of rivers of any State where the tide ebbs and flows, its exclusive right of property, as well as sovereignty, in these waters, may well be maintained, consistently with both the reasons above mentioned, as applicable to the sea in general. The State possessing the adjacent territory, by which these waters are partially surrounded and inclosed, has that physical power of constantly acting upon them, and, at the same time, of excluding, at its pleasure, the action of any other State or person, which, as we have already seen, constitutes possession. These waters cannot be considered, from the necessity of the case, to be subject to the common use of all mankind, any more than the adjacent land, which has already been appropriated by a particular people. Neither the material nor the moral obstacle, to the exercise of the exclusive rights of property and dominion, exists in this case. Consequently, the State, within whose territorial limits these waters are included, has the right of excluding every other nation from their use. The exercise of this right may be modified by compact, express or implied; but its existence is founded upon the mutual independence of nations, which entitles every State to judge for itself as to the manner in which the right is to be exercised, subject to the equal reciprocal rights of all other

(*y*) Moore, Digest, vol. i. p. 828. For the Behring Sea controversy, see *ibid.* vol. i. § 172; Cobbett, Cases, vol. i. pp. 124 *seq.* Official documents are to be found in the correspondence

contained in the British Parl. Papers, 1886—1898; and in the account of the Proceedings of the Arbitration at Paris, in 15 vols.

(*z*) *Vide supra*, p. 278.

States to establish similar regulations, in respect to their own waters (a).

2. It may, perhaps, be thought that these considerations do not apply, with the same force, to those portions of the sea which wash the coasts of any particular State, within the distance of a marine league, or as far as a cannon-shot will reach from the shore. The physical power of exercising an exclusive property and jurisdiction, and of excluding the action of other nations within these limits, exists to a certain degree; but the moral power may, perhaps, seem to extend no further than to exclude the action of other nations to the injury of the State by which this right is claimed. It is upon this ground that is founded the acknowledged immunity of a neutral State from the exercise of acts of hostility, by one belligerent Power against another, within those limits. This claim has, however, been sometimes extended to exclude other nations from the innocent use of the waters washing the shores of a particular State, in peace and in war; as, for example, for the purpose of participating in the fishery, which is generally appropriated to the subjects of the State within that distance of the coasts. This exclusive claim is sanctioned both by usage and convention, and must be considered as forming a part of the positive law of nations (b).

3. As to straits and sounds, bounded on both sides by the territory of the same State, so narrow as to be commanded by cannon-shot from both shores, and communicating from one sea to another, we have already seen that the territorial sovereignty may be limited, by the right of other nations to navigate the seas thus connected. The physical power which the State, bordering on both sides the sound or strait, has of appropriating its waters, and of excluding other nations from their use, is here encountered by the moral obstacle arising from the right of other nations to communicate with each other. If the Straits of Gibraltar, for example, were bounded on both sides by the possessions of the same nation, and if they were sufficiently narrow to be commanded by cannon-shot from both shores, this passage would not be the less freely open to all nations; since the navigation, both of the Atlantic Ocean and the Mediterranean Sea, is free to all. Thus it has already been stated that the navigation of the Dardanelles and the Bosphorus, by which the Mediterranean and Black Seas are connected together, is free to all nations, subject to those regu-

(a) *Vide supra*, pt. ii. ch. 2, pp. 282 *seq.*

Gens Moderne de l'Europe, § 153.  
Vattel, Droit des Gens, liv. i. c. 23,  
§ 287.

(b) Martens, Précis du Droit des

lations which are indispensably necessary for the security of the Ottoman Empire. In the negotiations which preceded the signature of the treaty of intervention, of the 15th of July, 1840, it was proposed, on the part of Russia, that an article should be inserted in the treaty, recognising the permanent rule of the Ottoman Empire, that, whilst that empire is at peace, the Straits, both of the Bosphorus and the Dardanelles, are considered as shut against the ships of war of all nations. To this proposition it was replied, on the part of the British Government, that its opinion respecting the navigation of these Straits by the ships of war of foreign nations rested upon a general and fundamental principle of international law. Every State is considered as having territorial jurisdiction over the sea which washes its shores, as far as three miles from low-water mark; and, consequently, any strait which is bounded on both sides by the territory of the same sovereign, and which is not more than six miles wide, lies within the territorial jurisdiction of that sovereign. But the Bosphorus and Dardanelles are bounded on both sides by the territory of the Sultan, and are in most parts less than six miles wide; consequently his territorial jurisdiction extends over both those Straits, and he has a right to exclude all foreign ships of war from those Straits, if he should think proper so to do. By the Treaty of 1809, Great Britain acknowledged this right on the part of the Sultan, and promised to acquiesce in the enforcement of it; and it was but just that Russia should make the same engagement. The British Government was of opinion, that the exclusion of all foreign ships of war from the two Straits would be more conducive to the maintenance of peace, than an understanding that the Strait in question should be a general thoroughfare, open, at all times, to ships of war of all countries; but whilst it was willing to acknowledge by treaty, as a general principle and as a standing rule, that the two Straits should be closed for all ships of war, it was of opinion, that if, for a particular emergency, one of those Straits should be open for one party, the other ought, at the same time, to be open for other parties, in order that there should be the same parity between the condition of the two Straits, when open and shut; and, therefore, the British Government would expect that, in that part of the proposed Convention which should allot to each Power its appropriate share of the measures of execution, it should be stipulated, that if it should become necessary for a Russian force to enter the Bosphorus, a British force should, at the same time, enter the Dardanelles.

It was accordingly declared, in the 4th Article of the Conven-



tion, that the co-operation destined to place the Straits of the Dardanelles and the Bosphorus and the Ottoman capital under the temporary safeguard of the contracting parties, against all aggression of Mehemet Ali, should be considered only as a measure of exception, adopted at the express request of the Sultan, and solely for his defence, in the single case above mentioned; but it was agreed that such measure should not derogate, in any degree, from the ancient rule of the Ottoman Empire, in virtue of which it had, at all times, been prohibited for ships of war of foreign Powers to enter those Straits. And the Sultan, on the one hand, declared that, excepting the contingency above mentioned, it was his firm resolution to maintain, in future, this principle invariably established as the ancient rule of his Empire, and, so long as the P<sup>o</sup>rte should be at peace, to admit no foreign ship of war into these Straits; on the other hand, the four Powers engaged to respect this determination, and to conform to the above-mentioned principle.

This rule, and the engagement to respect it, as we have already seen, were subsequently incorporated into the treaty of the 13th July, 1841, between the five great European Powers and the Ottoman Porte; and as the right of the private merchant vessels of all nations, in amity with the Porte, to navigate the interior waters of the Empire, which connect the Mediterranean and Black Seas, was recognised by the Treaty of Adrianople, in 1829, between Russia and the Porte, the two principles—the one excluding foreign ships of war, and the other admitting foreign merchant vessels to navigate those waters—may be considered as permanently incorporated into the public law of Europe (*c*). These principles were again affirmed by the Treaty of Paris of 1856, the London Conference of 1871, and the Treaty of Berlin, 1878.

The territory of the State includes the lakes, seas, and rivers, entirely enclosed within its limits. The rivers which flow through the territory also form a part of the domain, from their sources to their mouths, or as far as they flow within the territory, including the bays or estuaries formed by their junction with the sea. Where a navigable river forms the boundary of conterminous States, the middle of the channel, or 'thalweg,' is generally taken as the line of separation between the two States, the presumption of law being that the right of navigation is common to both; but this presumption may be destroyed by actual proof of prior occu-

Rivers forming part of the territory of the State.

(c) Wheaton, *Hist. Law of Nations*, pp. 577—583. See *ante*, pp. 292 *seq.*

pancy and long undisturbed possession, giving to one of the riparian proprietors the exclusive title to the entire river (*d*).

Right of innocent passage on rivers flowing through different States.

Things of which the use is inexhaustible, such as the sea and running water, cannot be so appropriated as to exclude others from using these elements in any manner which does not occasion a loss or inconvenience to the proprietor. This is what is called an 'innocent use.' Thus we have seen that the jurisdiction possessed by one nation over sounds, straits, and other arms of the sea leading through its own territory to that of another, or to other seas common to all nations, does not exclude others from the right of innocent passage through these communications. The same principle is applicable to rivers flowing from one State through the territory of another into the sea, or into the territory of a third State. The right of navigating, for commercial purposes, a river which flows through the territories of different States, is common to all the nations inhabiting the different parts of its banks; but this right of innocent passage being what the text-writers call an 'imperfect right,' its exercise is necessarily modified by the safety and convenience of the State affected by it, and can only be effectually secured by mutual convention regulating the mode of its exercise (*e*). There is by no means unanimity of opinion, however, among jurists as to the right of 'innocent passage.' Many assert it; but there are not a few who deny it as a matter of strict law (*f*). On the whole, modern views and practice, as a French writer says, favour freedom of navigation, subject to such precautionary measures as may be necessary to safeguard the riparian States, and to their respective rights of jurisdiction, police, customs regulations, &c. (*g*).

Incidental right to use the banks of the rivers.

It seems that this right draws after it the incidental right of using all the means which are necessary to the secure enjoyment of the principal right itself. Thus the Roman law, which considered navigable rivers as public or common property, declared that the right to the use of the shores was incident to that of the water; and that the right to navigate a river involved the right to

(*d*) Vattel, *Droit des Gens*, liv. i. ch. 22, § 266. Martens, *Précis du Droit des Gens Moderne de l'Europe*, liv. ii. ch. 1, § 39. Heffter, *Das Europäische Völkerrecht*, §§ 66—77. Cf. *Buttenurth v. St. Louis Bridge Co.* (1888), 123 *Illinois*, 535; Scott, *Cases*, p. 121; and *Iowa v. Illinois* (1893), 147 *U. S. 1*, where the phrase "middle of the Mississippi River" was taken to mean the "middle of the main channel" or "thread of the stream."

(*e*) Grotius, *De Jur. Bel. ac Pac.* lib. ii. cap. 2, §§ 12—14; cap. 3, §§ 7—12. Vattel, *Droit des Gens*, liv. ii. ch. 9, §§ 126—130; ch. 10, §§ 132—134. Pufendorf, *De Jur. Naturæ et Gentium*, lib. iii. cap. 3, §§ 3—6.

(*f*) Cf. Westlake, *Int. Law*, vol. i. (1904), pp. 158—9, where the opposing authorities are tabulated.

(*g*) H. Bonfils, *Droit Int. Public*, § 524.

moor vessels to its banks, to lade and unlade cargoes, &c. The public jurists apply this principle of the Roman civil law to the same case between nations, and infer the right to use the adjacent land for these purposes, as means necessary to the attainment of the end for which the free navigation of the water is permitted (*h*).

The incidental right, like the principal right itself, is imperfect in its nature, and the mutual convenience of both parties must be consulted in its exercise. These rights are imperfect.

Those who are interested in the enjoyment of these rights may renounce them entirely, or consent to modify them in such manner as mutual convenience and policy may dictate. A remarkable instance of such a renunciation is found in the Treaty of Westphalia, 1648, confirmed by subsequent treaties, by which the navigation of the river Scheldt was closed to the Belgic provinces, in favour of the Dutch. The forcible opening of this navigation by the French on the occupation of Belgium by the arms of the French Republic, in 1792, in violation of these treaties, was one of the principal ostensible causes of the war between France on one side, and Great Britain and Holland on the other. By the Treaties of Vienna, the Belgic provinces were united to Holland under the same sovereign, and the navigation of the Scheldt was placed on the same footing of freedom with that of the Rhine and other great European rivers. And by the Treaty of 1831, for the separation of Holland from Belgium, the free navigation of the Scheldt was, in like manner, secured, subject to certain duties, to be collected by the Dutch Government (*i*). Modification of these rights by compact.

On the 16th July, 1863, a treaty was entered into between Belgium and most of the European Powers, by which Belgium agreed to suppress the tolls on the Scheldt. Holland had renounced her claims to the tolls on the 12th of May of the same year, in consideration of an indemnity paid to her by Belgium (*k*). The suppression of the tolls was to apply to every flag, and they were never to be re-established. Belgium also agreed to abolish tonnage dues in her ports, and to reduce the pilotage rates previously charged; but this was only to apply to countries which were parties to the treaty (*l*). As a compensation, the signatory Powers agreed to indemnify Belgium against the claims she had become liable to, under the treaty with Holland, and to pay her a Redemption of the Scheldt tolls.

(*h*) Grotius, *De Jur. Bel. ac Pac.* lib. ii. cap. 2, § 15. Pufendorf, *De Jur. Naturæ et Gentium*, lib. iii. cap. 3, § 8. Vattel, *Droit des Gens*, liv. ii. ch. 9, § 129.

(*i*) Wheaton, *Hist. Law of Nations*, pp. 282—284, 552.

(*k*) Hertslet, *Map of Europe by Treaty*, vol. ii. p. 1532.

(*l*) The United States was not a party.



total sum, assessed in certain proportions among the contracting parties (*m*).

Treaties of Vienna respecting the great European rivers.

By the Treaty of Vienna in 1815, the commercial navigation of rivers, which separate different States, or flow through their respective territories, was declared to be entirely free in their whole course, from the point where each river becomes navigable to its mouth; provided that the regulations relating to the police of the navigation should be observed, which regulations were to be uniform, and as favourable as possible to the commerce of all nations (*n*).

By the Annexe xvi. to the Final Act of the Congress of Vienna, the free navigation of the Rhine is confirmed "in its whole course, from the point where it becomes navigable to the sea, ascending or descending"; and detailed regulations are provided respecting the navigation of that river, and the Necker, the Main, the Moselle, the Meuse, and the Scheldt, which are declared in like manner to be free from the point where each of these rivers becomes navigable to its mouth. Similar regulations respecting the free navigation of the Elbe were established among the Powers interested in the commerce of that river, by an Act signed at Dresden the 12th December, 1821. And the stipulations between the different Powers interested in the free navigation of the Vistula and other rivers of ancient Poland contained in the treaty of the 3rd May, 1815, between Austria and Russia, and of the same date between Russia and Prussia, to which last Austria subsequently acceded, are confirmed by the Final Act of the Congress of Vienna. The same treaty also extends the general principles adopted by the congress relating to the navigation of rivers to that of the Po (*o*).

Navigation of the Danube.

These principles were applied to the Danube by the Treaty of Paris, 1856 (*p*). It was then declared that "The navigation of the Danube cannot be subjected to any impediment or charge not expressly provided for by the stipulations contained in the following Articles; in consequence there shall not be levied any toll founded solely upon the fact of the navigation of the river, nor any duty upon the goods which may be on board of vessels. The regulations of police and of quarantine to be established for the safety of the States separated or traversed by that river, shall be so framed as to facilitate, as much as possible, the passage of

(*m*) Hertslet, Map of Europe by Treaty, vol. ii. p. 1550.

(*n*) Wheaton, Hist. Law of Nations, pp. 498—501.

(*o*) Mayer, Corpus Juris Germanici,

tom. ii. pp. 224—239, 298. Acte Final, Art. 14, 118, 96.

(*p*) Art. xv. Hertslet, Map of Europe by Treaty, vol. ii. p. 1257.

vessels. With the exception of such regulations, no obstacle whatever shall be opposed to free navigation." A European Commission was then appointed to manage the navigation of the river, and to carry out the works necessary for this purpose (*q*).

In 1865, a public Act was promulgated by the parties to the Treaty of Paris, by which all the works of the Danube Commission, together with its members and servants, were declared neutral in case of war. This principle was re-affirmed in the Treaty of London, 1871; but the right of Turkey, as territorial Power, to send vessels of war into the river was maintained (*r*). When war broke out between Russia and Turkey in 1877, some stoppage of the navigation became inevitable, as the lower part of the river was at first the actual seat of war. Both Austria and England addressed notes on the subject to the Governments of Russia and Turkey. It was admitted that the incidents of war might cause temporary obstacles to the navigation of the Danube; but a demand was made that this exceptional situation should not be invoked as a precedent to the prejudice of the liberty of navigation, and that the measures restricting this liberty, which might become indispensable, should be regulated on international principles, and should not overstep the limits traced by the most imperious necessity. As soon as the circumstances of the war permitted, the belligerents were immediately to restore the freedom of navigation (*s*). To this both parties replied, that they would confine their restrictions on the freedom of neutral commerce to the narrowest limits that the necessities of the war would admit, and that these restrictions would be removed as soon as possible (*t*). Throughout the discussion it was admitted that the existing international arrangements did not imply the absolute neutrality of the river way. The works of the Danube Commission could alone claim this exemption from the effects of war.

By Articles 52—57 of the Treaty of Berlin, all fortresses on the Danube, from the Iron Gates downwards, were to be razed, and no new ones erected, and no vessel of war, except light police and customs vessels, is to navigate the river below the same point. Roumania is added to the European Commission, and the functions of the Commission are extended to Galatz. By a treaty signed in London, 10th March, 1883, between the signatories to the Berlin Treaty, the duration of the Commission was prolonged to

Neutrality of  
the River and  
the Commis-  
sion.

(*q*) Art. xvii.

(*r*) Parl. Papers, Turkey (No. 29), 1878, p. 25. Hertslet, Map, vol. iii. p. 1922.

(*s*) Parl. Papers, Turkey (No. 25), 1877, pp. 236, 294.

(*t*) *Ibid.* Turkey (No. 26), 1877, pp. 26, 113.

24th April, 1904, and its authority was extended to Ibraila, which is the limit to which great ships are able to ascend (*u*). An agreement of 1904 provided for the continuance of the powers of the Commission for successive periods of three years' duration, but gave to each of the eight States represented on it the right to determine it by an intimation to be made a year before the conclusion of a triennial period.

Navigation of  
the Rhine.

The interpretation of the above stipulations respecting the free navigation of the Rhine, gave rise to a controversy between the kingdom of the Netherlands and the other States interested in the commerce of that river. The Dutch Government claimed the exclusive right of regulating and imposing duties upon the trade, within its own territory, at the places where the different branches into which the Rhine divides itself fall into the sea. The expression in the Treaties of Paris and Vienna "jusqu'à la mer," to the sea, was said to be different in its import from the term "dans la mer," into the sea; and, besides, it was added, if the upper States insist so strictly upon the terms of the treaties they must be contented with the course of the proper Rhine itself. The mass of waters brought down by that river, dividing itself a short distance above Nimeguen, is carried to the sea through three principal channels, the Waal, the Leck, and the Yssel; the first descending by Gorcum, where it changes its name for that of the Meuse; the second approaching the sea at Rotterdam; and the third, taking a northerly course by Zutphen and Deventer, empties itself into Zuyderzee. None of these channels, however, is called the Rhine; that name is preserved to a small stream which leaves the Leck at Wyck, takes its course by the learned retreats of Utrecht and Leyden, gradually dispersing and losing its waters among the sandy downs at Kulwyck. The proper Rhine being thus useless for the purposes of navigation, the Leck was substituted for it by common consent of the Powers interested in the question; and the Government of the Netherlands afterwards consented that the Waal, as being better adapted to the purposes of navigation, should be substituted for the Leck. But it was insisted by that Government that the Waal terminates at Gorcum, to which the tide ascends, and where, consequently, the Rhine terminates; all that remains of that branch of the river from Gorcum to Helvoetsluys and the mouth of the Meuse is an arm of the sea, inclosed within the territory of the kingdom, and consequently subject to any regulations which its Government may think fit to establish.

(*u*) Parl. Papers, 1883, Danube, No. 5; Holland, p. 233.



On the other side, it was contended by the Powers interested in the navigation of the river, that the stipulations in the Treaty of Paris, in 1814, by which the sovereignty of the House of Orange over Holland was revived, with an accession of territory, and the navigation of the Rhine was, at the same time, declared to be free "from the point where it becomes navigable to the sea," were inseparably connected in the intentions of the allied Powers who were parties to the treaty. The intentions thus disclosed were afterwards carried into effect by the Congress of Vienna, which determined the union of Belgium to Holland, and confirmed the freedom of the navigation of the Rhine, as a condition annexed to this augmentation of territory which had been accepted by the Government of the Netherlands. The right to the free navigation of the river, it was said, draws after it, by necessary implication, the innocent use of the different waters which unite it with the sea; and the expression "to the sea" was, in this respect, equivalent to the term "into the sea," since the pretension of the Netherlands to levy unlimited duties upon its principal passage into the sea would render wholly useless to other States the privilege of navigating the river within the Dutch territory (*x*).

After a long and tedious negotiation, this question was finally settled by the convention concluded at Mayence, the 31st of March, 1831, between all the riparian States of the Rhine, by which the navigation of the river was declared free from the point where it becomes navigable into the sea ("bis in die See"), including its two principal outlets or mouths in the kingdom of the Netherlands, the Leck and the Waal, passing by Rotterdam and Briel through the first-named watercourse, and by Dordrecht and Helvoetsluys through the latter, with the use of the artificial communication by the canal of Voorne with Helvoetsluys. By the terms of this treaty the Government of the Netherlands stipulates, in case the passages by the main sea by Briel or Helvoetsluys should at any time become innavigable, through natural or artificial causes, to indicate other watercourses for the navigation and commerce of the riparian States, equal in convenience to those which may be open to the navigation and commerce of its own subjects. The convention also provides minute regulations of police and fixed toll-duties on vessels and merchandise passing through the Netherlands territory to or from the sea, and also by the different ports of the upper riparian States on the Rhine (*y*).

The Rhine.  
Convention of  
Mayence.

(*x*) Annual Register (1826), vol. lxxviii. pp. 259—363.

(*y*) Martens, Nouveau Recueil, tom. ix. p. 252.

Navigation  
of the  
Mississippi.

By the Treaty of Peace concluded at Paris in 1763, between France, Spain, and Great Britain, 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 French and British possessions in North America was ascertained by a line drawn through the middle of the river Mississippi from its source to the Iberville, and from thence through the latter river and the lakes of Maurepas and Pontchartrain to the sea. The right of navigating the Mississippi was at the same time secured to the subjects of Great Britain from its source to the sea, and the passages in and out of its mouth, without being stopped, or visited, or subjected to the payment of any duty whatsoever. The province of Louisiana was soon afterwards ceded by France to Spain; and by the Treaty of Paris, 1783, Florida was retroceded to Spain by Great Britain. The independence of the United States was acknowledged, and the right of navigating the Mississippi was secured to the citizens of the United States and the subjects of Great Britain by the separate treaty between these Powers. But Spain having become thus possessed of both banks of the Mississippi at its mouth, and a considerable distance above its mouth, claimed its exclusive navigation below the point where the southern boundary of the United States struck the river. This claim was resisted, and the right to participate in the navigation of the river from its source to the sea was insisted on by the United States, under the treaties of 1763 and 1783, as well as by the law of nature and nations. The dispute was terminated by the Treaty of San Lorenzo el Real, in 1795, by the 4th Article of which his Catholic Majesty agreed that the navigation of the Mississippi, in its whole length, from its source to the ocean, should be free to the citizens of the United States: and by the 22nd Article, they were permitted to deposit their goods at the port of New Orleans, and to export them from thence, without paying any other duty than the hire of the warehouses. The subsequent acquisition of Louisiana and Florida by the United States having included within their territory the whole river from its source to the Gulf of Mexico, and the stipulation in the treaty of 1783, securing to British subjects a right to participate in its navigation, not having been renewed by the Treaty of Ghent in 1814, the right of navigating the Mississippi is now vested exclusively in the United States.

Claim of the  
United States.

The right of the United States to participate with Spain in the navigation of the river Mississippi, was rested by the American Government on the sentiment written in deep characters on the

heart of man, that the ocean is free to all men, and its rivers to all their inhabitants. This natural right was found to be universally acknowledged and protected in all tracts of country, united under the same political society, by laying the navigable rivers open to all their inhabitants. When these rivers enter the limits of another society, if the right of the upper inhabitants to descend the stream was in any case obstructed, it was an act of force by a stronger society against a weaker, condemned by the judgment of mankind. The then recent case of the attempt of the Emperor Joseph II. to open the navigation of the Scheldt from Antwerp to the sea was considered as a striking proof of the general union of sentiment on this point, as it was believed that Amsterdam had scarcely an advocate out of Holland, and even there her pretensions were advocated on the ground of treaties, and not of natural right. This sentiment of right in favour of the upper inhabitants must become stronger in the proportion which their extent of country bears to the lower. The United States held 600,000 square miles of inhabitable territory on the Mississippi and its branches, and this river, with its branches, afforded many thousands of miles of navigable waters penetrating this territory in all its parts. The inhabitable territory of Spain below their boundary and bordering on the river, which alone could pretend any fear of being incommoded by their use of the river, was not the thousandth part of that extent. This vast portion of the territory of the United States had no other outlet for its productions, and these productions were of the bulkiest kind. And, in truth, their passage down the river might not only be innocent, as to the Spanish subjects on the river, but would not fail to enrich them far beyond their actual condition. The real interests, then, of the inhabitants, upper and lower, concurred in fact with their respective rights.

If the appeal was to the law of nature and nations, as expressed by writers on the subject, it was agreed by them, that even if the river, where it passes between Florida and Louisiana, were the exclusive property of Spain, still an innocent passage along it was a natural right in those inhabiting its borders above. It would, indeed, be what those writers call an 'imperfect' right, because the modification of its exercise depends, in a considerable degree, on the convenience of the nation through which they were to pass. But it was still a right, as real as any other right, however well defined; and were it to be refused, or to be so shackled by regulations not necessary for the peace or safety of the inhabitants, as to render its use impracticable to them, it would then be an injury, of which they should be entitled to demand redress. The right of

Legal view of  
the claim.



the upper inhabitants to use this navigation was the counterpart to that of those possessing the shores below, and founded in the same natural relations with the soil and water. And the line at which their respective rights met was to be advanced or withdrawn, so as to equalize the inconveniences resulting to each party from the exercise of the right by the other. This estimate was to be fairly made with a mutual disposition to make equal sacrifices, and the numbers on each side ought to have their due weight in the estimate. Spain held so very small a tract of habitable land on either side below our boundary, that it might in fact be considered as a strait in the sea; for though it was eighty leagues from the American southern boundary to the mouth of the river, yet it was only here and there in spots and slips that the land rises above the level of the water in times of inundation. There were then, and ever must be, so few inhabitants on her part of the river, that the freest use of its navigation might be admitted to Americans without annoyance to the former (*z*).

It was essential to the interests of both parties that the navigation of the river should be free to both, on the footing on which it was defined by the Treaty of Paris, viz., through its whole length. The channel of the Mississippi was remarkably winding, crossing and recrossing perpetually from one side to the other of the general bed of the river. Within the elbows thus made by the channel, there was generally an eddy setting upwards, and it was by taking advantage of these eddies, and constantly crossing from one to another of them, that boats were enabled to ascend the river. Without this right the navigation of the whole river would be impracticable both to the Americans and Spaniards.

It was a principle that the right to a thing gives a right to the means without which it could not be used, that is to say, that the means follow the end. Thus a right to navigate a river draws to it a right to moor vessels to its shores, to land on them in cases of distress, or for other necessary purposes, &c. This principle was founded in natural reason, was evidenced by the common sense of mankind, and declared by the writers before quoted.

The Roman law, which, like other municipal laws, placed the navigation of their rivers on the footing of nature, as to their own citizens, by declaring them public, declared also that the right to the use of the shores was incident to that of the water (*a*). The

(*z*) The authorities referred to on this head were the following: Grotius, *De Jur. Bel. ac Pac. lib. ii. cap. 2*, §§ 11—13; c. 3, §§ 7—12. Pufendorf,

lib. iii. cap. 3, §§ 3—6. Wolff, *Institutiones*, §§ 310—312. Vattel, *liv. i. 292*; *liv. i. §§ 123—139*.

(*a*) *Inst. liv. ii. t. 1, §§ 1—5*.

laws of every country probably did the same. This must have been so understood between France and Great Britain at the Treaty of Paris, where a right was ceded to British subjects to navigate the whole river, and expressly that part between the island of New Orleans and the western bank, without stipulating a word about the use of the shores, though both of them belonged then to France, and were to belong immediately to Spain. Had not the use of the shores been considered as incident to that of the water, it would have been expressly stipulated, since its necessity was too obvious to have escaped either party. Accordingly all British subjects used the shores habitually for the purposes necessary to the navigation of the river; and when a Spanish governor undertook at one time to forbid this, and even cut loose the vessels fastened to the shores, a British vessel went immediately, moored itself opposite the town of New Orleans, and set out guards with orders to fire on such as might attempt to disturb her moorings. The governor acquiesced, the right was constantly exercised afterwards, and no interruption ever offered.

This incidental right extends even beyond the shores, when circumstances render it necessary to the exercise of the principal right; as in the case of a vessel damaged, where the mere shore could not be a safe deposit for her cargo till she could be repaired, she may remove into safe ground off the river. The Roman law was here quoted too, because it gave a good idea both of the extent and the limitations of this right (*b*).

The relative position of the United States and Great Britain in respect to the navigation of the great northern lakes and the river St. Lawrence, appears to be similar to that of the United States and Spain, previously to the cession of Louisiana and Florida, in respect of the Mississippi; the United States being in possession of the southern shores of the lakes and the river St. Lawrence to the point where their northern boundary line strikes the river, and Great Britain, of the northern shores of the lakes and the river in its whole extent to the sea, as well as of the southern banks of the river, from the latitude 45° north to its mouth.

The claim of the people of the United States, of a right to navigate the St. Lawrence to and from the sea, was, in 1826, the subject of discussion between the American and British Governments.

Navigation  
of the  
St. Lawrence.

(*b*) Mr. Jefferson's Instructions to U. S. Ministers in Spain, March 18, 1792. Waite, State Papers, vol. x. pp. 135—140.

The  
St. Lawrence.  
Controversy  
between  
Great Britain  
and the  
United States.

On the part of the United States Government, this right was based on the same grounds of natural right and obvious necessity which had formerly been urged in respect to the river Mississippi. The dispute between different European Powers respecting the navigation of the Scheldt, in 1784, was also referred to in the correspondence on this subject, and the case of that river was distinguished from that of the St. Lawrence by its peculiar circumstances. Among others, it is known to have been alleged by the Dutch, that the whole course of the two branches of this river which passed within the dominions of Holland was entirely artificial; that it owed its existence to the skill and labour of Dutchmen; that its banks had been erected and maintained by them at a great expense. Hence, probably, the motive for that stipulation in the Treaty of Westphalia, that the lower Scheldt, with the canals of Sas and Swin, and other mouths of the sea adjoining them, should be kept closed on the side belonging to Holland. But the case of the St. Lawrence was totally different, and the principles on which its free navigation was maintained by the United States had recently received an unequivocal confirmation in the solemn Act of the principal States of Europe. In the treaties concluded at the Congress of Vienna, it had been stipulated that the navigation of the Rhine, the Necker, the Main, the Moselle, the Maes, and the Scheldt, should be free to all nations. These stipulations, to which Great Britain was a party, might be considered as an indication of the present judgment of Europe upon the general question. The importance of the present claim might be estimated by the fact, that the inhabitants of at least eight States of the American Union, besides the territory of Michigan, had an immediate interest in it, besides the prospective interests of other parts connected with this river and the inland seas through which it communicates with the ocean. The right of this great and growing population to the use of this its only natural outlet to the ocean, was supported by the same principles and authorities which had been urged by Mr. Jefferson in the negotiation with Spain respecting the navigation of the river Mississippi. The present claim was also fortified by the consideration that this navigation was, before the war of the American Revolution, the common property of all the British subjects inhabiting this continent, having been acquired from France by the united exertions of the mother country and the colonies, in the war of 1756. The claim of the United States to the free navigation of the St. Lawrence was of the same nature with that of Great Britain to the navigation of the Mississippi,



as recognised by the 7th Article of the Treaty of Paris, 1763, when the mouth and lower shores of that river were held by another Power. The claim, whilst necessary to the United States, was not injurious to Great Britain, nor could it violate any of her just rights (c).

On the part of the British Government, the claim was considered as involving the question whether a perfect right to the free navigation of the river St. Lawrence could be maintained according to the principles and practice of the law of nations. The British claim.

The liberty of passage to be enjoyed by one nation through the dominions of another was treated by the most eminent writers on public law as a qualified, occasional exception to the paramount rights of property. They made no distinction between the right of passage by a river, flowing from the possessions of one nation through those of another, to the ocean, and the same right to be enjoyed by means of any highway, whether of land or water, generally accessible to the inhabitants of the earth. The right of passage, then, must hold good for other purposes, besides those of trade—for objects of war as well as for objects of peace—for all nations, no less than for any nation in particular, and be attached to artificial as well as to natural highways. The principle could not, therefore, be insisted on by the American Government, unless it was prepared to apply the same principle by reciprocity, in favour of British subjects, to the navigation of the Mississippi and the Hudson, access to which from Canada might be obtained by a few miles of land-carriage, or by the artificial communications created by the canals of New York and Ohio. Hence the necessity which has been felt by the writers on public law, of controlling the operation of a principle so extensive and dangerous, by restricting the right of transit to purposes of innocent utility, to be exclusively determined by the local sovereign. Hence the right in question is termed by them an imperfect right. But there was nothing in these writers, or in the stipulations of the Treaties of Vienna, respecting the navigation of the great rivers of Germany, to countenance the American doctrine of an absolute natural right. These stipulations were the result of mutual consent, founded on considerations of mutual interest growing out of the relative situation of the different States concerned in this navigation. The same observation would apply to the various conventional regulations which had been, at different periods, applied to the navigation of the

(c) American Paper on the Navigation of the St. Lawrence; Congress Documents, Session 1827—1828, No. 43, p. 34.

river Mississippi. As to any supposed right derived from the simultaneous acquisition of the St. Lawrence by the British and American people, it could not be allowed to have survived the treaty of 1783, by which the independence of the United States was acknowledged, and a partition of the British dominions in North America was made between the new Government and that of the mother country (*d*).

The American  
reply.

To this argument it was replied, on the part of the United States, that, if the St. Lawrence were regarded as a *strait* connecting navigable seas, as it ought properly to be, there would be less controversy. The principle on which the right to navigate straits depends, is, that they are accessorial to those seas which they unite, and the right of navigating which is not exclusive, but common to all nations; the right to navigate the seas drawing after it that of passing the straits. The United States and Great Britain have between them the exclusive right of navigating the lakes. The St. Lawrence connects them with the ocean. The right to navigate both (the lakes and the ocean) includes that of passing from one to the other through the natural link. Was it then reasonable or just that one of the two coproprietors of the lakes should altogether exclude his associate from the use of a common bounty of nature, necessary to the full enjoyment of them? The distinction between the right of passage, claimed by one nation through the territories of another, on land, and that on navigable water, though not always clearly marked by the writers on public law, has a manifest existence in the nature of things. In the former case the passage can hardly ever take place, especially if it be of numerous bodies, without some detriment or inconvenience to the State whose territory is traversed. But in the case of a passage on water no such injury is sustained. The American Government did not mean to contend for any principle, the benefit of which, in analogous circumstances, it would deny to Great Britain. If, therefore, in the further progress of discovery, a connection should be developed between the river Mississippi and Upper Canada, similar to that which exists between the United States and the St. Lawrence, the American Government would be always ready to apply, in respect to the Mississippi, the same principles it contended for in respect to the St. Lawrence. But the case of rivers, which rise and debouch altogether within the limits of the same nation, ought not to be confounded with those which, having their sources

(*d*) British Paper on the Navigation of the St. Lawrence; Session 1827—28, No. 43, p. 41.

and navigable portions of their streams in States above, finally discharge themselves within the limits of other States below. In the former case, the question as to opening the navigation to other nations depended upon the same considerations which might influence the regulation of other commercial intercourse with foreign States, and was to be exclusively determined by the local sovereign. But in respect to the latter, the free navigation of the river was a natural right in the upper inhabitants, of which they could not be entirely deprived by the arbitrary caprice of the lower State. Nor was the fact of subjecting the use of this right to treaty regulations, as was proposed at Vienna to be done in respect to the navigation of the European rivers, sufficient to prove that the origin of the right was conventional, and not natural. It often happened to be highly convenient, if not sometimes indispensable, to avoid controversies by prescribing certain rules for the enjoyment of a natural right. The law of nature, though sufficiently intelligible in its great outlines and general purposes, does not always reach every minute detail which is called for by the complicated wants and varieties of modern navigation and commerce. Hence the right of navigating the ocean itself, in many instances, principally incident to a state of war, is subjected, by innumerable treaties, to various regulations. These regulations—the transactions of Vienna, and other analogous stipulations—should be regarded only as the spontaneous homage of man to the paramount Lawgiver of the universe, by delivering his great works from the artificial shackles and selfish contrivances to which they have been arbitrarily and unjustly subjected (*e*).

The controversy was provisionally settled by the Reciprocity Treaty of June 5, 1854, of which Article 4 gave to the inhabitants of the United States the right to navigate the river St. Lawrence and the canals in Canada as a means of communication between the Great Lakes and the Atlantic Ocean, subject to the same tolls and assessments imposed on British subjects. British subjects obtained a similar right of navigating Lake Michigan and the State canals. This treaty, however, was made terminable on notice; and in 1866 the United States thus renounced it. A few years later the question was definitely settled by the Treaty of Washington, May 8, 1871, which declared (Article xxvi.) that "The navigation of the river St. Lawrence, ascending and descending, from the 45th parallel of north latitude, where it ceases

Reciprocity  
Treaty, 1854.

Treaty of  
Washington,  
1871, as to the  
St. Lawrence.

(*e*) Mr. Secretary Clay's letter to Mr. Gallatin, June 19, 1826. Session 1827—1828, No. 43, p. 18.



to form the boundary between the two countries, from, to, and into the sea, shall for ever remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain, or of the Dominion of Canada, not inconsistent with such privilege of free navigation" (*f*). In 1909 a treaty between the two Powers was concluded, regulating the navigation and use of boundary waters (*g*).

African  
rivers.

By the General Act of the Berlin Conference, 1885, the trade of all nations, except in so far as any independent sovereign State may neglect to apply this principle within its territory, is to enjoy complete freedom in the basin of the Congo, its mouth and circumjacent regions, extending to the Indian Ocean and the Zambesi. The signatory parties bind themselves to respect the neutrality of the same free trade zone, so long as the ruling Power in any territory within it shall fulfil the duties which neutrality requires; and in case any such Power shall be engaged in war, the signatory Powers bind themselves to use their good offices to the end that any territory within the free trade zone, belonging to either belligerent, may be placed, in effect, in very much the same position as though it were neutral territory. The navigation of the Congo is to remain free for the merchant ships of all nations equally. The provisions of the Act of Navigation are to remain in force in time of war. Consequently all nations, whether neutral or belligerent, are to be always free, for the purposes of trade, to navigate the Congo and the territorial waters fronting the embouchure of the river, except in so far as concerns the transport of articles intended for a belligerent and, in virtue of the law of nations, regarded as contraband of war. Provisions of a like nature were made in respect of the navigation of the Niger (*h*).

International  
canals.

The scientific progress of the world has added another mode of water communication, viz., by international canals, which has given rise to very important questions of international law. The Suez Canal, between the continents of Africa and Asia, has long been an accomplished fact, and a successful commercial speculation; whilst the Panama Canal, between North and South America, after a somewhat chequered career of the project, was

(*f*) Art. xxvi. Treaty of Washington, 1871. See Appendix C.

(*g*) American Journal of International Law, Supplement, vol. iv.

pp. 239 *seq.*

(*h*) Hertslet, Map of Africa by Treaty, p. 20. British Parl. Papers, Africa, No. 4 (1885), pp. 308, 311.

opened to commerce on August 15, 1914 (i). In the former of these cases the works are the property of a commercial corporation, and are situated entirely within the territories of the State where they are located. But their importance as maritime highways for the whole world is, and will be, enormous, while their value to the actual States where they are situated is merely confined to such local prosperity as may be derived from the transit of passengers and goods through the canals. Thus the question of keeping these waterways open at all times, and under all circumstances, becomes one of paramount importance to countries that have no direct connection with the States where the canals are situated. In theory, Egypt and the newly constituted Republic of Panama ought respectively to have absolute control over the Suez and Panama Canals; but the interests of other countries in these works are so vast and far-reaching, that it is found practically impossible to admit any such rights. The Suez Canal was made chiefly with French capital, while about three-fifths of the traffic passing through it is English (k); and the maintenance of the military connection between England and India makes the canal far more important to England than to any other country. The United States consider that the Panama Canal would render their Western seaboard much more liable to attack by a European country than it now is; and on this ground they consider themselves to have a most important interest in its control, although the canal is hundreds of miles from the nearest point of their territory.

It is impossible to lay down any general rule to meet all such cases as these. The situation of the waterway and the States whose commercial or other interests require its maintenance must all be considered.

The considerations noticed in the preceding paragraphs induced the British Government, in 1875, to purchase from the Khedive of Egypt a large number of shares in the Suez Canal, which the latter owned in his private capacity of shareholder. The Turko-Russian War of 1887 gave rise to apprehensions lest either of the belligerents should endeavour to close the canal, or commit acts of hostility in or near it; and strong opinions were expressed in the British Parliament to the effect that Great Britain would insist

The Suez Canal.

(i) During the first six months of operation, ending Feb. 14, 1915, 496 vessels (excluding canal vessels and launches) passed through the canal, with a tonnage of 2,367,244.

of 4,979 vessels, with a gross tonnage of 19,758,040, which passed through the canal, 2,902, with a gross tonnage of 11,887,170, were British (Statesman's Year Book, 1915).

(k) In the year 1913, out of a total

on the canal being kept open. M. de Lesseps, the engineer of the canal and president of the company, on 10th May, 1877, laid before Lord Derby a proposal for its neutralization. His lordship declined to accept the scheme as put forward by M. de Lesseps, but he "intimated to the Russian ambassador that an attempt to blockade, or otherwise to interfere with the canal or its approaches, would be regarded by Her Majesty's Government as a menace to India, and as a grave injury to the commerce of the world." "Any such step would be incompatible with the maintenance by Her Majesty's Government of an attitude of passive neutrality." "Her Majesty's Government will expect that the Porte and the Khedive will on their side abstain from impeding the navigation of the canal, or adopting any measures likely to injure the canal or its approaches, and they are firmly determined not to permit the canal to be made the scene of any combat, or other warlike operations" (*l*).

One main object of the British occupation of Egypt in 1882 was to protect the canal against injury; and in August of that year, British war vessels and transports entered the canal, which was thereafter used as the British base of operations, and was patrolled by armed boats and launches belonging to Her Majesty's ships. These acts, however, were done under the authority of the Khedive, and in his interest (*m*).

Early in 1883, Lord Granville had proposed to the Powers that the canal should be neutralized (*n*). By a declaration, which was signed at London on the 17th March, 1885, by Lord Granville and the ambassadors of Germany, Austria-Hungary, France, Italy, and Russia, and, on the last day but one of the same month, by Musurus Pasha on behalf of Turkey, after reciting that the Powers had agreed to recognise the urgent necessity for negotiating with the object of sanctioning, by a Conventional Act, the establishment of a definite regulation guaranteeing at all times, and for all Powers, the freedom of the Suez Canal, it is declared that it has been agreed between the seven Governments that a commission composed of delegates named by the said Governments shall meet at Paris on the 30th March to prepare and draw up this Act, taking for its basis the circular in which Lord Granville had made the proposal above mentioned (*o*).

The sittings of the commission terminated in the summer of the

(*l*) Lord Derby to Lord Lyons, 16th May, 1877. Parl. Papers, Egypt, No. 1 (1877).

(*m*) *Ante*, pp. 57 *seq.*

(*n*) Parl. Papers, Egypt, No. 2 (1882).

(*o*) Parl. Papers, Egypt, No. 6 (1885); Holland, *European Concert*, pp. 194, 195.



same year. A general agreement upon many points had been arrived at, but there were some on which a difference of opinion still remained; the principal divergence being in reference to the question of superintendence to insure the execution of the treaty. After protracted negotiations between the two Governments (the chief points in dispute being the one specified above, the extent of the area to be neutralized—the French Government wishing to include the “approaches” to the canal, a strip of land on either side of it, and a large part of the territorial waters of Egypt, while Great Britain was desirous of confining the treaty to the canal itself, and its immediate ports—and as to how far the territorial rulers, the Sultan, and the Khediye, should be left unfettered to take such measures as they might think fit for defending the canal from attack) a draft convention was signed by M. Flourens and Mr. Egerton at Paris on the 24th October, 1887. The draft was communicated by the French Government to the other Powers, and after much correspondence, the Convention, which, as amended to suit Turkey, had been approved in the previous July by Great Britain, France, Germany, Austria-Hungary, Russia, Italy, Spain, and the Netherlands, was finally signed at Constantinople on the 29th October, 1888, by the representatives of all those Powers and Turkey, the ratifications being exchanged in the following December (*p*).

The effect of the Treaty of Constantinople, or, as it was commonly called, the Suez Canal Convention, is to open the canal in time of war as in time of peace to every vessel of commerce or of war, without distinction of flag, and to free it from the exercise of the right of blockade. But in time of war, the canal, as respects the ships of belligerents, will be in a position analogous to that of a neutral port. No acts of hostility may be committed within the limits of the canal or its ports of access, or within a distance of three miles therefrom. The warships of a belligerent may not use the canal to embark or disembark troops (a prohibition that is not to apply, however, to the landing of unarmed invalid soldiers at the hospitals of Suez and Port Said) (*q*), or to revictual or take in stores, or to remain in the canal or its ports of access for more than twenty-four hours, except in case of necessity as provided; and prizes are subject to the same restrictions. If vessels of different belligerents are in the canal or ports of access at the same time, a period of twenty-four hours must intervene between the departure of any vessel belonging to one belligerent and that of

(*p*) Parl. Papers, Egypt, No. 2 (1859).      (*q*) Cf. Parl. Papers, Egypt, No. 1 (1888).

any vessel belonging to the other. Men-of-war may not be stationed inside the canal; but each Power that is not a belligerent may station two warships in the ports of Suez or Port Said. The agents in Egypt of the signatory Powers are to watch over the execution of the treaty, the necessary measures for insuring which are to be taken by the Egyptian Government. In case the Egyptian Government should not have sufficient means at its disposal, it is to call upon the Imperial Ottoman Government, which is to take the necessary measures, giving notice to the signatory Powers, and concerting, if necessary, with them on the subject. The provisions as to belligerent vessels and the landing of troops, the stationing of war vessels, and superintendence, are not to interfere with the measures which the Sultan and the Khedive may find it necessary to take for securing, by their own forces, the defence of Egypt, and the maintenance of public order, or occasion any obstacle to the measures which the Imperial Ottoman Government may think it necessary to take in order to insure by its own forces the defence of its other possessions situated on the eastern coast of the Red Sea. Though measures to be taken in either of these respects are not to interfere with the free use of the canal, none of the contracting parties are to endeavour to obtain, with respect to the canal, territorial or commercial advantages or privileges. The rights of Turkey as the territorial Power are reserved, and, with the exception of the obligations expressly provided by the treaty, the sovereign rights of the Sultan, and the rights and immunities of the Khedive, are in no way affected.

Great Britain in signing the convention reserved to herself liberty of action, in view of the transitional state of Egypt at the time. But in the Declaration respecting Egypt and Morocco (Article VI.), contained in the Anglo-French Agreement, 1904, she notified her acceptance of the stipulations contained in the Canal Convention, though she had observed them before then (*r*).

Panama  
Canal.

In 1846, a treaty was ratified between the United States and the Republic of Colombia (then called New Granada), by which a right of transit over the Isthmus of Panama was given to the United States, and the free transit over the Isthmus "from the one to the other sea" guaranteed by both the contracting Powers. As a consequence of this treaty, the Panama Railroad was built by American capital, and completed in 1855. In 1849, the United States entered into another treaty with Nicaragua for the con-

(*r*) See Appendix D.

struction of a ship canal from Greytown (San Juan) on the Atlantic side to the Pacific coast, by way of the lake of Nicaragua; and the idea of carrying out this work appears to have been seriously entertained at the time. But the question was complicated by England claiming a protectorate over the Mosquito Indians, in whose territory the Atlantic end of the canal would of necessity be placed. The United States declined to admit the validity of this claim, but disputes were for the time being avoided by a treaty, 1850 (known as the Clayton-Bulwer treaty), that was agreed to, whereby the proposed canal was placed under the joint protection of England and the United States. By Article I. of this treaty, both these Governments 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 was either Government to "take advantage of any intimacy or use any alliance, connection, or influence, that either may possess with any State or Government through whose territory the canal may pass for the purpose of acquiring or holding, directly or indirectly, for the citizens or subjects of the one, any rights or advantages in regard to commerce or navigation through the said canal which shall not be offered on the same terms to the citizens or subjects of the other." By Article II., it was provided that, in case of war between the contracting parties, vessels of either traversing the canal should be exempt from blockade, detention, or capture by the other. By Article V., the contracting parties further engage that when the said canal shall have been completed, they will protect it from interruption, seizure, or unjust confiscation, and that they will guarantee the neutrality, so that the said canal may for ever be open and free, and the capital invested therein secure." But this protection might be withdrawn after six months' notice by either party, if either or both were of opinion that the Canal Company were making vexatious regulations, or unduly favouring the trade of one party to the prejudice of the other. By Article VIII., Great Britain and the United States also agreed to extend their protection to any other communications across the isthmus, whether by railway or canal.

The attempt of M. de Lesseps to construct a canal across the Isthmus of Panama, and its tragic failure, are matters of recent



history. During the course of the operations the United States showed a constant apprehension lest the canal, when completed, should fall under the control of any European Power or combination of Powers. At a crisis in the affairs of the company, when it seemed possible that the French Government might be induced to afford financial or official assistance, the United States Senate passed a resolution to the effect that the American Government would look with serious concern and disapproval upon any connection of any European Government with the construction or control of any ship canal across the Isthmus of Darien or Central America, and must regard any such connection or control as injurious to the just rights of the United States, and a menace to their welfare (*s*).

For some years the project of constructing a ship canal was in abeyance, but it was revived by the United States to whom the severance of their Atlantic and Pacific sea-boards by the whole length of the South American continent was growing more and more intolerable in view of their annexation of the Hawaiian Islands, and the prospective expansion of American influence and commerce in the Pacific. Finally, the Government resolved upon the construction of a canal either across the Isthmus of Panama, or through the territory of Nicaragua. But before taking any further steps it was resolved to obtain a fuller control over the canal when completed than was permissible under the terms of the Clayton-Bulwer treaty. In 1901 a treaty was negotiated between Mr. Hay and Lord Pauncefote, then British Ambassador at Washington, by the 1st Article of which the Clayton-Bulwer treaty, therein described as the Convention of April 19th, 1850, was declared to be superseded. By the 2nd Article it was agreed that a canal might be constructed under the auspices of the United States Government, either directly at its own cost or by a gift or loan of money to individuals or corporations, or through subscription to or purchase of stock or shares; and that, subject to the provisions of the present treaty, the said Government should have and enjoy all rights incident to such construction, as well as the exclusive right of providing regulations for the management of the canal. The 3rd Article adopted, as the basis of the neutralization of the canal, rules borrowed from the Convention of Constantinople of October 28th, 1888, for the free navigation of the Suez Canal. Of these the most important was the first one:—"That

(*s*) See The Times, Jan. 8th, 1889.

the canal shall be free and open to vessels of commerce and war of all nations observing these rules on the terms of entire equality, so that there shall be no discriminations against any such nation or its citizens or subjects in respect of the conditions or charges of traffic or otherwise: such conditions and charges of traffic to be just and equitable." It was further agreed that no change in the territorial sovereignty or international relations of the country or countries traversed by the canal should affect the general principle of neutralization or the obligation of the contracting parties.

The treaty was ratified by the Senate on the 16th of December, 1901 (*t*). The Panama route was ultimately decided upon, but the Colombian Government showed themselves unwilling to carry out the provisions of the treaty of 1841, under which the United States claimed the right to construct a canal. On November 5th, 1903, a revolution on the Isthmus, by which the inhabitants of the adjacent territory declared themselves independent of the Colombian Government, resulted in the proclamation of the Republic of Panama, whose existence was recognised with remarkable promptitude by the United States; and when President Roosevelt sent his message to Congress on December 7th, he was in a position to lay before the Senate a treaty (known as the Hay-Varilla Treaty) with the new Republic for the building of a canal across the Isthmus of Panama. He stated that "there is granted to the United States in perpetuity the use, occupation, and control of a strip ten miles wide and extending three nautical miles into the sea at either terminal, with all lands lying outside of the zone necessary for the construction of the canal or for its auxiliary works, and with the islands in the Bay of Panama." In consideration of this grant, an immediate payment of ten million dollars was to be made, and after the lapse of nine years an annual payment of a quarter of a million dollars.

The question as to whether the United States is entitled to erect fortifications at the entrances to the Panama Canal appears to have given rise to some controversy. By the treaty of 1903 with Panama, the United States acquired the right of fortification; but in the Hay-Pauncefote Treaty nothing is said of such a right. The Clayton-Bulwer Treaty expressly prohibited the erection of fortifications, and the first draft of the Hay-Pauncefote Treaty contained a clause to the same effect. This clause was, however,

(*t*) The negotiations which led to the eventual ratification of the Hay-Pauncefote Treaty form a curious chapter in diplomatic history, but the

details would be out of place in these pages. See Parl. Papers, United States, No. 1 (1900) [Cd. 30]; and Annual Register, 1900, p. 418.

deliberately omitted from the final form of the latter treaty, which superseded the Clayton-Bulwer Treaty. In the absence of an express exemption it would seem, therefore, that the United States may erect fortifications; for when it was intended, in the case of the Suez Canal, to forbid such a proceeding, express clauses were inserted to that effect (*u*).

(*u*) For arguments for and against the fortification of the Panama Canal, see Amer. Journ. of Int. Law, vol. iii.

(1909), pp. 354 *seq.*, 885 *seq.*; vol. iv.  
(1910), pp. 324 *seq.*



## PART THIRD.

### INTERNATIONAL RIGHTS OF STATES IN THEIR PACIFIC RELATIONS.

#### CHAPTER I.

##### RIGHTS OF LEGATION.

THERE is no circumstance which marks more distinctly the progress of modern civilization than the institution of permanent diplomatic missions between different States. The rights of ambassadors were known, and, in some degree, respected by the classic nations of antiquity (*x*). During the middle ages they were less distinctly recognised, and it was not until the seventeenth century that they were firmly established. The institution of resident permanent legations at all the European courts took place subsequently to the Peace of Westphalia (1648), and was rendered expedient by the increasing interest of the different States in each other's affairs, growing out of more extensive commercial and political relations, and more refined speculations respecting the balance of power, giving them the right of mutual inspection as to all transactions by which that balance might be affected. Hence the rights of legation have become definitely ascertained and incorporated into the international code.

Usage of permanent diplomatic missions.

Every independent State has a right to send public ministers to, and receive ministers from, any other sovereign State with which it desires to maintain the relations of peace and amity. No State, strictly speaking, is obliged, by the positive law of nations, to send or receive public ministers, although the usage and comity of nations seem to have established a sort of reciprocal duty in this respect. It is evident, however, that this cannot be more than an imperfect obligation, and must be modified by the nature and

Right to send and obligation to receive public ministers.

(*x*) *Cf.* Phillipson, *Int. Law and Custom of Ancient Greece and Rome*, vol. i. ch. 13.

importance of the relations to be maintained between different States by means of diplomatic intercourse (*a*).

Rights of  
legation, to  
what States  
belonging.

How far the rights of legation belong to dependent or semi-sovereign States must depend upon the nature of their peculiar relation to the superior State under whose protection they are placed. Thus, by the treaty concluded at Kinardgi, in 1774, between Russia and the Porte, the provinces of Moldavia and Wallachia, placed under the protection of the former Power, obtained the right of sending *chargés d'affaires* of the Greek communion to represent them at the Court of Constantinople (*b*).

So also of confederated States; their right of sending public ministers to each other, or to foreign States, depends upon the peculiar nature and constitution of the union by which they are bound together. Under the constitution of the former German Empire, and that of the Germanic Confederation, this right was preserved to all the princes and States composing the federal union (*c*). Such was also the former constitution of the United Provinces of the Low Countries, and such is now that of the Swiss Confederation. By the constitution of the United States of America every State is expressly prohibited from entering, without the consent of Congress, into any treaty, alliance, or confederation, with any other State of the Union, or with a foreign State, or from entering, without the same consent, into any agreement or compact with another State, or with a foreign Power. The original power of sending and receiving public ministers is essentially modified, if it be not entirely taken away, by this prohibition (*d*).

How affected  
by civil war  
or contest  
for the  
sovereignty.

The question, to what department of the Government belongs the right of sending and receiving public ministers, also depends upon the municipal constitution of the State. In monarchies, whether absolute or constitutional, this prerogative usually resides in the sovereign. In republics, it is vested either in the chief magistrate, or in a senate or council, conjointly with, or exclusive, of, such magistrate. In the case of a revolution, civil war, or other

(*a*) Vattel, *Droit des Gens*, liv. iv. ch. 5, §§ 56—65. Rutherford, *Institutes*, vol. ii. b. ii. ch. 9, § 20. Martens, *Précis du Droit des Gens Moderne de l'Europe*, liv. vii. ch. 1, §§ 187—190.

(*b*) Vattel, liv. iv. ch. 5, § 60. Klüber, *Droit des Gens Moderne de l'Europe*, st. 2, tit. 2, ch. 3, § 175. Merlin, *Répertoire*, tit. *Ministre Publique*, sect. ii. § 1, No. 3, 4. Roumania, as these united provinces are now called, has now acquired complete independence, which is recognised by the Treaty of Berlin. This State has

therefore the right of sending diplomatic representatives to the Porte, and to other countries, on the same terms as other independent States. See Treaty of Berlin, Art. 43.

(*c*) It is now merged in that of the German Empire.

(*d*) Heffter, *Das Europäische Völkerrecht*, § 200. Merlin, *Répertoire*, tit. *Ministre Publique*, sect. ii. § 1, No. 5. As to the reception of the Dutch ambassadors in the sixteenth century, see Motley, *Life of John Barneveld* (1874), vol. i. ch. 1.

contest for the sovereignty, although, strictly speaking, the nation has the exclusive right of determining in whom the legitimate authority of the country resides, yet foreign States must of necessity judge for themselves whether they will recognise the Government *de facto*, by sending to, and receiving ambassadors from, it; or whether they will continue their accustomed diplomatic relations with the prince whom they choose to regard as the legitimate sovereign, or suspend altogether these relations with the nation in question. So, also, where an empire is severed by the revolt of a province or colony declaring and maintaining its independence, foreign States are governed by expediency in determining whether they will commence diplomatic intercourse with the new State, or wait for its recognition by the metropolitan country (e).

For the purpose of avoiding the difficulties which might arise from a formal and positive decision of these questions, diplomatic agents are frequently substituted, who are clothed with the powers, and enjoy the immunities, of ministers, though they are not invested with the representative character, nor entitled to diplomatic honours.

It was on this footing that Messrs. Slidell and Mason, the emissaries of the Confederate States, who were seized on board the *Trent*, were sent to Europe (f). During the continuance of a rebellion, although foreign States may refuse to recognise the insurgents in any way, or to enter into regular diplomatic intercourse with them, it sometimes becomes necessary for the protection of their own commerce and subjects, that foreign States should communicate with the rebel authorities. Lord Russell has laid it down that "Her Majesty's Government hold it to be an undoubted principle of international law, that when the persons or the property of the subjects or citizens of a State are injured by a *de facto* Government, the State so aggrieved has a right to claim from the *de facto* Government redress and reparation; and also that in cases of apprehended losses or injury to their subjects, States may lawfully enter into communication with *de facto* Governments to provide for the temporary security of the persons and property of their subjects" (g).

Communi-  
cation with  
rebels.

As no State is under a perfect obligation to receive ministers from another, it may annex such conditions to their reception as it thinks fit; but when once received, they are in all other respects

Conditional  
reception of  
foreign  
ministers.

(e) *Vide supra*, Pt. I. ch. 2, pp. 38 seq. Merlin, Répertoire, tit. *Ministre Publique*, sect. ii. § 6.

1862 (No. 5), p. 34. See *ante*, Pt. II. ch. 2, p. 178.

(f) Wheaton (Lawrence), p. 378, n. 118. Parl. Papers, N. America,

(g) Earl Russell to Mr. Adams, 26th Nov. 1861. U. S. Dipl. Cor. 1862, p. 8.



entitled to the privileges annexed by the law of nations to their public character. Thus some Governments have established it as a rule not to receive one of their own native subjects as a minister from a foreign Power; and a Government may receive one of its own subjects under the express condition that he shall continue amenable to the local laws and jurisdiction. So also one court may refuse to receive a particular individual as minister from another court, alleging the motives on which such refusal is grounded (*h*).

Classification  
of public  
ministers.

The primitive law of nations makes no other distinction between the different classes of public ministers, than that which arises from the nature of their functions; but the modern usage of Europe having introduced into the voluntary law of nations certain distinctions in this respect, which, for want of exact definition, became the perpetual source of controversies, uniform rules were at last adopted by the Congress of Vienna (1815), and that of Aix-la-Chapelle (1818), which put an end to those disputes. By the rules thus established, public ministers are divided into the four following classes:

1. Ambassadors, and papal legates or nuncios (*i*).
2. Envoys, ministers, or others accredited to sovereigns ('auprès des souverains').
3. Ministers resident accredited to sovereigns.
4. Chargés d'affaires accredited to the minister of foreign affairs (*k*).

(*h*) Bynkershoek, De Foro Legatorum, cap. 11, § 10. Martens, Manuel Diplomatique, ch. 1, § 6. Merlin, Répertoire, tit. *Ministre Publique*, sect. iii. § 5. A recent instance of the exercise of this right occurred in 1891, when the Chinese Government refused to accept as Minister of the United States at Peking a gentleman who had used strong language in the Senate on the occasion of the Chinese Exclusion Bill; Annual Register, 1891.

(*i*) Since the abolition of the Pope's temporal power, 1870, papal legates and nuncios have necessarily lost their character of public ministers.

(*k*) The 'règlement' of the Congress of Vienna of the 19th of March, 1815, provides:—

"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;

"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.

"Le présent règlement n'apportera aucune innovation relativement aux représentans du Pape.

"Art. 5. Il sera déterminé dans chaque état une mode uniforme pour la réception des employés diplomatiques de chaque classe.

"Art. 6. Les liens de parenté ou d'alliance de famille entre les cours, ne donnent aucun rang à leurs employés diplomatiques.

"Il en est de même des alliances politiques.

Ambassadors and other public ministers of the first class are exclusively entitled to what is called the representative character, being considered as peculiarly representing the sovereign or State by whom they are delegated, and entitled to the same honours to which their constituent would be entitled, were he personally present. This must, however, be taken in a general sense, as indicating the sort of honours to which they are entitled; but the exact ceremonial to be observed towards this class of ministers depends upon usage, which has fluctuated at different periods of European history. There is a slight shade of difference between ambassadors ordinary and extraordinary; the former designation being exclusively applied to those sent on permanent missions, the latter to those employed on a particular or extraordinary occasion, though it is sometimes extended to those residing at a foreign court for an indeterminate period (*l*).

The right of sending ambassadors is exclusively confined to crowned heads, the great republics, and other States entitled to royal honours (*m*).

All other public ministers are destitute of that particular character which is supposed to be derived from representing generally the person and dignity of the sovereign. They represent him only in respect to the particular business committed to their charge at the court to which they are accredited (*n*).

Ministers of the second class are envoys, envoys extraordinary, and ministers plenipotentiary, while those of the pope are called internuncios (*o*).

So far as the relative rank of diplomatic agents may be determined by the nature of their respective functions, there is no essential difference between public ministers of the first class and those of the second. Both are accredited by the sovereign, or supreme executive power of the State, to a foreign sovereign. The

Ambassadors.

Ministers of the second class.

Diplomatic precedence.

"Art. 7. Dans les actes ou traités entre plusieurs puissances, qui admettent l'alternat, le sort décidera, entre les ministres, de l'ordre qui devra être suivi dans les signatures." Martens, Nouv. Rec. ii. 449.

The protocol of the Congress of Aix-la-Chapelle of the 21st November, 1818, declares:

"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 paraît pas avoir prévu, il est arrêté entre les cinq cours, que les ministres résidents, ac-

crédités auprès d'elles, formeront, par rapport à leur rang, une classe intermédiaire entre les ministres du second ordre et les chargés d'affaires." State Papers, vol. v. p. 1090.

(*l*) Vattel, Droit des Gens, liv. iv. ch. 6, §§ 70—79. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. vii. ch. 9, § 192. Martens, Manuel Diplomatique, ch. 1, § 9.

(*m*) Martens, Précis, &c., liv. vii. ch. 2, § 198. *Vide ante*, Pt. II. ch. 4, p. 262.

(*n*) Martens, Manuel Diplomatique, ch. 1, § 10.

(*o*) *Ibid.*

distinction between ambassadors and envoys was originally grounded upon the supposition, that the former are authorized to negotiate directly with the sovereign himself; whilst the latter, although accredited to him, are only authorized to treat with the minister of foreign affairs or other person empowered by the sovereign. The authority to treat directly with the sovereign was supposed to involve a higher degree of confidence, and to entitle the person, on whom it was conferred, to the honours due to the highest rank of public ministers. This distinction, so far as it is founded upon any essential difference between the functions of the two classes of diplomatic agents, is more apparent than real. The usage of all times, and especially the more recent times, authorizes public ministers of every class to confer, on all suitable occasions, with the sovereign at whose court they are accredited, on the political relations between the two States. But even at those periods when the etiquette of European courts confined this privilege to ambassadors, such verbal conferences with the sovereign were never considered as binding official acts. Negotiations were then, as now, conducted and concluded with the minister of foreign affairs, and it is through him that the determinations of the sovereign are made known to foreign ministers of every class. If this observation be applicable as between States, according to whose constitutions of government negotiations may, under certain circumstances, be conducted directly between their respective sovereigns, it is still more applicable to representative Governments, whether constitutional monarchies or republics. In the former, the sovereign acts, or is supposed to act, only through his responsible ministers, and can only bind the State and pledge the national faith through their agency. In the latter, the supreme executive magistrate cannot be supposed to have any relations with a foreign sovereign, such as would require or authorize direct negotiations between them respecting the mutual interests of the two States (*p*).

Ministers of  
the third  
class.

In the third class are included ministers, ministers resident, residents, and ministers chargés d'affaires, accredited to sovereigns (*q*).

Chargés d'affaires, accredited to the ministers of foreign affairs of the court at which they reside, are either chargés d'affaires *ad hoc*, who are originally sent and accredited by their Governments,

(*p*) Pinheiro-Ferreira, Notes to Martens, Précis du Droit des Gens, tom. ii. Notes 12, 14.

(*q*) Martens, Précis, &c., liv. vii. ch. 2, § 194.



or chargés d'affaires *ad interim*, substituted in the place of the minister of their respective nations during his absence (*r*).

According to the rule prescribed by the Congress of Vienna, and which has since been generally adopted, public ministers take rank between themselves, in each class, according to the date of the official notification of their arrival at the court to which they are accredited (*s*). Precedence.

The same decision of the Congress of Vienna has also abolished all distinctions of rank between public ministers, arising from consanguinity and family or political relations between their different courts (*t*).

A State which has a right to send public ministers of different classes, may determine for itself what rank it chooses to confer upon its diplomatic agents; but usage generally requires that those who maintain permanent missions near the Government of each other should send and receive ministers of equal rank. One minister may represent his sovereign at different courts, and a State may send several ministers to the same court. A minister or ministers may also have full powers to treat with foreign States, as at a Congress of different nations, without being accredited to any particular court (*u*).

Consuls, and other commercial agents, not being accredited to the sovereign or minister of foreign affairs, are not, in general, considered as public ministers; but the consuls maintained by the Christian Powers of Europe and America in Mohammedan countries and in the Orient are accredited and treated as public ministers (*v*). Consuls.

Every diplomatic agent, in order to be received in that character, and to enjoy the privileges and honours attached to his rank, must be furnished with a letter of credence. In the case of an ambassador, envoy, or minister, of any of the first three classes, this letter of credence is addressed by the sovereign, or other chief magistrate of his own State to the sovereign or State to whom Letters of credence.

(*r*) Martens, Manuel Diplomatique, ch. 1, § 11.

(*s*) Récez du Congrès de Vienne du 19 Mars, 1815, Art. 4. See *ante*, p. 332, n.

(*t*) *Ibid.* Art. 6.

(*u*) Martens, Précis, &c., liv. vii. ch. 2, §§ 199—204.

(*v*) Cf. Bynkershoek, De Foro Competent. Legat. cap. 10, §§ 4—6. Martens, Manuel Diplomatique, ch. 1, § 13. Vattel, liv. ii. ch. 2, § 34.

Wiquefort, De l'Ambassadeur, liv. i. § 1, p. 63. The Great Powers are represented in Egypt by ministers bearing the title of "Agent Diplomatique and Consul-General." Lord Kitchener was described as the British Agent, Consul-General, and Minister Plenipotentiary. After Egypt was declared a British Protectorate during the Great War, a High Commissioner was appointed, Dec. 18, 1914.

the minister is delegated. In the case of a chargé d'affaires, it is addressed by the secretary, or minister of state charged with the department of foreign affairs, to the minister of foreign affairs of the other Government. It may be in the form of a 'cabinet letter,' but is more generally in that of a 'letter of council.' If the latter, it is signed by the sovereign or chief magistrate, and sealed with the great seal of state. The minister is furnished with an authenticated copy, to be delivered to the minister of foreign affairs, on asking an audience for the purpose of delivering the original to the sovereign, or other chief magistrate of the State to whom he is sent. The letter of credence states the general object of his mission, and requests that full faith and credit may be given to what he shall say on the part of his court (*x*).

Full power.

The full power, authorizing the minister to negotiate, may be inserted in the letter of credence, but it is more usually drawn up in the form of letters-patent. In general, ministers sent to a Congress are not provided with a letter of credence, but only with a full power, of which they reciprocally exchange copies with each other, or deposit them in the hands of the mediating Power or presiding minister (*y*).

Instructions.

The instructions of the minister are for his own direction only, and not to be communicated to the Government to which he is accredited, unless he is ordered by his own Government to communicate them *in extenso*, or partially; or unless, in the exercise of his discretion, he deems it expedient to make such a communication (*z*).

Communication of instructions.

Some States refuse to receive communications from foreign ministers, either on all or on particular topics, unless a copy is at the same time given to their own minister. In 1825, Canning was informed that the Russian ambassador was about to read him a despatch from St. Petersburg, relating to British policy in South America, but that he would not leave him a copy. At the interview Canning declined to allow the reading of the despatch to commence if no copy would be left, on the ground that he could not, at a single hearing, take in the full bearing of the document, nor weigh its expressions sufficiently to return a suitable reply (*a*).

Passport.

A public minister, proceeding to his destined post in time of peace requires no other protection than a passport from his own

(*x*) Martens, Précis, &c., liv. vii. ch. 3, § 202. Wicquefort, De l'Ambassadeur, liv. i. § 15.

(*y*) Wicquefort, liv. i. § 16. Martens, Précis, &c., liv. vii. ch. 3, § 204. Manuel Diplomatique, ch. 2, § 17.

(*z*) Manuel Diplomatique, ch. 2, § 16.

(*a*) Calvo, Droit International (2nd ed.), vol. i. § 430, p. 550; and see Stapleton, George Canning and his Times, p. 429.

Government: In time of war, he must be provided with a safe conduct, or passport, from the Government of the State with which his own country is in hostility, to enable him to travel securely through its territories (*b*).

It is the duty of every public minister, on arriving at his destined post, to notify his arrival to the minister of foreign affairs. If the foreign minister is of the first class, this notification is usually communicated by a secretary of embassy or legation, or other person attached to the mission, who hands to the minister of foreign affairs a copy of the letter of credence, at the same time requesting an audience of the sovereign for his principal. Ministers of the second and third classes generally notify their arrival by letter to the minister of foreign affairs, requesting him to take the orders of the sovereign, as to the delivery of their letters of credence. Chargés d'affaires, who are not accredited to the sovereign, notify their arrival in the same manner, at the same time requesting an audience of the minister of foreign affairs for the purpose of delivering their letters of credence.

Duties of a public minister on arriving at his post.

Ambassadors, and other ministers of the first class, are entitled to a public audience of the sovereign; but this ceremony is not necessary to enable them to enter on their functions, and, together with the ceremony of the solemn entry, which was formerly practised with respect to this class of ministers, is now usually dispensed with, and they are received in a private audience, in the same manner as other ministers. At this audience, the letter of credence is delivered, and the minister pronounces a complimentary discourse, to which the sovereign replies. In republican States, the foreign minister is received in a similar manner, by the chief executive magistrate or council, charged with the foreign affairs of the nation (*c*).

Audience of the sovereign, or chief magistrate.

The usage of civilized nations has established a certain etiquette, to be observed by the members of the diplomatic corps, resident at the same court, towards each other, and towards the members of the Government to which they are accredited. The duties which comity requires to be observed, in this respect, belong rather to the code of manners than of laws, and can hardly be made the subject of positive sanction; but there are certain established rules in respect to them, the non-observance of which may be attended with inconvenience in the performance of more serious and important duties. Such are the visits of etiquette,

Diplomatic etiquette.

(*b*) Vattel, liv. iv. ch. 7, § 85.  
Manuel Diplomatique, ch. 2, § 19.  
Flassan, Histoire de la Diplomatie

Française, tom. v. p. 246.

(*c*) Martens, Manuel Diplomatique, ch. 4, §§ 33—36.



which the diplomatic ceremonial of Europe requires to be rendered and reciprocated, between public ministers resident at the same court (*d*).

Privileges of  
a public  
minister.

From the moment a public minister enters the territory of the State to which he is sent, during the time of his residence, and until he leaves the country, he is entitled to an entire exemption from the local jurisdiction, both civil and criminal. Representing the rights, interests, and dignity of the sovereign or State by whom he is delegated, his person is sacred and inviolable. To give a more lively idea of this complete exemption from the local jurisdiction, the fiction of extra-territoriality has been invented (*e*), by which the minister, though actually in a foreign country, is supposed still to remain within the territory of his own sovereign. He continues still subject to the laws of his own country, which govern his personal status and rights of property, whether derived from contract, inheritance, or testament. His children born abroad are considered as natives. This exemption from the local laws and jurisdiction is founded upon mutual utility, growing out of the necessity that public ministers should be entirely independent of the local authority, in order to fulfil the duties of their mission. The act of sending the minister on the one hand, and of receiving him on the other, amounts to a tacit compact between the two States that he shall be subject only to the authority of his own nation (*f*).

The passports or safe conduct, granted by his own Government in time of peace, or by the Government to which he is sent in time of war, are sufficient evidence of his public character for this purpose (*g*).

Inviolability  
and exterritoriality.

Halleck draws a distinction between the inviolability and the exterritoriality of a public minister. He says: "The former is not a consequence of the latter, but the latter was invented for the purpose of giving security to the former. The mere fact of a public minister being regarded as a foreigner, resident in a

(*d*) Manuel Diplomatique, ch. 4, § 37.

(*e*) There is a difference of opinion among jurists as to the present-day usefulness and applicability of the theory of exterritoriality. For tabulated references on the question, see A. S. Hershey, Essentials of International Public Law (New York, 1912), pp. 285, 286.

(*f*) Grotius, De Jur. Bel. ac Pac. lib. ii. cap. 18, §§ 1—6. Rutherford,

Inst. vol. ii. b. ii. ch. 9, § 20. Wicquefort, De l'Ambassadeur, liv. i. § 27. Bynkershoek, De Jure Competent. Legat. cap. 5, 8. Vattel, Droit des Gens, liv. iv. ch. 7, §§ 81—125. Martens, Précis, liv. vii. ch. 5, §§ 214—218. Klüber, Droit des Gens Moderne de l'Europe, Pt. II. tit. 2, § 203. Fœlix, Droit International Privé, § 184. Wheaton, Hist. Law of Nations, pp. 237—243.

(*g*) Vattel, liv. iv. ch. 7, § 83.

foreign country, would not, of itself, necessarily exempt him from local jurisdiction. . . . The true basis of all diplomatic privilege consists in the idea of inviolability which international jurisprudence attaches to his person and his office, and from which it cannot be severed. This idea of inviolability is an inherent and essential quality of the public minister, and the office cannot exist without it. International law has conferred it upon the State or sovereign which he represents, and to divest him of that quality is to divest him of his office, as the two are inseparable. Not so with respect to the fiction of extra-territoriality. So far as that is not necessary to the exercise of his functions, or, in other words, to secure his inviolability, it is not an essential quality of the public minister, and therefore may be dispensed with by renoucement or otherwise" (*h*).

The attack on the Chinese Legations and the murder of Baron von Ketteler (1900) stand happily alone of recent years as a violation of the immunity of diplomatic agents on the part of a nation claiming to be regarded as civilised. But in 1799 the French plenipotentiaries to the Congress of Rastadt were brutally murdered in cold blood by Austrian hussars (*i*).

This immunity extends, not only to the person of the minister, but to his family and suite, secretaries of legation and other secretaries, his servants, moveable effects, and the house in which he resides (*l*).

The absolute exterritoriality of a minister's house was disputed in comparatively recent times by the French Government. In April, 1867, one Mickilchenkorff, a Russian subject, appeared at the Russian embassy in Paris, and made a demand, which was refused. Thereupon he assaulted one of the attachés with a dagger, wounded him, and injured two other persons who came to the rescue. The police, being applied to, entered the house and removed the culprit, who was afterwards brought before the Cour d'Assises. The Russian ambassador, who was absent when the crime was committed, on his return demanded that the prisoner should be sent to Russia, on the ground that the act having been committed in his 'hôtel,' the French courts had no jurisdiction,

Exemption  
from the local  
jurisdiction.

Minister's  
house.

(*h*) Halleck, Int. Law, ed. Sir G. S. Baker (1908), vol. i. pp. 359, 360. (In the last sentence the word "not" in the phrase "so far as that is not necessary," is omitted from the 1908 edition, though it is found in the first edition, 1861. The omission is obviously due to inadvertence; so that the negative is retained here.)

(*i*) Alison, vol. iv. sect. 27, p. 228.

(*l*) Grotius, De Jur. Bel. ac Pac. lib. ii. cap. xviii. §§ 8, 9. Bynkershoek, De Foro Competent. Legat. cap. 13, § 5; cap. 15, 20. Vattel, liv. iv. ch. 8, § 113; ch. 9, §§ 117—123. Martens, Précis, liv. vii. ch. 5, §§ 215—227; ch. 9, §§ 234—237. Fœlix, § § 184—186.

and the case must be tried in Russia. The French Government refused to give up the prisoner, urging that the principle of ex-territoriality did not cover the case of a stranger entering the minister's house, and there committing a crime; and that even if it did, the parties themselves had in this particular case waived the privilege by summoning the local police. The Russian Government finally admitted the jurisdiction of the French court, and the prisoner was duly tried by the local law (*l*). Again, in 1896, a Chinese refugee having been induced to enter the Chinese ambassador's residence in London, was kept there under arrest, with a view to sending him back to his own country for trial. But the British Government insisted on his release.

The minister's person is in general entirely exempt both from the civil and criminal jurisdiction of the country where he resides. To this general exemption, there may be the following exceptions:—

Exceptions to  
the general  
rule of  
exemption.

1. This exemption from the jurisdiction of the local tribunals and authorities does not apply to the contentious jurisdiction which may be conferred on those tribunals by the minister voluntarily making himself a party to a suit at law (*m*).

Suits by and  
against  
ministers.

It has been held in England that an ambassador, having no real property in the country, and having done nothing to disentitle him to the general privileges of his office, cannot, while he remains such ambassador, be sued in England against his will, although the suit may arise out of commercial transactions by him here, and although neither his person nor his goods are touched by the suit (*n*). But if the ambassador appears and submits to the jurisdiction, the action can then be proceeded with (*o*). The constitution of the United States vests the exclusive jurisdiction "of all suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls," in the courts of the United States, to the exclusion of the State courts (*p*). If an ambassador contracts debts which he refuses to pay, and if he also refuses to submit to the jurisdiction, creditors have no remedy but to apply

(*l*) Calvo, Droit International, vol. i. § 571.

(*m*) Bynkershoek, cap. 16, §§ 13—15. Vattel, liv. iv. ch. 8, § 111. Martens, Précis, liv. vii. ch. 5, § 216. Merlin, Rep. tit. *Ministre*, s. 5, § 4, No. 10.

(*n*) *Magdalena Steam Navig. Co. v. Martin* (1859), 2 E. & E. 94. Cf. *Macartney v. Garbutt* (1890), 24 Q. B. D. 368.

(*o*) *Taylor v. Best* (1854), 14 C. B. 521; *Gladstone v. Musurus Bey* (1862), 1 H. & M. 495. And see *U. S. v. Hand*, 2 Washington C. C. 435; *Parkinson v. Potter* (1885), 16 Q. B. D. 152.

(*p*) U. S. Revised Statutes, tit. xiii. ch. 12, sec. 711. *U. S. v. Ravara* (1793), 2 Dallas, 297; *Cohens v. Virginia*, 6 Wheaton, 407; *St. Luke's Hospital v. Barkley*, 3 Blatchford, 259.



to the Minister for Foreign Affairs of the ambassador's own country (*q*). The immunity of an ambassador from process in the English courts extends not merely to the time during which he is accredited to the Sovereign, but to such a reasonable period after he has presented his letters of recall as is necessary to enable him to wind up his official business and prepare for his return to his own country, and he is not deprived of the immunity by reason that his successor is duly accredited before that period has elapsed (*r*).

In 1888, an application was made to a Queen's Bench Divisional Court in England to set aside service of process which had been effected in Paris upon one General Blanco, the minister of Venezuela, accredited and received in France in that character. The court discharged the order upon other grounds, and gave no judgment on this point. Baron Huddleston, however, expressed an opinion that the privilege of ambassadors was confined by the municipal law to representatives of foreign States resident at Her Majesty's Court. Mr. Justice Manisty, on the other hand, thought that the principle laid down by Grotius—"omnis coactio a legato adesse debet," as recognised in *Magdalena Steam Navigation Co. v. Martin*—would be violated by compelling (in effect) a foreign minister to a foreign country to appear and defend himself here (*s*).

Ministers in foreign countries.

The immunities of ambassadors in England are partially defined by a statute of the reign of Queen Anne, which recites that "Whereas several turbulent and disorderly persons having in a most outrageous manner insulted the person of his Excellency Andrew Artemonowitz Mattueof, ambassador extraordinary of his Czarish Majesty, Emperor of Great Russia, by arresting him and taking him by violence out of his coach in the public street, and detaining him in custody for several hours, in contempt of the protection granted by Her Majesty, contrary to the law of nations, and in prejudice of the rights and privileges which ambassadors and other public ministers, authorized and received as such, have at all times been thereby possessed of, and ought to be kept sacred and inviolable"; it was therefore enacted, "That all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador, or other public minister of any foreign prince or State . . . or the domestick or domestick servant of any such ambassador, or other public minister,

Foreign ministers in England.

(*q*) Calvo, *Droit International*, vol. i. *others*, (1894) 2 Q. B. 352.  
 § 575. (*s*) *New Chile Co. v. Blanco* (1888),  
 (*r*) *Musurus Bey v. Gadban and* 4 T. L. R. 346.

may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized or attached, shall be deemed or adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever" (*t*). But no merchant or trader who puts himself into the service of an ambassador, shall have the benefit of the Act, and every ambassador's servant must be registered to entitle him to exemption from process (*u*). If the ambassador himself engage in trade, he does not thereby forfeit the privilege conferred by the statute (*x*).

2. If he is a citizen or subject of the country to which he is sent, and that country has not renounced its authority over him, he remains still subject to its jurisdiction (*y*). But it may be questionable whether his reception as a minister from another Power, without any express reservation as to his previous allegiance, ought not to be considered as a renunciation of this claim, since such reception implies a tacit convention between the two States that he shall be entirely exempt from the local jurisdiction (*z*).

3. If he is at the same time in the service of the Power who receives him as a minister, as has sometimes happened among the German courts, he continues still subject to the local jurisdiction (*a*).

4. In case of offences committed by public ministers affecting the existence and safety of the State where they reside, if the danger is urgent, their persons and papers may be seized, and they may be sent out of the country. In all other cases, it appears to be the established usage of nations to request their recall by their own sovereign, which, if unreasonably refused by him, would unquestionably authorize the offended State to send away the offender. There may be other cases which might, under circumstances of sufficient aggravation, warrant the State thus offended in proceeding against an ambassador as a public enemy, or in inflicting punishment upon his person if justice should be refused by his own sovereign. But the circumstances which would authorize such a proceeding are hardly capable of precise definition, nor can any general rule be collected from the examples to be found

(*t*) 7 Anne, c. 12, sec. 3.

(*u*) *Ibid.* sec. 5.

(*x*) *Barbuit's case* (1737), Cas. temp. Talbot, 281; *Taylor v. Best* (1854), 14 C. B. 481. Foote, Priv. Int. Jurisp. pp. 172 *seq.*

(*y*) Except in any respect directly relating to the performance of his public functions. *Parkinson v. Potter*

(1885), 16 Q. B. D. 152, 162.

(*z*) Bynkershoek, cap. 11. Vattel, liv. iv. ch. 8, § 112. The principle supported in the text has been established by a noted English case, *Macartney v. Garbutt* (1890), 24 Q. B. D. 368.

(*a*) Martens, Manuel Diplomatique, ch. 3, § 23.

in the history of nations where public ministers have thrown off their public character and plotted against the safety of the State to which they were accredited. These anomalous exceptions to the general rule resolve themselves into the paramount right of self-preservation and necessity. Grotius distinguishes here between what may be done in the way of self-defence and what may be done in the way of punishment. Though the law of nations will not allow an ambassador's life to be taken away as a punishment for a crime after it has been committed, yet this law does not oblige the State to suffer him to use violence without endeavouring to resist it (*b*).

Several instances are to be found in history of ambassadors being seized and sent out of the country. The Bishop of Ross, ambassador of Mary Queen of Scots, was imprisoned and then banished from England, for conspiring against the sovereign, while the Duke of Norfolk and other conspirators were tried and executed (*c*). In 1584, Mendoza, the Spanish ambassador in England, was ordered to quit the realm for conspiring to introduce foreign troops and dethrone Queen Elizabeth (*d*). That he was not liable to be put to death for his offence was the opinion of Gentilis and Hotman, to whom the case was referred. In 1654, De Bass, the French minister, was ordered to depart from the country in twenty-four hours, on a charge of conspiracy against the life of Cromwell (*e*). In 1717, Gyllenborg, the Swedish ambassador, contrived a plot to dethrone George I. He was arrested, his cabinet broken open and searched, and his papers seized. Sweden arrested the British minister at Stockholm by way of reprisal. The Regent of France interposed his good offices, and the two ambassadors were shortly afterwards exchanged (*f*). The arrest of Gyllenborg was necessary as a measure of self-defence, but on no principle of international law can the arrest of the British minister by Sweden be made justifiable. For similar reasons, Cellamare, Spanish ambassador in France, was, in 1718, arrested, his papers seized, and himself conducted to the frontier by a military escort (*g*).

Instances of  
the expulsion  
of ambas-  
sadors.

(*b*) Grotius, *De Jur. Bel. ac Pac.* lib. ii. cap. 18, § 4. Rutherford, *Inst.* vol. ii. b. ii. ch. 9, § 20. Bykershoek, *De Foro Competent. Legat.* cap. 17, 18, 19. Vattel, *liv. iv. ch. 7, §§ 94—102.* Martens, *Précis*, liv. vii. ch. 5, § 218. Ward, *Hist. of the Law of Nations*, vol. ii. ch. 17, pp. 291—334. Wheaton, *Hist. of Law of Nations*, pp. 250—254.

(*c*) Froude, *Hist. of England*, vol. x. pp. 222 *et seq.* (ed. 1866).

(*d*) *Ibid.* vol. xi. p. 623.

(*e*) Phillimore, vol. ii. § 164.

(*f*) Mahon, *Hist. of England*, vol. i. pp. 388 *seq.* Cf. C. de Martens, *Causes Célèbres*, vol. i. p. 97.

(*g*) Mahon, *Hist. of Eng.* vol. i. p. 484. Cf. De Martens, *Causes Célèbres*, i. pp. 139 *seq.*



In 1792, the recall of Genêt, the French minister in the United States, was insisted on because he fitted out privateers with a view to preying on British commerce, and set up Prize Courts on American territory for adjudicating on British vessels captured by French cruisers—these being acts in violation of the neutrality of the United States (*h*). At the same time the recall of Governor Morris was requested by the French Government on the ground that he had taken part in intrigues on behalf of the monarchical party in France. In 1804, Yrujo, minister of Spain to the United States, caused great annoyance to the President and ministers by intemperate conduct in diplomatic intercourse, and more particularly by endeavouring, and claiming the right to endeavour, by a pecuniary recompense, to induce a newspaper editor to forward his views and insert articles from him impeaching the conduct of the President. His recall was demanded, and the King intimated that his minister had received his royal permission to return to Spain at the season which would be convenient for a safe passage. Yrujo, however, after the lapse of many months, being about to present himself at Washington to attend the meeting of Congress, a letter of remonstrance was addressed to him. He replied, in a letter the tone of which departs from the usual style of diplomatic correspondence, that he had not come to Washington to form plots, to excite conspiracies, or to promote any attempts against the United States Government, and as he had not directly or indirectly committed any acts of that tendency, which *alone*, as he said, could justify the tenour and object of the letter of remonstrance, he should live where he pleased and stay where he pleased, taking no orders but from his Catholic Majesty. This letter received no answer, but a copy of the whole correspondence was transmitted to Spain to be laid before the Government. The Spanish Secretary replied supporting his minister. It is not clear how the matter ended (*i*).

So recently as 1848, Sir H. Bulwer, the British ambassador in Spain, had his passports returned, and was requested by the Government to leave Spanish territory. Certain disturbances had taken place in various parts of Spain, and the Government, without the least justification, persuaded themselves that Sir H. Bulwer had lent his assistance to the disaffected. This proceeding caused diplomatic arrangements to be suspended between the two countries

(*h*) See Moore, Digest, vol. iv. § 639.

(*i*) Wharton, Digest, § 84, p. 605; § 106, Appendix; Moore, Digest, vol. iv. pp. 508 *seq.*

during two years, and the dispute was only settled by the mediation of the King of the Belgians (*k*).

In the autumn of 1888, Lord Sackville, the British minister at Washington, received a letter, purporting to come from a citizen in California of British birth, asking advice as to which way the writer should vote at the approaching Presidential election. The letter also contained reflections upon the sincerity of the Senate in its rejection of the Fisheries Treaty (*l*), and upon the subsequent conduct of the Government. Lord Sackville replied in a letter which he marked "private," and indicated that the then Government were favourably disposed towards Great Britain. He spoke of the opening of the questions with Canada since the rejection of the treaty as "unfortunate." This letter was construed as sanctioning the reflection cast by Lord Sackville's correspondent upon the Senate and Government, and as an unwarrantable interference in the domestic affairs of the United States. It seemed, indeed, to Mr. Bayard to threaten the dignity, security, and independent sovereignty of the United States, and Lord Sackville having also, as it was alleged, though without the slightest foundation, spoken slightly of the President and Senate in interviews with reporters, the attention of the British Government was called to the facts, and Lord Sackville's passports were sent to him (*m*).

Lord Salisbury, communicating with the American minister on the subject, considered it "hardly practicable to lay down the principle that a diplomatic representative was prohibited from expressing, even privately, any opinion on the events passing in the country to which he was accredited." The language imputed to Lord Sackville in the interviews with newspaper reporters was different, and must be taken to have been intended for publication, and Lord Salisbury awaited Lord Sackville's explanation, and a copy of the expressions actually used by him. Before these could arrive the passports had been sent (*n*).

Diplomatic intercourse with Lord Sackville was terminated on 30th of October, but the copies of the correspondence, and newspapers containing reports of the interviews complained of, were not communicated to Lord Salisbury till the 8th December. In his letter forwarding these documents the American minister wrote:—"In asking from Her Majesty's Government the recall or withdrawal of its minister, upon a representation of the general

(*k*) Calvo, Droit International, vol. i. § 581.

(*l*) *Ante*, p. 289.

(*m*) Mr. Bayard to the President,

The Times, 1st November, 1888.

(*n*) Parliamentary Papers, United States, No. 3 (1888); The Times, 7th November, 1888.

purport of the letter and statements above mentioned, the Government of the United States assumed that such request would be sufficient for that purpose, whatever considerations the reason for it might afterwards demand and receive." In his reply, Lord Salisbury combated this statement of the law and usage, and maintained that although it was open to any Government to terminate its diplomatic relations with any particular minister of any other State, it has no claim to demand that the other State shall make itself the instrument of that proceeding, or concur in it, unless satisfied on sufficient reasons, duly produced, of the justice of the demand. With regard to the complaint which had been made by Mr. Bayard, that Lord Sackville had made public no denial of the statements imputed to him by the reporters, Lord Sackville stated to Lord Salisbury that Mr. Bayard, as Secretary of State, was in possession of his disclaimer, and that any communication through the press could only have led to unseemly and undignified controversy (*o*). The British Government contented itself by treating the conduct of the President and his secretary as personal to themselves, due to political exigencies arising out of the Presidential campaign, and left the legation in charge of the First Secretary till after the formal installation of the new President in the following year (*oo*).

If it appears that the ambassador has not fully entered upon his functions, either by his credentials not having been presented, or by his not having been fully invested with the character by his own country, he cannot then claim the inviolability attached to regular ambassadors (*p*).

Personal exemption extending to his family, secretaries, servants, &c.

The wife and family, servants and suite, of the minister, participate in the inviolability attached to his public character. The secretaries of embassy and legation are especially entitled, as official persons, to the privileges of the diplomatic corps, in respect to their exemption from the local jurisdiction (*q*).

The municipal laws of some, and the usages of most nations, require an official list of the domestic servants of foreign ministers to be communicated to the secretary or minister of foreign affairs,

(*o*) Parliamentary Papers, United States, No. 4 (1888); The Times, 14th January, 1888.

(*oo*) Cf. the case of Dr. Dumba (Sept. 1915).

(*p*) See case of Marquis de la Chetardie; Calvo, Droit International, vol. i. § 561. Case of Da Sa; 5

Howell, State Trials, 460.

(*q*) Grotius, lib. ii. cap. 18, § 8. Bynkershoek, cap. 15, 20. Vattel, liv. iv. ch. 9, §§ 120—123. Martens, Précis, liv. vii. ch. 5, § 219; ch. 9, §§ 234—237. Félix, § 184. Taylor v. Best (1854), 14 C. B. 487; Dupont v. Pichon (1805), 4 Dallas, 300.



in order to entitle them to the benefit of this exemption (*r*). But this requirement is not always observed (*s*).

It follows from the principle of the extra-territoriality of the minister, his family, and other persons attached to the legation, or belonging to his suite, and their exemption from the local laws and jurisdiction of the country where they reside, that the civil and criminal jurisdiction over these persons rests with the minister, to be exercised according to the laws and usages of his own country. In respect to civil jurisdiction, both contentious and voluntary, this rule is, with some exceptions, followed in the practice of nations. But in respect to criminal offences committed by his domestics, although in strictness the minister has a right to try and punish them, the modern usage merely authorizes him to arrest and send them for trial to their own country. He may, also, in the exercise of his discretion, discharge them from his service, or deliver them up for trial under the laws of the State where he resides; as he may renounce any other privilege to which he is entitled by the public law (*t*).

The personal effects or movables belonging to the minister, within the territory of the State where he resides, are entirely exempt from the local jurisdiction; so, also, of his dwelling-house (*u*). But any other real property, or immovables, of which he may be possessed within the foreign territory, is subject to its laws and jurisdiction. Nor is the personal property of which he may be possessed as a merchant carrying on trade, or in a fiduciary character, as an executor, &c., exempt from the operation of the local laws (*x*).

Exemption of the minister's house and property.

The question, how far the personal effects of a public minister are liable to be seized or detained, in order to enforce the performance on his part of the contract of hiring of a dwelling-house, inhabited by him, was discussed between the American and Prussian Governments in *Wheaton's case* (1839). According to the Prussian Civil Code "the lessor is entitled, as a security for the rent and other demands arising under the contract, to the rights of a 'Pfandgläubiger' [*i.e.*, a creditor whose rights are secured

Wheaton's Case (1839).

(*r*) Blackstone, Commentaries, vol. i. ch. 7. LL. of the United States, vol. i. ch. 9, § 26.

(*s*) Cf. *In re Baiz* (1889), 135 U. S. 403; *U. S. v. Liddle* (1808), 2 Wash. C. C. 205.

(*t*) Bynkershoek, cap. 15, 20. Vattel, liv. iv. ch. 9, § 124. Rutherford, Inst. vol. ii. b. ii. ch. 9, § 20. Klüber, Pt. II. tit. 2, §§ 212—214. Merlin,

Répertoire, tit. *Ministre Publique*, sect. vi.

(*u*) Grotius, De Jur. Bel. ac Pac. lib. i. cap. 18, § 9; Bynkershoek, De For. Legat. cap. ix. §§ 9, 10. Vattel, Droit des Gens, liv. iv. ch. 8, § 114.

(*x*) Vattel, liv. iv. ch. 8, §§ 113—115. Martens, Précis, liv. vii. ch. 8, § 217. Klüber, Pt. II. tit. 2, ch. 3, § 210. Merlin, sect. v. § iv. No. 6.

by hypothecation] upon the goods brought by the tenant upon the premises, and there remaining at the expiration of the lease" (*y*). Under this law the proprietor of the house in which the minister of the United States accredited at the court of Berlin resided, claimed the right of detaining the goods of the minister 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 Prussian Government decided that the general exemption, under the law of nations, of the personal property of foreign ministers from the local jurisdiction, did not extend to this case, where, it was contended, the right of detention was created by the contract itself, and by the legal effect given to it by the local law. The American minister maintained, however, that such a decision was contrary to the principle of diplomatic immunity, inasmuch as it placed diplomatic agents on the same footing with the subjects of the country. The publicists who have referred to this case appear to support the arguments of the United States minister (*z*).

Duties and taxes.

The person and personal effects of the minister are not liable to taxation. He is exempt from the payment of duties on the importation of articles for his own personal use and that of his family. But this latter exemption is, at present, by the usage of most nations, limited to a fixed sum during the continuance of the mission. He is liable to the payment of tolls and postages. The house in which he resides, though exempt 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 (*a*). And though, in general, his house is inviolable, and cannot be entered, without his permission, by police, custom-house, or excise officers, yet the abuse of this privilege, by which it was converted in some countries into an asylum for fugitives from justice, has caused it to be very much restrained by the recent usage of nations (*b*).

Messengers and couriers.

The practice of nations has also extended the inviolability of public ministers to the messengers and couriers, sent with despatches to or from the legations established in different countries. They are exempt from every species of visit and search,

(*y*) Allgemeines Landrecht für die Preussischen Staaten, Pt. I. tit. 21, § 395; tit. 30, § 1.

(*z*) Cf. Moore, Digest, vol. iv. § 663. For a review of the controversy, see Fœlix, Revue du droit français et étranger, ii. 31.

(*a*) *Macartney v. Garbutt* (1890), 24 Q. B. D. 368.

(*b*) Vattel, liv. iv. ch. 9, §§ 117, 118. Martens, Précis, liv. vii. ch. 5, § 220. Manuel Diplomatique, ch. 3, §§ 30, 31. Merlin, Répertoire, tit. *Ministre Publique*, sect. v. § 5, Nos. 2, 3.

in passing through the territories of those Powers with whom their own Government is in amity. For the purpose of giving effect to this exemption, they must be provided with passports from their own Government, attesting their official character; and, in the case of despatches sent by sea, the vessel or 'aviso' must also be provided with a commission or pass. In time of war, a special arrangement, by means of a cartel or flag of truce, furnished with passports, not only from their own Government, but from its enemy, is necessary, for the purpose of securing these despatch vessels from interruption, as between the belligerent Powers. But an ambassador, or other public minister, resident in a neutral country for the purpose of preserving the relations of peace and amity between the neutral State and his own Government, has a right freely to send his despatches in a neutral vessel, which cannot lawfully be interrupted by the cruisers of a Power at war with his own country (c).

The opinion of public jurists appears to be somewhat divided upon the question of the respect and protection to which a public minister is entitled, in passing through the territories of a State other than that to which he is accredited. The inviolability of ambassadors, under the law of nations, is understood by Grotius and Bynkershoek, among others, as binding only on those to whom they are sent, and by whom they are received (d). Wicquefort, in particular, who has ever been considered as the stoutest champion of ambassadorial rights, asserts that the assassination of the ministers of the French king, Francis I., in the territories of the Emperor Charles V., though an atrocious murder, was no breach of the law of nations, as to the privileges of ambassadors. It might be regarded as a violation of the right of innocent passage, aggravated by the circumstance of the dignified character of the persons on whom the crime was committed—and might even be considered a just cause of war against the emperor, without involving the question of protection in the character of ambassador, which arises exclusively from a legal presumption which can only exist between the sovereigns from and to whom he is sent (e).

Public minister passing through the territory of another State than that to which he is accredited.

Vattel, on the other hand, states that passports are necessary to an ambassador, in passing through different territories on his way to his destined post, in order to make known his public character. It is true that the sovereign to whom he is sent is more

Opinion of Vattel.

(c) Vattel, liv. iv. ch. 9, § 123. Martens, Précis, liv. vii. ch. 13, § 250. *The Caroline* (1807), 6 C. Rob. 466.

lib. ii. cap. 18, § 5. Bynkershoek, De Foro Comp. Legat. cap. ix. § 7.

(e) Wicquefort, De l'Ambassadeur, liv. i. § 29, pp. 433—439.

(d) Grotius, De Jur. Bel. ac Pac.



especially bound to cause to be respected the rights attached to that character; but he is not the less entitled to be treated, in the territory of a third Power, with the respect due to the envoy of a friendly sovereign. He is, above all, entitled to enjoy complete personal security; to injure and insult him would be to injure and insult his sovereign and entire nation; to arrest him, or commit any other act of violence against his person, would be to infringe the rights of legation which belong to every sovereign. Francis I. was therefore fully justified in complaining of the assassination of his ambassadors, and, as Charles V. refused satisfaction, in declaring war against him. "If an innocent passage, with complete security, is due to a private individual, with still more reason is it due to the public minister of a sovereign, who is executing the orders of his master, and travelling on the business of his nation. I say *an innocent passage*; for if the journey of the minister is liable to just suspicion, as to its motives and objects; if the sovereign, through whose territories he is about to pass, has reason to apprehend that he may abuse the liberty of entering them for sinister purposes, he may refuse the passage. But he cannot maltreat him, or suffer others to maltreat him. If he has not sufficient reasons for refusing the passage, he may take such precautions as are necessary to prevent the privilege being abused by the minister" (f).

He afterwards limits this right of passage to the ambassadors of sovereigns, with whom the State, through which the attempt to pass is made, is at the time in the relation of peace and amity; and adduces, in support of this limitation of the right, the case of Marshal Belle-Isle, French ambassador at the Prussian court, in 1744 (France and Great Britain being then at war), who, in attempting to pass through Hanover, was arrested and carried off a prisoner to England (g).

Of Bynkershoek.

Bynkershoek maintains that ambassadors, passing through the territories of another State than that to which they are accredited, are amenable to the local jurisdiction, both civil and criminal, in the same manner with other aliens, who owe a temporary allegiance to the State.) He interprets the edict of the States-General, of 1679, exempting from arrest "the persons, domestics, and effects of ambassadors ('hier te lande komende, residerende of passerende')," as extending only to those public ministers actually accredited to their High Mightinesses. He considers the last-mentioned term 'passerende' as referring not to those who,

(f) Vattel, *Droit des Gens*, liv. iv. ch. 7, §§ 84, 85.

(g) Ch. de Martens, *Causes Célèbres du Droit des Gens*, tome i. p. 310.

coming from abroad, merely pass through the territories of the State in order to proceed to another country, but to those only who are about to leave the State where they have been resident as ministers accredited to its Government (*h*).

This appears to Merlin to be a forced interpretation. "The word 'passer' in French, like 'passerende' in Dutch," says he, "was never used to designate a person returning from a given place; but is applicable to one who, having arrived at that place, does not stop there, but proceeds on to another. We must, therefore, conclude that the law in question attributes to ambassadors, who merely pass through the United Provinces, the same independence with those who are there resident. If it be objected, as Bynkershoek does object, that the States-General (that is, the authors of this very law) caused to be arrested, in 1717, the Baron de Gortz, ambassador of Sweden at the court of London, at the request of George I., against the security of whose crown he had been plotting, the answer to this example is furnished by Bynkershoek himself. 'The only reason,' says he, 'alleged by the States-General for this proceeding was, that this ambassador had not presented to them his letters of credence.' This reason (continues Merlin) is not the less conclusive for being the only one alleged by the States-General. (When it is said that an ambassador is entitled, in the territories through which he merely passes, to the independence belonging to his public character, it must be understood with this qualification, that he travels as an ambassador; that is to say, after having caused himself to be announced as such, and having obtained permission to pass in that character. This permission places the sovereign, by whom it has been granted, under the same obligation as if the public minister had been accredited to and received by him. Without this permission, the ambassador must be considered as an ordinary traveller, and there is nothing to prevent his being arrested for the same causes which would justify the arrest of a private individual <sup>(i)</sup>).

To these observations of the learned and accurate Merlin it may be added, that the inviolability of a public minister in this case depends upon the same principle with that of his sovereign, coming into the territory of a friendly State by the permission, express or implied, of the local Government. Both are equally entitled to the protection of that Government, against every act

(*h*) Bynkershoek, *De For. Legat.* cap. ix. Wheaton, *Hist. Law of Nations*, p. 243.

(*i*) Merlin, *Répertoire*, tit. *Ministre Publique*, sect. v. § 3, Nos. 4, 12.

of violence and every species of restraint, inconsistent with their sacred character. We have used the term 'permission, express or implied'; because a public minister accredited to one country who enters the territory of another, making known his official character in the usual manner, is as much entitled to avail himself of the permission which is implied from the absence of any prohibition, as would be the sovereign himself in a similar case (*k*).

Freedom of religious worship.

A minister resident in a foreign country is entitled to the privilege of religious worship in his own private chapel, according to the peculiar forms of his national faith, although it may not be generally tolerated by the laws of the State where he resides. Even since the epoch of the Reformation, this privilege has been secured, by convention or usage, between the Catholic and Protestant nations of Europe. It is also enjoyed by the public ministers and consuls from the Christian Powers in Mohammedan and Oriental countries. The increasing spirit of religious freedom and liberality has gradually extended this privilege to the establishment, in most countries, of public chapels, attached to the different foreign embassies, in which not only foreigners of the same nation, but even natives of the country of the same religion, are allowed the free exercise of their peculiar worship. This does not, in general, extend to public processions, the use of bells, or other external rites celebrated beyond the walls of the chapel (*l*).

Consuls not entitled to the peculiar privileges of public ministers.

Consuls are not public ministers. Whatever protection they may be entitled to in the discharge of their official duties, and whatever special privileges may be conferred upon them by the local laws and usages, or by international compact, they are not entitled, by the general laws of nations, to the peculiar immunities of ambassadors. No State is bound to permit the residence of foreign consuls, unless it has stipulated by convention to receive them. They are to be approved and admitted by the local sovereign, and, if guilty of illegal or improper conduct, are liable to

(*k*) *Vide supra*, Pt. ii. ch. 2, p. 151. Later jurists and publicists are also divided as to whether ambassadors enjoy inviolability in third States. On the whole the main current of opinion is against absolute inviolability (cf. *Annuaire de l'Institut de droit international*, vol. xiv. p. 239), and in favour of limited immunity, *i.e.*, conditional on the ambassador's good behaviour and innocent passage through the territory of the third State, when it is at peace with each of the other two States concerned. Cf. the Ameri-

can case, *Wilson v. Blanco* (1889), 56 N. Y. Sup. Court, 582, and the English case, *New Chile Gold Mining Co. v. Blanco* (1888); in both cases the principle of immunity against civil suits was recognised in the case of a Venezuelan minister to the French Republic.

(*l*) Vattel, liv. iv. ch. 7, § 104. Martens, *Précis*, liv. vii. ch. 6, §§ 222—226. Klüber, *Droit des Gens Moderne de l'Europe*, Pt. II. tit. ii. ch. 3, §§ 215, 216.



have the exequatur, which is granted them, withdrawn, and may be punished by the laws of the State where they reside, or sent back to their own country, at the discretion of the Government which they have offended. In civil and criminal cases, they are subject to the local law in the same manner with other foreign residents owing a temporary allegiance to the State (*m*). None the less, they enjoy certain privileges and immunities not possessed by private persons. Moreover, the special class of consuls sent by the European and United States Governments to non-Christian countries are usually granted, either by treaty or through long-established usage, the rights and immunities of diplomatic agents.

Sir Robert Phillimore says: "The privileges of consuls [*i.e.*, other than those last mentioned], so far as they are derived from the country to which they are sent, are, generally speaking, an exemption from any personal tax, and generally from the liability to have soldiers quartered in their houses. They are usually allowed to grant passports to the subjects of their own country, living within the range of their consulate, but not to foreigners. As a general rule, the muniments and papers of the consulate are inviolable, and under no pretext to be seized or examined by the local authorities" (*n*). There have been numerous judicial decisions on this subject. The general result of the English, American, and French cases establishes that consuls have certain privileges, but that they are not diplomatic officers, and that they cannot claim any of the immunities accorded specially to members of the diplomatic service (*o*).

Privileges of consuls.

A remarkable case of the withdrawal of a consul's exequatur took place in America in 1861. In order to protect British commerce, Her Majesty's Government were desirous that the Confederates should observe the last three Articles of the Declaration of Paris, and accordingly Mr. Bunch, the British Consul at Charleston, was instructed to communicate this desire of Her Majesty's Government to the Confederate authorities. The United States thereupon demanded that Mr. Bunch should be removed from his office, on the ground that the law of the United States

Case of Mr. Bunch.

(*m*) Wicquefort, *De l'Ambassadeur*, liv. i. § 5. Bynkershoek, cap. 10. Martens, *Précis*, liv. iv. ch. 3, § 148. Kent, *Comment.* vol. i. pp. 43—45 (5th ed.). Félix, *Droit Int. Privé*, § 191.

(*n*) Phillimore, vol. ii. § 248. Fynn, *The British Consul Abroad*, p. 17.

(*o*) *Viveash v. Becker* (1814), 3 M. & S. 284; *Clark v. Cretico* (1808), 1 Taunt. 186; *Aspinwall v. Queen's Proctor* (1839), 2 Curteis, 241; *Sorensen v. Reg.*, 11 Moo. P. C. 141; *The Octavie*, 33 L. J. Adm. 115; *Davis v. Packhard*, 7 Peters, 276; *St. Luke's Hospital v. Barkley*, 3 Blatchford, 259. Cf. Calvo, *Droit Int.* vol. ii. § 485.

prohibited any person, not specially appointed, from counselling, advising, &c., in any political correspondence with the Government of any foreign State, in relation to any disputes or controversies with the United States, and that Mr. Bunch ought to have known of this law, and to have communicated it to his Government before obeying their instructions. It was also urged that the proper agents to make known the wishes of a foreign Government were its diplomatic and not its consular officers. On these grounds Mr. Bunch's exequatur was withdrawn (*p*).

Termination  
of public  
mission.

The mission of a foreign minister resident at a foreign court, or at a congress of ambassadors, may terminate during his life in one of the following modes:—

1. By the expiration of the period fixed for the duration of the mission; or, where the minister is constituted *ad interim* only, by the return of the ordinary minister to his post. In either of these cases, a formal recall is unnecessary.

2. When the object of the mission is fulfilled, as in the case of embassies of mere ceremony; or where the mission is special, and the object of the negotiation is attained or has failed.

3. By the recall of the minister.

4. By the decease or abdication of his own sovereign, or the sovereign to whom he is accredited. In either of these cases it is necessary that his letters of credence should be renewed; which, in the former instance, is sometimes done in the letter of notification written by the successor of the deceased sovereign to the foreign prince at whose court the minister resides. In the latter case he is provided with new letters of credence; but where there is reason to believe that the mission will be suspended for a short time only, a negotiation already commenced may be continued with the same minister confidentially *sub spe rati*.

5. When the minister, on account of any violation of the law of nations, or any important incident in the course of his negotiation, assumes on himself the responsibility of declaring his mission terminated.

6. When, on account of the minister's misconduct or the measures of his Government, the court at which he resides thinks fit to send him away without waiting for his recall.

7. By a change in the diplomatic rank of the minister.

8. By the outbreak of hostilities or declaration of war between the minister's own country and that to which he is accredited.

When, by any of the circumstances above mentioned, the minister is suspended from his functions, and in whatever manner his mission is terminated, he still remains entitled to all the privileges of his public character until his return to his own country (*q*).

A formal letter of recall must be sent to the minister by his Government: 1. Where the object of his mission has been accomplished, or has failed; 2. Where he is recalled from motives which do not affect the friendly relations of the two Governments. Letter of recall.

In these two cases, nearly the same formalities are observed as on the arrival of the minister. He delivers a copy of his letter of recall to the minister of foreign affairs, and asks an audience of the sovereign, for the purpose of taking leave. At this audience the minister delivers the original of his letter of recall to the sovereign, with a complimentary address adapted to the occasion.

If the minister is recalled on account of a misunderstanding between the two Governments, the peculiar circumstances of the case must determine whether a formal letter of recall is to be sent to him, or whether he may quit the residence without waiting for it; whether the minister is to demand, and whether the sovereign is to grant him, an audience of leave.

Where the diplomatic rank of the minister is raised or lowered, as where an envoy becomes an ambassador, or an ambassador has fulfilled his functions as such, and is to remain as a minister of the second or third class, he presents his letter of recall, and a letter of credence in his new character.

Where the mission is terminated by the death of the minister, his body is to be decently interred, or it may be sent home for interment; but the external religious ceremonies to be observed on this occasion depend upon the laws and usages of the place. The secretary of legation, or, if there be no secretary, the minister of some allied Power, is to place the seals upon his effects, and the local authorities have no right to interfere, unless in case of necessity. All questions respecting the succession *ab intestato* to the minister's movable property, or the validity of his testament, are to be determined by the laws of his own country. His effects may be removed from the country where he resided, without the payment of any 'droit d'aubaine' or 'détraction' (*r*).

Although in strictness the personal privileges of the minister expire with the termination of his mission by death, the custom of

(*q*) Martens, Manuel Diplomatique, ch. 7, § 59; ch. 2, § 15. Précis, liv. vii. ch. 9, § 232. Vattel, liv. iv. ch. 9, § 126.

(*r*) But the estate of an attaché, or,

semble, of an ambassador, dying domiciled in England, is not exempt from the payment of legacy duty. *Att.-Gen. v. Kent* (1862), 31 L. J. Ex. 391.



nations entitles the widow and family of the deceased minister, together with their domestics, to a continuance, for a limited period, of the same immunities which they enjoyed during his lifetime.

It was formerly the usage of certain courts to give presents to foreign ministers on their recall, and on other special occasions. Some Governments prohibit their ministers from receiving such presents. Such was formerly the rule observed by the Venetian Republic, and such is now the law of the United States (s).

(s) Martens, Précis, liv. vii. ch. 10, ch. 7, §§ 60—65. Moore, Digest, §§ 240—245. Manuel Diplomatique, vol. iv. § 651.

## CHAPTER II.

## RIGHTS OF NEGOTIATION AND TREATIES—ARBITRATION.

THE power of negotiating and contracting public treaties between nation and nation exists in full vigour in every sovereign State which has not parted with this portion of its sovereignty, or agreed to modify its exercise by compact with other States.

Power of contracting by treaty, how limited or modified.

Semi-sovereign or dependent States have, in general, only a limited faculty of contracting in this manner; and even sovereign and independent States may restrain or modify this faculty by treaties of alliance or confederation with others. Thus the several States of the North American Union are expressly prohibited from entering into any treaty with foreign Powers, or with each other, without the consent of the Congress; whilst the sovereign members of the Germanic Confederation formerly retained the power of concluding treaties of alliance and commerce, not inconsistent with the fundamental laws of the Confederation (*a*).

The constitution or fundamental law of every particular State must determine in whom is vested the power of negotiating and contracting treaties with foreign Powers. In absolute, and even in constitutional monarchies, it is usually vested in the reigning sovereign. In republics, the chief magistrate, senate, or executive council is entrusted with the exercise of this sovereign power.

No particular form of words is essential to the conclusion and validity of a binding compact between nations.

Form of treaty.

The mutual consent of the contracting parties may be given expressly or tacitly; and in the first case, either verbally or in writing. It may be expressed by an instrument signed by the plenipotentiaries of both parties, or by a declaration, and counter declaration, or in the form of letters or notes exchanged between them. But modern usage requires that verbal agreements should be, as soon as possible, reduced to writing in order to avoid disputes; and all mere verbal communications preceding the final signature of a written convention are considered as merged in the

(*a*) See Pt. I. ch. 2, pp. 74 *et seq.*

instrument itself. The consent of the parties may be given tacitly, in the case of an agreement made under an imperfect authority, by acting under it as if duly concluded (*b*).

Cartels,  
truces, and  
capitulations.

There are certain compacts between nations which are concluded, not in virtue of any special authority, but in the exercise of a general implied power confided to certain public agents, as incidental to their official stations. Such are the official acts of generals and admirals, suspending or limiting the exercise of hostilities within the sphere of their respective military or naval commands, by means of special licences to trade, of cartels for the exchange of prisoners, of truces for the suspension of arms, or capitulations for the surrender of a fortress, city, or province. These conventions do not, in general, require the ratification of the supreme power of the State, unless such a ratification be expressly reserved in the act itself (*c*).

Sponsions.

Such acts or engagements, when made without authority, or exceeding the limits of the authority under which they purport to be made, may be called 'sponsions.' These conventions must be confirmed by express or by tacit ratification. The former is given in positive terms, and with the usual forms; the latter is implied from the fact of acting under the agreement as if bound by its stipulations. Mere silence is not sufficient to infer a ratification by either party, though good faith requires that the party refusing it should notify its determination to the other party, in order to prevent the latter from carrying its own part of the agreement into effect. If, however, it has been totally or partially executed by either party, acting in good faith upon the supposition that the agent was duly authorized, the party thus acting is entitled to be indemnified or replaced in his former situation (*d*).

Full power  
and ratifica-  
tion.

As to other public treaties: in order to enable a public minister or other diplomatic agent to conclude and sign a treaty with the Government to which he is accredited, he must be furnished with a 'full power,' independent of his general letter of credence.

Opinions of  
Grotius and  
Pufendorf.

Grotius, and after him Pufendorf, consider treaties and conventions, thus negotiated and signed, as binding upon the sovereign in whose name they are concluded, in the same manner as any other contract made by a duly authorized agent binds his principal, ac-

(*b*) Martens, Précis, liv. ii. ch. 2, §§ 49, 51, 65. Heffter, § 87.

The Roman civilians arranged all international contracts into three classes: (1) 'Pactiones'; (2) 'Sponsiones'; (3) 'Fœdera.' The latter were considered the most solemn. Gaius, Comm. iii. § 94.

(*c*) Grotius, De Jur. Bel. ac Pac. lib. iii. cap. 22, §§ 6—8. Vattel, Droit des Gens, liv. ii. ch. 14, § 207.

(*d*) Grotius, De Jur. Bel. ac Pac. lib. ii. cap. 15, § 16; lib. iii. cap. 22, §§ 1—3. Vattel, Droit des Gens, liv. ii. ch. 14, §§ 209—212. Rutherford, Inst. bk. ii. ch. 9, § 21.



ording to the general rules of civil jurisprudence. Grotius makes a distinction between the procuration which is communicated to the other contracting party, and the instructions which are known only to the principal and his agent. According to him, the sovereign is bound by the acts of his ambassador, within the limits of his patent full-power, although the latter may have transcended or violated his secret instructions (*e*).

This opinion of the earlier public jurists, founded upon the analogies of the Roman law respecting the contract of mandate or commission, has been contested by more recent writers.

Bynkershoek lays down the true principles applicable to this subject, with the clearness and practical precision which distinguish the writings of that great public jurist (*f*). He propounds the question, whether the sovereign is bound by the acts of his minister, contrary to his secret instructions. According to him, if the question were to be determined by the ordinary rules of private law, it is certain that the principal is not bound where the agent exceeds his power. But in the case of an ambassador, we must distinguish between the general full-power which he exhibits to the sovereign to whom he is accredited, and his special instructions, which he may, and generally does, retain, as a secret between his own sovereign and himself. He refers to the opinion of Albericus Gentilis (*g*), and that of Grotius above cited, that if the minister has not exceeded the authority given in his patent credentials, the sovereign is bound to ratify, although the minister may have deviated from his secret instructions. Bynkershoek admits that if the credentials are special, and describe the particulars of the authority conferred on the minister, the sovereign is bound to ratify whatever is concluded in pursuance of this authority. But the credentials given to plenipotentiaries are rarely special, still more rarely does the secret authority contradict the public full-power, and most rarely of all does a minister disregard his secret instructions (*h*). But what if he should disregard them? Is the sovereign bound to ratify in pursuance of the promise contained in the full-power? According to Bynkershoek, the usage of nations, at the time when he wrote, required a ratification by the sovereign to give validity to treaties concluded by his minister, in every instance, except in the very rare case where the entire instructions were contained in the patent full-power. He controverts the posi-

Of Bynkers-  
hoek.

(*e*) Grotius, De Jur. Bel. ac Pac. lib. ii. cap. xi. § 12. Pufendorf, De Jur. Naturæ et Gent. lib. iii. cap. ix. § 2.

(*f*) Quæst. Jur. Pub. lib. ii. cap. vii.

(*g*) Gentilis, De Jure Belli, lib. iii. cap. xiv.

(*h*) Bynkershoek, Quæst. Jur. Pub. lib. ii. cap. vii.

tion of Wicquefort (*i*), condemning the conduct of those princes who had refused to ratify the acts of their ministers on the ground of their contravening secret instructions. The analogies of the Roman law, and the usages of the Roman people, were not to be considered as an unerring guide in this matter, since time had gradually worked a change in the usage of nations, which constitutes the law of nations; and Wicquefort himself, in another passage, had admitted the necessity of a ratification to give validity to the acts of a minister under his full-power (*k*). Bynkershoek does not, however, deny that, if the minister has acted precisely in conformity with his patent full-power, which may be special, or his secret instructions, which are always special, even the sovereign is bound to ratify his acts, and subjects himself to the imputation of bad faith if he refuses. But if the minister exceed his authority, or undertake to treat points not contained in his full-power and instructions, the sovereign is fully justified in delaying, or even refusing, his ratification. The peculiar circumstances of each particular case must determine whether the rule or the exception ought to be applied (*l*).

Of Vattel.

Vattel considers the sovereign as bound by the acts of his minister, within the limits of his credentials, unless the power of ratifying be expressly reserved, according to the practice already established at the time when he wrote.

“Sovereigns treat with each other through the medium of their attorneys or agents, who are invested with sufficient powers for the purpose, and are commonly called plenipotentiaries. To their office we may apply all the rules of natural law which respect things done by commission. The rights of the agent are determined by the instructions that are given him. He must not deviate from them; but every promise which he makes, within the terms of his commission, and within the extent of his powers, binds his constituent.

“At present, in order to avoid all danger and difficulty, princes reserve to themselves the power of ratifying what has been concluded in their name by their ministers. The full-power is but a procuracy *cum libera*. If this procuracy were to have its full effect, they could not be too circumspect in giving it. But as princes cannot be compelled to fulfil their engagements, otherwise than by force of arms, it is customary to place no dependence on their treaties, until they have agreed to and ratified them. Thus,

(*i*) Wicquefort, l'Ambassadeur et ses Fonctions, liv. ii. § 15.

(*k*) Bynkershoek, Quæst. Jur. Pub. lib. ii. cap. vii.

(*l*) *Ibid.*

as every agreement made by the minister remains invalid until sanctioned by the ratification of the prince, there is less danger in giving the minister a full-power. But before a sovereign can honourably refuse to ratify that which has been concluded in virtue of a full-power, he must have strong and solid reasons, and, in particular, he must show that his minister has deviated from his instructions" (*m*).

The slightest reflection will show how wide is the difference between the power given by sovereigns to their ministers to negotiate treaties respecting vast and complicated international concerns, and that given by an individual to his agent or attorney to contract with another in his name respecting mere private affairs. The acts of public ministers under such full powers have been considered from very early times as subject to ratification (*n*).

The reason on which this practice is founded is clearly explained by a veteran diplomat, whose long experience gives additional weight to his authority. "The forms in which one State negotiates with another," says Sir Robert Adair, "requiring, for the sake of the business itself, that the powers to transact it should be as extensive and general as words can render them, it is usual so to draw them up, even to a promise to ratify; although, in practice, the non-ratification of preliminaries is never considered to be a contravention of the law of nations. The reason is plain. A plenipotentiary, to obtain credit with a State on an equality with his master, must be invested with powers to do, and agree to, all that could be done and agreed to by his master himself, even to the alienating the best part of his territories. But the exercise of these vast powers, always under the understood control of non-ratification, is regulated by his instructions" (*o*).

Of Sir R.  
Adair

The exposition of the approved practice of nations, from which alone the law of nations applicable to this matter can be deduced, conclusively shows that a full power, however general, and even

Of Klüber.

(*m*) Vattel, *Droit des Gens*, liv. ii. ch. 12, § 156.

(*n*) One of the earliest recorded examples of this practice was given in the treaty of peace concluded, in 561, by the Roman Emperor Justinian, with Cosroes I., King of Persia. Both the preliminaries and the definitive treaty, signed by the respective plenipotentiaries, were subsequently ratified by the two monarchs, and the ratifications formally exchanged. Barbeyrac, *Histoire des anciens traités*, partie ii. p. 295.

It has been very justly observed that this example of the exchange of formal

ratifications, at a period of the world like that of Justinian, which invented nothing, but only collected and followed the precedents of the preceding ages, is conclusive to show that this sanction was then deemed necessary by the general usage of nations to give validity to treaties concluded under full powers. On negotiation and the conclusion of treaties in ancient times, see Phillipson, *Int. Law and Custom of Ancient Greece and Rome*, vol. i. pp. 375—419.

(*o*) Adair, *Mission to the Court of Vienna*, p. 54.



extending to a promise to ratify, does not involve the obligation of ratifying in a case where the plenipotentiary has deviated from his instructions. Yet the contrary doctrine inferred, as we have seen, by the earlier public jurists, from the analogies of private law in respect to the obligation of contracts, concluded by procuracy, is countenanced by a modern writer of no inconsiderable merit. Klüber asserts that "public treaties can only be concluded in a valid manner by the ruler of the State, who represents it towards foreign nations, either immediately by himself, or through the agency of plenipotentiaries, and in a manner conformable to the constitutional laws of the State. A treaty concluded by such a plenipotentiary is valid, provided he has not transcended his patent full power; and a subsequent ratification is only required in the case where it is expressly reserved in the full power, or stipulated in the treaty itself, as is usually the case at present in all those conventions which are not, such as military arrangements are, of urgent necessity. The ratification by one of the contracting parties does not bind the other party to give his in return. Except in the case of special stipulations, a treaty is deemed to take effect from the time of the signature, and not from that of the ratification. A simple sponson, an engagement entered into for the State, whether made by the representative of the State or his agent, unless he has full authority for making it, is not binding, except so far as it is ratified by the State. The question whether a treaty, made in the name of the State, by the chief of the Government with the enemy, while the former is a prisoner of war, is binding on the State, or whether it is to be regarded even as a sponson, has given rise to serious disputes" (*p*).

Of Martens.

Martens concurs with Klüber so far as to admit, that what he calls the universal law of nations, "does not require a special ratification to render obligatory the engagement of a minister acting within the limits of his full power, on the faith of which the other contracting party has entered into negotiation with him, even if the minister has transcended his secret instructions." But he very correctly adds, that "the positive law of nations, considering the necessity of giving to negotiators very extensive full powers, has required a special ratification so as not to expose the State to the irreparable injury which the inadvertence or bad faith of a subordinate authority might occasion it; so that treaties are only relied on when ratified. But the reason of this usage,

which may be traced back to the remotest time, sufficiently shows, that if one of the two parties duly offers his ratification, the other party cannot refuse his in return, except so far as his agent may have transcended the limits of his instructions, and consequently is liable to punishment; and that, at least regularly, it does not depend upon the unlimited discretion of one nation to refuse its ratification by alleging mere reasons of convenience" (*q*).

Martens remarks, in a note to the third edition of his work, published after Klüber's had appeared, that the latter is of a contrary opinion, as to the obligation of one party to exchange ratifications when proposed by the other; "and as he (Klüber) considers the ratification as necessary only where it is reserved in the full power, or in the treaty itself (which is at present rarely omitted), it seems that this author deduces from this reservation the right of arbitrarily refusing the ratification, which I doubt" (*r*).

This observation of Martens appears to be founded on a misapprehension of the meaning of Klüber. Although he has not, perhaps, guarded his meaning with sufficient caution, further examination has convinced us that neither Klüber, nor any other institutional writer, has laid down so lax a principle, as that the ratification of a treaty, concluded in conformity with a full power, may be refused at the mere caprice of one of the contracting parties, and without assigning strong and solid reasons for such refusal.

The expressions used by Vattel, that "before a sovereign can honourably refuse to ratify that which has been concluded in virtue of a full power, he must have strong and solid reasons, and, in particular, he must show that his minister has deviated from his instructions," may seem to imply that he considered such deviation as a necessary ingredient in the strong and solid reasons to be alleged for refusing to ratify. But several classes of cases may be enumerated, in which, it is conceived, such refusal might be justified, even where the minister had not transcended or violated his instructions. Among these the following may be mentioned:—

1. Treaties may be avoided, even subsequent to ratification, upon the ground of the impossibility, physical or moral, of fulfilling their stipulations. Physical impossibility is where the party making the stipulation is disabled from fulfilling it for want of the necessary physical means depending on himself. Moral

Justification  
of refusal to  
ratify.

(*q*) Martens, Précis, § 48.

(*r*) Martens, Précis (3rd ed.), note f.

impossibility is where the execution of the engagement would affect injuriously the rights of third parties. It follows, in both cases, that if the impossibility of fulfilling the treaty arises, or is discovered previous to the exchange of ratifications, it may be refused on this ground.

2. Upon the ground of mutual error in the parties respecting a matter of fact, which, had it been known in its true circumstances, would have prevented the conclusion of the treaty. Here, also, if the error be discovered previous to the ratification, it may be withheld upon this ground.

3. In case of a change of circumstances, on which the validity of the treaty is made to depend, either by an express stipulation (*clausula rebus sic stantibus*), or by the nature of the treaty itself. As such a change of circumstances would avoid the treaty, even after ratification, so if it take place previous to the ratification, it will afford a strong and solid reason for withholding that sanction.

When treaties  
begin to bind.

Every treaty is binding on the contracting parties from the date of its signature, unless it contains an express stipulation to the contrary. The exchange of ratifications has a retroactive effect, confirming the treaty from its date (s).

The intervention in 1840 of four of the great European Powers in the internal affairs of the Ottoman Empire, affords a remarkable example of a treaty concluded by plenipotentiaries, which was not only held to be completely binding between the contracting parties, but the execution of which was actually commenced before the exchange of ratifications. Such was the case with the Convention of the 15th July, 1840, between Great Britain, Austria, Prussia, Russia, and Turkey. In the secret protocol annexed to the treaty, it was stated that, on account of the distance which separated the respective courts from each other, the interests of humanity, and weighty considerations of European policy, the plenipotentiaries, in virtue of their full powers, had agreed that the preliminary measures should be immediately carried into execution, and without waiting for the exchange of ratifications, consenting formally by the present act, and with the assent of their courts, to the immediate execution of these measures.

(s) Martens, Précis, § 48. Essai l'Europe, § 48. Heffter, Das Euro-  
concernant les Armateurs, § 48. päische Völkerrecht, § 87.  
Klüber, Droit des Gens Moderne de



This anomalous case may, at first sight, seem to contradict the principles above stated, as to the necessity of a previous ratification, to give complete effect to a treaty concluded by plenipotentiaries. But further reflection will show the obvious distinction which exists between a declaration of the plenipotentiaries, authorized by the instructions of their respective courts, dispensing by mutual consent with the previous ratification; and a demand by one of the contracting parties, that the treaty should be carried into execution without waiting for the ratification of the other party (*t*).

The municipal constitution of every particular State determines in whom resides the authority to ratify treaties negotiated and concluded with foreign Powers, so as to render them obligatory upon the nation. In absolute monarchies, it is the prerogative of the sovereign himself to confirm the act of his plenipotentiary by his final sanction. In certain limited or constitutional monarchies, the consent of the legislative power of the nation is, in some cases, required for that purpose. In some republics, as in that of the United States of America, the advice and consent of the Senate are essential, to enable the chief executive magistrate to pledge the national faith in this form. In all these cases, it is, consequently, an implied condition in negotiating with foreign Powers, that the treaties concluded by the executive government shall be subject to ratification in the manner prescribed by the fundamental laws of the State.

“He who contracts with another,” says Ulpian, “knows, or ought to know, his condition.” (“*Qui cum alio contrahit, vel est, vel debet esse non ignarus conditionis ejus*” (*u*).) But, in practice, the full powers given by the Government of the United States to their plenipotentiaries always expressly reserve the ratification of the treaties concluded by them, by the President, with the advice and consent of the Senate.

The treaty, when thus ratified, is obligatory upon the contracting States, independently of the auxiliary legislative measures, which may be necessary on the part of either, in order to carry it into complete effect. Where, indeed, such auxiliary legislation becomes necessary, in consequence of some limitation upon the treaty-making power, expressed in the fundamental laws of the State, or necessarily implied from the distribution of its constitutional powers—such, for example, as a prohibition of alienating the

The treaty-making power dependent on the municipal constitution.

Auxiliary legislative measures, how far necessary to the validity of a treaty.

(*t*) Martens, *Nouveau Recueil Général*, tome i. p. 163. Cf. Holland, *European Concert on the Eastern*

Question, pp. 90 *seq.*

(*u*) L. 19, D. de div. R. J. 50, 17.

national domain—then the treaty may be considered as imperfect in its obligation, until the national assent has been given in the forms required by the municipal constitution. A general power to make treaties of peace necessarily implies a power to decide the terms on which they shall be made; and, among these, may properly be included the cession of the public territory and other property, as well as of private property included in the eminent domain annexed to the national sovereignty. If there be no limitation expressed in the fundamental laws of the State, or necessarily implied from the distribution of its constitutional authorities on the treaty-making power in this respect, it necessarily extends to the alienation of public and private property, when deemed necessary or expedient (*x*).

Commercial treaties, which have the effect of altering the existing laws of trade and navigation of the contracting parties, may require the sanction of the legislative power in each State for their execution. Thus the commercial treaty of Utrecht, between France and Great Britain, by which the trade between the two countries was to be placed on the footing of reciprocity, was never carried into effect—the British Parliament having rejected the Bill which was brought in for the purpose of modifying the existing laws of trade and navigation, so as to adapt them to the stipulations of the treaty (*y*). In treaties requiring the appropriation of moneys for their execution, it is the usual practice of the British Government to stipulate that the king will recommend to parliament to make the grant necessary for that purpose. Under the Constitution of the United States, by which treaties made and ratified by the President, with the advice and consent of the Senate, are declared to be “the supreme law of the land,” it seems to be understood that the Congress is bound to redeem the national faith thus pledged, and to pass the laws necessary to carry the treaty into effect (*z*).

American  
Courts on  
commence-  
ment of  
treaties.

The Supreme Court of the United States has laid down as a principle of international law that, respecting the rights of either Government under it, a treaty is considered concluded and binding from the date of its signature. In this regard the exchange of ratifications has, as stated in the text, a retroactive effect, confirming the treaty from its date. But a different rule prevails where the treaty operates on individual rights. The principle of

(*x*) Grotius, *De Jur. Bel. ac Pac.* lib. iii. cap. 20, § 7. Vattel, *Droit des Gens*, liv. i. ch. 20, § 244; ch. 2, §§ 262—265. Kent, *Comment. on American law*, vol. i. p. 164 (5th ed.).

(*y*) Lord Mahon, *History of England from the Peace of Utrecht*, vol. i. p. 24.

(*z*) Kent, *Comment. vol. i.* p. 285 (5th ed.).

relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an 'exchange of ratifications' (a). The reason of the rule is this. In America a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. 'If so, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate is not required to adopt or reject it as a whole, but may modify or amend it; thus in 1897 the Senate rejected a proposed treaty with Great Britain providing for the reference of future disputes between the parties to a court of arbitration, and in 1900 in a treaty relating to the Panama Canal it introduced amendments which Great Britain did not accept. As the individual citizen on whose rights of property it operates has no means of knowing anything of it while before the Senate, it would be wrong in principle to hold him bound by it, as the law of the land, until it was ratified and proclaimed. And to construe the law, so as to make the ratification of the treaty relate back to its signing, thereby divesting a title already vested, would be manifestly unjust (b).

By the general principles of private jurisprudence, recognised by most, if not all, civilized countries, a contract obtained by violence is void. Freedom of consent is essential to the validity of every agreement, and contracts obtained under duress are void, because the general welfare of society requires that they should be so. If they were binding, the timid would constantly be forced by threats, or by violence, into a surrender of their just rights. The notoriety of the rule that such engagements are void, makes the attempt to extort them among the rarest of human crimes. On the other hand, the welfare of society requires that the engagements entered into by a nation under such duress as is implied by the defeat of its military forces, the distress of its people, and the occupation of its territories by an enemy, should be held binding; for if they were not, wars could only be terminated by the utter subjugation and ruin of the weaker party. Nor does inadequacy of consideration, or inequality in the conditions of a treaty between nations, such as might be sufficient to set aside a contract as between private individuals on the ground of gross inequality or

Freedom of consent, how far necessary to the validity of treaties.

(a) *U. S. v. Arredondo* (1832), 6 Peters, 735.

(b) *Haver v. Yaker* (1869), 9 Wal-

lace, 34. See also *U. S. v. Reynes* (1850), 9 Howard, 148, 289; *Foster v. Neilson* (1829), 2 Peters, 314.



enormous lesion, form a sufficient reason for refusing to execute the treaty (*e*).

Kinds of  
international  
treaties.

General compacts between nations may be divided into what are called transitory (*dispositive* or *executed*) conventions, and treaties properly so termed (sometimes called *executory* conventions). The first are perpetual in their nature, so that, being once carried into effect, they subsist independent of any change in the sovereignty and form of government of the contracting parties; and although their operation may, in some cases, be suspended during war, they revive on the return of peace without any express stipulation. Such are treaties of cession, boundary, or exchange of territory, or those which create a permanent servitude in favour of one nation within the territory of another (*d*). The second class includes treaties relating to friendship and alliance, commerce and navigation, extradition, guarantee, &c.

Transitory  
conventions  
perpetual.

Thus the treaty of peace of 1783, between Great Britain and the United States, by which the independence of the latter was acknowledged, prohibited future confiscations of property; and the Treaty of 1794, between the same parties, confirmed the titles of British subjects holding lands in the United States, and of American citizens holding lands in Great Britain, which might otherwise be forfeited for alienage. Under these stipulations, the Supreme Court of the United States determined that the title both of British natural subjects and of corporations to lands in America was protected by the treaty of peace, and confirmed by the Treaty of 1794, so that it could not be forfeited by any intermediate legislative act, or other proceeding, for alienage. Even supposing the treaties were abrogated by the war which broke out between the two countries in 1812, it would not follow that the rights of property already vested under those treaties could be divested by supervening hostilities. The extinction of the treaties would no more extinguish the title to real property acquired or secured under their stipulations than the repeal of a municipal law affects rights of property vested under its provisions (*e*). But independent of this incontestable principle, on which the security of all property rests, the Court was not inclined to admit the doctrine, that treaties become, by war between the two contracting parties,

(*e*) Senior, Edinburgh Rev. No. CLVI. Art. 1. Martens, Précis, liv. ii. ch. 2, §§ 50, 52. Grotius, De Jur. Bel. ac Pac. lib. ii. sect. xiv. §§ 4—12.  
(*d*) Vattel, Droit des Gens, liv. ii.

ch. 12, § 192. Martens, Précis, liv. ii. ch. 2, § 58.

(*e*) *Chirac* v. *Chirac* (1817), 2 Wheaton, 277.

*ipso facto* extinguished, if not revived by an express or implied renewal on the return of peace. Whatever might be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms in relation to the subject, it was satisfied that the doctrine contended for was not universally true. There might be treaties of such a nature as to their object and import, as that war would necessarily put an end to them; but where treaties contemplated a permanent arrangement of territory, and other national rights, or in their terms were meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by war. If such were the law, even the Treaty of 1783, so far as it fixed the limits of the United States, and acknowledged their independence, would be gone, and they would have had again to struggle for both, upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning. The Court, therefore, concluded 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, revive upon the return of peace (*f*).

By the third Article of the treaty of peace of 1783, between the United States and Great Britain, it was "agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other Banks of Newfoundland; also, in the Gulf of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries used, at any time heretofore, to fish; and also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not to dry, or cure the same on that island), and also on the coasts, bays, and creeks of all other of his Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbours, and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but as soon as the same, or either of them shall be settled, it shall not be

Controversy between the American and British Governments respecting the rights of fishery on the coasts of the British dominions in North America. Effect of war on transitory or dispositive treaties.

(*f*) *The Society for the Propagation of the Gospel in Foreign Parts v. The Town of New Haven* (1823), 8 Wheaton, 464. The same principle was asserted by the English Court of

Chancery, as to American citizens holding lands in Great Britain under the Treaty of 1794, in *Sutton v. Sutton* (1830), 1 R. & M. 663.

lawful for the said fishermen to dry or cure fish at such settlement, without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground."

Negotiation  
at Ghent.

During the negotiation at Ghent, in 1814, the British plenipotentiaries gave notice that their Government "did not intend to grant to the United States, gratuitously, the privileges formerly granted by treaty to them of fishing within the limits of the British sovereignty, and of using the shores of the British territories for purposes connected with the British fisheries." In answer to this declaration the American plenipotentiaries stated that they were "not authorized to bring into discussion any of the rights or liberties which the United States have heretofore enjoyed in relation thereto; from their nature, and from the peculiar character of the Treaty of 1783, by which they were recognized, no further stipulation has been deemed necessary by the Government of the United States to entitle them to the full enjoyment of them all."

The treaty of peace concluded at Ghent, in 1814, therefore, contained no stipulation on the subject; and the British Government subsequently expressed its intention to exclude the American fishing vessels from the liberty of fishing within one marine league of the shores of the British territories in North America, and from that of drying and curing their fish on the unsettled parts of those territories, and, with the consent of the inhabitants, within those parts which had become settled since the peace of 1783.

Argument of  
Mr. J. Q.  
Adams.

In discussing this question, the American minister in London, Mr. J. Q. Adams, stated, that from the time the settlement in North America, constituting the United States, was made, until their separation from Great Britain and their establishment as distinct sovereignties, these liberties of fishing, and of drying and curing fish, had been enjoyed by them, in common with the other subjects of the British Empire. In point of principle, they were pre-eminently entitled to the enjoyment; and in point of fact, they had enjoyed more of them than any other portion of the empire; their settlement of the neighbouring country having naturally led to the discovery and improvement of these fisheries; and their proximity to the places where they were prosecuted having led them to the discovery of the most advantageous fishing grounds, and given them facilities in the pursuit of their occupation in those regions which the remoter parts of the empire could not possess. It might be added, that they had contributed their full share, and more than their share, in securing the con-



quest from France of the provinces on the coasts of which these fisheries were situated.

It was doubtless upon considerations such as these that an express stipulation was inserted in the Treaty of 1783, recognising the rights and liberties which had always been enjoyed by the people of the United States in these fisheries, and declaring that they should continue to enjoy the right of fishing on the Grand Bank, and other places of common jurisdiction, and have the liberty of fishing, and drying and curing their fish, within the exclusive British jurisdiction on the North American coasts, to which they had been accustomed whilst they formed a part of the British nation. This stipulation was a part of that treaty by which his Majesty acknowledged the United States as free, sovereign, and independent States, and that he treated with them as such.

It could not be necessary to prove that this treaty was not, in its general provisions, one of those which, by the common understanding and usage of civilized nations, is considered as annulled by a subsequent war between the same parties. To suppose that it is, would imply the inconsistency and absurdity of a sovereign and independent State, liable to forfeit its right of sovereignty by the act of exercising it on a declaration of war. But the very words of the treaty attested that the sovereignty and independence of the United States were not considered as grants from his Majesty. They were taken and expressed as existing before the treaty was made, and as then only first formally recognised by Great Britain. Effect of war.

Precisely of the same nature were the rights and liberties in the fisheries. They were, in no respect, grants from the King of Great Britain to the United States; but the acknowledgment of them as rights and liberties enjoyed before the separation of the two countries, and which it was mutually agreed should continue to be enjoyed under the new relations which were to subsist between them, constituted the essence of the article concerning the fisheries. The very peculiarity of the stipulation was an evidence that it was not, on either side, understood or intended as a grant from one sovereign State to another. Had it been so understood, neither could the United States have claimed, nor would Great Britain have granted, gratuitously, any such concession. There was nothing, either in the state of things, or in the disposition of the parties, which could have led to such a stipulation on the part of Great Britain, as on the ground of a grant, without an equivalent.

If the stipulation by the Treaty of 1783 was one of the conditions by which his Majesty acknowledged the sovereignty and independence of the United States; if it was the mere recognition of rights and liberties previously existing and enjoyed,—it was neither a privilege gratuitously granted, nor liable to be forfeited by the mere existence of a subsequent war. If it was not forfeited by the war, neither could it be impaired by the declaration of Great Britain at Ghent, that she did not intend to renew the grant. Where there had been no gratuitous concession, there could be none to renew; the rights and liberties of the United States could not be cancelled by the declaration of the British intentions. Nothing could abrogate them but a renunciation by the United States themselves (*g*).

Argument of  
Earl  
Bathurst.

In the answer of the British Government to this communication, it was stated that Great Britain had always considered the liberty formerly enjoyed by the United States, of fishing within British limits and using British territory, as derived from the 3rd Article of the Treaty of 1783, and from that alone; and that the claim of an independent State to occupy and use, at its discretion, any portion of the territory of another, without compensation or corresponding indulgence, could not rest on any other foundation than conventional stipulation. It was unnecessary to inquire into the motives which might have originally influenced Great Britain in conceding such liberties to the United States, or whether other articles of the treaty did or did not, in fact, afford an equivalent for them, because all the stipulations profess to be founded on reciprocal advantage and mutual convenience. If the United States derived from that treaty privileges, from which other independent nations not admitted by treaty were excluded, the duration of the privileges must depend on the duration of the instrument by which they were granted; and if the war abrogated the treaty, it determined the privileges. It had been urged, indeed, on the part of the United States, that the Treaty of 1783 was of a peculiar character, and that, because it contained a recognition of American independence, it could not be abrogated by a subsequent war between the parties. To a position of this novel nature Great Britain could not accede. She knew of no exception to the rule, that all treaties are put an end to by a subsequent war between the same parties; she could not, therefore, consent to give her diplomatic relations with one State a different degree of permanency from that on which her connection with all other

(*g*) Mr. J. Q. Adams to Lord State Papers, fol. ed. 1834, vol. iv. Bathurst, Sept. 25, 1815. American p. 352.

States depended. Nor could she consider any one State at liberty to assign to a treaty made with her such a peculiarity of character as should make it, as to duration, an exception to all other treaties, in order to found, on a peculiarity thus assumed, an irrevocable title to indulgences which had all the features of temporary concessions.

It was by no means unusual for treaties containing recognitions and acknowledgments of title, in the nature of perpetual obligation, to contain, likewise, grants of privileges liable to revocation. The Treaty of 1783, like many others, contained provisions of different character; some in their own nature irrevocable, the others merely temporary. If it were thence inferred that, because some advantages specified in that treaty would not be put an end to by the war, therefore all the other advantages were intended to be equally permanent, it must first be shown that the advantages themselves are of the same, or at least of a similar character; for the character of one advantage, recognised or conceded by treaty, can have no connection with the character of another, though conceded by the same instrument, unless it arises out of a strict and necessary connection between the advantages themselves. But what necessary connection could there be between a right to independence and a liberty to fish within British jurisdiction, or to use British territory? Liberties within British limits were as capable of being exercised by a dependent as by an independent State; and could not, therefore, be the necessary consequence of independence.

The independence of a State could not be correctly said to be granted by a treaty, but to be acknowledged by one. In the Treaty of 1783, the independence of the United States was certainly acknowledged, not merely by the consent to make the treaty, but by the previous consent to enter into the provisional Articles, executed in 1782. Their independence might have been acknowledged, without either the treaty or the provisional Articles; but by whatever mode acknowledged, the acknowledgment was, in its own nature, irrevocable. A power of revoking, or even of modifying it, would be destructive of the thing itself; and, therefore, all such power was necessarily renounced when the acknowledgment was made. The war could not put an end to it, for the reason justly assigned by the American minister; because a nation could not forfeit its sovereignty by the act of exercising it; and for the further reason that Great Britain, when she declared war against the United States, gave them, by that very act, a new recognition of their independence.



The rights acknowledged by the Treaty of 1783 were not only distinguishable from the liberties conceded by the same treaty, in the foundation on which they stand, but they were carefully distinguished in the wording of the treaty. In the 1st Article, Great Britain acknowledged an independence already expressly recognised by the other Powers of Europe, and by herself in her consent to enter into the provisional Articles of 1782. In the 3rd Article, Great Britain acknowledged the right of the United States to take fish on the Banks of Newfoundland and other places, from which Great Britain had no right to exclude any independent nation. But they were to have the liberty to cure and dry them in certain unsettled places within the British territory. If the liberties thus granted were to be as perpetual and indefeasible as the rights previously recognised, it was difficult to conceive that the American plenipotentiaries would have admitted a variation of language so adapted to produce a different impression; and, above all, that they should have admitted so strange a restriction of a perpetual and indefeasible right as that with which the Article concludes, which left a right so practical and so beneficial as this was admitted to be, dependent on the will of British subjects, proprietors, or possessors of the soil, to prohibit its exercise altogether.

It was, therefore, surely obvious that the word 'right' was, throughout the treaty, used as applicable to what the United States were to enjoy in virtue of a recognised independence; and the word 'liberty' to what they were to enjoy as concessions strictly dependent on the treaty itself (*h*).

Reply of  
Mr. Adams.

The American minister, in his reply to this argument, disavowed every pretence of claiming for the diplomatic relations between the United States and Great Britain a degree of permanency different from that of the same relations between either of the parties and all other Powers. He disclaimed all pretence of assigning to any treaty between the two nations any peculiarity not founded in the nature of the treaty itself. But he submitted to the candour of the British Government whether the Treaty of 1783 was not, from the very nature of its subject-matter, and from the relations previously existing between the parties to it, peculiar? Whether it was a treaty which could have been made between Great Britain and any other nation? And if not, whether the whole scope and object of its stipulations were not expressly intended to establish a new and permanent state of diplomatic relations between the two countries, which would not and could not

(*h*) Earl Bathurst to Mr. J. Q. Adams, Oct. 30, 1815. State Papers, fol. ed. 1834, vol. iv. American p. 354.

be annulled by the mere fact of a subsequent war? And he made this appeal with the more confidence, because the British note admitted that treaties often contained recognitions in the nature of perpetual obligation; and because it implicitly admitted that the whole Treaty of 1783 is of this character, with the exception of the Article concerning the navigation of the Mississippi, and a small part of the Article concerning the fisheries.

The position, that "Great Britain knows of no exception to the rule, that all treaties are put an end to by a subsequent war," appeared to the American minister not only novel, but unwarranted by any of the received authorities upon the law of nations; unsanctioned by the practice and usages of sovereign States; suited, in its tendency, to multiply the incitements to war, and to weaken the ties of peace between independent nations; and not easily reconciled with the admission that treaties not unusually contain, together with articles of a temporary character, liable to revocation, "recognitions and acknowledgments in the nature of perpetual obligation."

A recognition or acknowledgment of title, stipulated by convention, was as much a part of the treaty as any other Article; and if all treaties are abrogated by war, the recognitions and acknowledgments contained in them must necessarily be null and void, as much as any other part of the treaty.

If there were no exception to the rule, that war puts an end to all treaties between the parties to it, what could be the purpose or meaning of those Articles which, in almost all treaties of commerce, were provided expressly for the contingency of war, and which during the peace are without operation? For example, the 10th Article of the Treaty of 1794, between the United States and Great Britain, stipulated that "Neither the debts due from individuals of the one nation to individuals of the other, nor shares, nor moneys, which they may have in the public funds, or in the public or private banks, shall ever, in any event of war, or national differences, be sequestered or confiscated." If war put an end to all treaties, what could the parties to this engagement intend by making it formally an Article of the treaty? According to the principle laid down, excluding all exception, by the British note, the moment a war broke out between the two countries this stipulation became a dead letter, and either State might have sequestered or confiscated those specified properties, without any violation of compact between the two nations.

The American minister believed that there were many exceptions to the rule by which the treaties between nations are mutually

considered as terminated by the intervention of a war; that these exceptions extend to all engagements contracted with the understanding that they are to operate equally in war and peace, or exclusively during war; to all engagements by which the parties superadd the sanction of a formal compact to principles dictated by the eternal laws of morality and humanity; and, finally, to all engagements, which, according to the expression of the British note, are in the nature of perpetual obligation. To the first and second of these classes might be referred the 10th Article of the Treaty of 1794, and all treaties or Articles of treaties stipulating the abolition of the slave trade. The treaty of peace of 1783 belongs to the third class.

The reasoning of the British note seemed to confine this perpetuity of obligation to recognitions and acknowledgments of title, and to consider its perpetual nature as resulting from the subject-matter of the contract, and not from the engagement of the contractor. While Great Britain left the United States unmolested in the enjoyment of all the advantages, rights and liberties stipulated in their behalf in the Treaty of 1783, it was immaterial whether she founded her conduct upon the mere fact that the United States are in possession of such rights, or whether she was governed by good faith and respect for her own engagements. But if she contested any of these rights, it was to her engagements only that the United States could appeal, as the rule for settling the question of right. If this appeal were rejected, it ceased to be a discussion of right; and this observation applied as strongly to the recognition of independence and the boundary line, in the Treaty of 1783, as to the fisheries. It was truly observed in the British note, that in that treaty the independence of the United States was not granted, but acknowledged; and it was added, that it might have been acknowledged without any treaty, and that the acknowledgment, in whatever mode, would have been irrevocable. But the independence of the United States was precisely the question upon which a previous war between them and Great Britain had been waged. Other nations might acknowledge their independence without a treaty, because they had no right or claim of right to contest it; but this acknowledgment, to be binding upon Great Britain, could have been made only by treaty, because it included the dissolution of one social compact between the parties, as well as the formation of another. Peace could exist between the two nations only by the mutual pledge of faith to the new social relations established between them; and hence it was that the stipulations to that treaty were in the nature of perpetual



obligation, and not liable to be forfeited by a subsequent war, or by any declaration of the will of either party, without the assent of the other (*i*).

The above analysis of the correspondence which took place relating to this subject, has been inserted as illustrative of the general question, how far treaties are abrogated by war between the parties to them; but the particular controversy itself was finally settled between the two countries on the basis of compromise, by the convention of 1818, in which the liberty claimed by the United States in respect to the fishery within the British jurisdiction and territory, was confined to certain geographical limits (*k*).

Result of this  
correspon-  
dence.

Treaties, properly so called, or *fœdera*, are those of friendship and alliance, commerce and navigation, guarantee, extradition, &c., which, even if perpetual in terms, expire of course:—

Treaties, the  
operation of  
which ceases  
in certain  
cases.

1. In case either of the contracting parties loses its existence as an independent State.

2. Where the internal constitution of government of either State is so changed as to render the treaty inapplicable under circumstances different from those with a view to which it was concluded.

Here the distinction laid down by institutional writers between 'real' and 'personal' treaties becomes important. The first bind the contracting parties independently of any change in the sovereignty, or in the rulers of the State. The latter include only treaties of mere personal alliance, such as are expressly made with a view to the person of the actual ruler or reigning sovereign, and though they bind the State during his existence, expire with his natural life or his public connection with the State (*l*).

3. In case of war between the contracting parties; unless certain stipulations were made expressly with a view to a rupture, such as the period of time allowed to the respective subjects to retire with their effects, or other limitations of the general rights of war. Such is the stipulation contained in the 10th Article of the Treaty of 1794, between Great Britain and the United States, —providing that private debts and shares or moneys in the public funds, or in public or private banks belonging to private individuals, should never, in the event of war, be sequestered or confiscated. There can be no doubt that the obligation of this Article would not be impaired by a supervening war, being the very con-

(*i*) Mr. J. Q. Adams to Lord Castle-  
reagh, Jan. 22, 1816. American State  
Papers, fol. ed. 1834, vol. iv. p. 356.

(*k*) *Vide ante*, pt. ii. ch. v. p. 287.

(*l*) *Vide ante*, pt. i. ch. 2, p. 45.

tingency meant to be provided for, and that it must remain in full force until mutually agreed to be rescinded (*m*).

4. Treaties expire by their own limitation, unless revived by express agreement, or when their stipulations are fulfilled by the respective parties, or when a total change of circumstances renders them no longer obligatory.

Treaties  
revived and  
confirmed on  
the renewal  
of peace.

Most international compacts, and especially treaties of peace, are of a mixed character, and contain Articles of both kinds, which renders it frequently difficult to distinguish between those stipulations which are perpetual in their nature, and such as are extinguished by war between the contracting parties, or by such changes of circumstances as affect the being of either party, and thus render the compact inapplicable to the new condition of things. It is for this reason, and from abundance of caution, that stipulations are frequently inserted in treaties of peace, expressly reviving and confirming the treaties formerly subsisting between the contracting parties, and containing stipulations of a permanent character, or in some other mode excluding the conclusion that the obligation of such antecedent treaties is meant to be waived by either party. The reiterated confirmations of the treaties of Westphalia and Utrecht, in almost every subsequent treaty of peace or commerce between the same parties, constituted a sort of written code of conventional law, by which the distribution of power and territory among the principal European States was permanently settled, until violently disturbed by the partition of Poland and the wars of the French Revolution. The arrangements of territory and political relations substituted by the treaties of Vienna for the ancient conventional law of Europe, and doubtless intended to be of a similar permanent character, have already undergone, in consequence of the French, Polish, and Belgic revolutions of 1830, very important modifications (*n*).

Treaties of  
guaranty.

The convention of guaranty (or guarantee) is one of the most usual international contracts. It is an engagement by which one State promises to aid another where it is interrupted, or threatened to be disturbed, in the peaceable enjoyment of its rights by a third Power. It may be applied to every species of right and obligation that can exist between nations; to the possession and boundaries of territories, the sovereignty of the State, its constitution of government, the right of succession, &c.; but it is most

(*m*) Vattel, liv. iii. ch. 10, § 175.  
Kent, Comment. on American Law,  
vol. i. p. 175 (5th ed.).

(*n*) Wheaton, Hist. Law of Nations,  
pp. 435—445, 538—551.

commonly applied to treaties of peace. The guaranty may also be contained in a distinct and separate convention, or included among the stipulations annexed to the principal treaty intended to be guaranteed. It then becomes an accessory obligation (*o*).

The guaranty may be stipulated by a third Power not a party to the principal treaty, by one of the contracting parties in favour of another, or mutually between all the parties. Thus, by the treaty of peace concluded at Aix-la-Chapelle in 1748, the eight high contracting parties mutually guaranteed to each other all the stipulations of the treaty.

The guaranteeing party is bound to nothing more than to render the assistance stipulated. If it prove insufficient, he is not obliged to indemnify the Power to whom his aid has been promised. Nor is he bound to interfere to the prejudice of the just rights of a third party, or in violation of a previous treaty rendering the guaranty inapplicable in a particular case. Guaranties apply only to rights and possessions existing at the time they are stipulated. It was upon these grounds that Louis XV. declared, in 1741, in favour of the Elector of Bavaria against Maria Theresa, the heiress of the Emperor Charles VI., although the court of France had previously guaranteed the Pragmatic Sanction of that Emperor, regulating the succession to his hereditary States. And it was upon similar grounds that France refused to fulfil the Treaty of Alliance of 1756 with Austria, in respect to the pretensions of the latter Power upon Bavaria, in 1778, which threatened to produce a war with Russia. Whatever doubts may be suggested as to the application of these principles to the above cases, there can be none respecting the principles themselves, which are recognised by all the text writers (*p*).

These writers make a distinction between a 'surety' and a 'guarantee.' Thus Vattel lays it down, that where the matter relates to things which another may do or give as well as he who makes the original promise, as, for instance, the payment of a sum of money, it is safer to demand a surety ('caution') than a guarantee ('garant'). For the surety is bound to make good the promise in default of the principal; whereas the guarantee is only obliged to use his best endeavours to obtain a performance of the promise from him who has made it (*q*).

(*o*) Vattel, *Droit des Gens*, liv. ii. ch. 16, §§ 235—239. Klüber, *Droit des Gens Moderne de l'Europe*, Pt. II. tit. ii. sect. 1, ch. 2, §§ 157, 158. Martens, *Précis*, § 63.

(*p*) Vattel, liv. ii. ch. 16, § 238.

Flassan, *Histoire de la Diplomatie Française*, tom. vii. p. 195.

(*q*) Vattel, § 239. See Hertslet, *Map of Europe by Treaty, Index*, tit. Guaranty.



When several States join to guarantee a certain condition of things, *e.g.*, the independence and neutrality of another State, it is important to determine the extent of the liability imposed on the guarantors. The liability may be a "joint" or "collective" liability; or it may be a "separate," "several," or "individual" liability. Thus in the treaties of 1831 and 1839, Great Britain, France, Prussia, Russia, and Austria guaranteed the neutrality and independence of Belgium; and the liability of the signatory Powers has always been considered to be an individual liability, though the expression was not specifically adopted in the Convention. On the other hand, the neutralisation treaty relating to Luxemburg, 1867, was only a collective guarantee, imposing, therefore, a narrower responsibility on the contracting parties (*viz.*, the above five Powers, together with Italy and Holland). The result of this distinction is, that should any State violate or attempt to violate the neutrality of Belgium, each guarantor is individually bound to intervene, whether the co-guarantors intervene or not; but should an attempt be made on the territory of Luxemburg, each guarantor in the treaty of 1867 is not necessarily bound to intervene unless the co-guarantors join to take united action (*r*).

Treaties of alliance.

Treaties of alliance may be either defensive or offensive. In the first case, the engagements of the ally extend only to a war really and truly defensive; to a war of aggression first commenced, in point of fact, against the other contracting party. In the second, the ally engages generally to co-operate in hostilities against a specified Power, or against any Power with whom the other party may be engaged in war.

An alliance may also be both offensive and defensive.

Distinction between general alliance and treaties of limited succour and subsidy.

General alliances are to be distinguished from treaties of limited succour and subsidy. Where one State stipulates to furnish to another a limited succour of troops, ships of war, money, or provisions, without any promise looking to an eventual engagement in general hostilities, such a treaty does not necessarily render the party furnishing this limited succour the enemy of the opposite belligerent. It only becomes such, so far as respects the auxiliary forces thus supplied; in all other respects it remains neutral. Such, for example, had long been the accustomed relations of the confederated Cantons of Switzerland with the other European Powers (*s*).

(*r*) Cf. Phillipson, *International Law and the Great War* (1915), pp. 18 *seq.*

(*s*) Vattel, *Droit des Gens*, liv. iii. ch. 6, §§ 79—82.

Grotius and the other text writers hold that the *casus fœderis* of a defensive alliance does not apply to the case of a war manifestly unjust, that is, to a war of aggression on the part of the Power claiming the benefit of the alliance. And it is even said to be a tacit condition annexed to every treaty made in time of peace, stipulating to afford succour in time of war, that the stipulation is applicable only to a just war. To promise assistance in an unjust war would be an obligation to commit injustice, and no such contract is valid. But, it is added, this tacit restriction in the terms of a general alliance can be applied only to a manifest case of unjust aggression on the part of the other contracting party, and cannot be used as a pretext to elude the performance of a positive and unequivocal engagement, without justly exposing the ally to the imputation of bad faith. In doubtful cases, the presumption ought rather to be in favour of our confederate, and of the justice of his quarrel (*t*).

*Casus fœderis*  
of a defensive  
alliance.

The application of these general principles must depend upon the nature and terms of the particular guaranties contained in the treaty in question. This will best be illustrated by specific examples.

Thus, the States-General of Holland were engaged, previously to the war of 1756 between France and Great Britain, in three different guaranties and defensive treaties with the latter Power. The first was the original defensive alliance, forming the basis of all the subsequent compacts between the two countries, concluded at Westminster in 1678. In the preamble to this treaty, the preservation of each other's dominions was stated as the cause of making it; and it stipulated a mutual guaranty of all they already enjoyed, or might thereafter acquire by treaties of peace, "in Europe only." They further guaranteed all treaties which were at that time made, or might thereafter conjointly be made, with any other Power. They stipulated also to defend and preserve each other in the possession of all towns and fortresses which did at that time belong, or should in future belong, to either of them; and, that for this purpose, when either nation was attacked or molested, the other should immediately succour it with a certain number of troops and ships, and should be obliged to break with the aggressor in two months after the party that was already at war should require it; and that they should then act conjointly, with

Alliance  
between  
Great Britain  
and Holland.

(*t*) Grotius, De Jur. Bel. ac Pac. lib. ii. cap. 15, § 13; cap. 25, § 4. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9. Vattel, Droit des Gens, liv. ii. ch. 12, § 168; liv. iii. ch. 6, §§ 86—96.

all their forces, to bring the common enemy to a reasonable accommodation.

The second defensive alliance then subsisting between Great Britain and Holland was that stipulated by the treaties of barrier and succession, of 1709 and 1713, by which the Dutch barrier on the side of Flanders was guaranteed on the one part, and the Protestant succession to the British crown on the other; and it was mutually stipulated, that, in case either party should be attacked, the other should furnish, at the requisition of the injured party, certain specified succours; and if the danger should be such as to require a greater force, the other ally should be obliged to augment his succours, and ultimately to act with all his power in open war against the aggressor.

The third and last defensive alliance between the same Powers was the treaty concluded at the Hague in 1717, to which France was also a party. The object of this treaty was declared to be the preservation of each other reciprocally, and the possession of their dominions, as established by the Treaty of Utrecht. The contracting parties stipulated to defend all and each of the Articles of the said treaty, as far as they relate to the contracting parties respectively, or each of them in particular; and they guarantee all the kingdoms, provinces, states, rights, and advantages, which each of the parties at the signing of that treaty possessed, confining this guaranty to Europe only. The succours stipulated by this treaty were similar to those above mentioned; first, interposition of good offices, then a certain number of forces, and lastly, declaration of war. This treaty was renewed by the quadruple alliance of 1718, and by the Treaty of Aix-la-Chapelle, 1748.

Argument of  
the Dutch  
Government.

It was alleged on the part of the British court, that the States-General had refused to comply with the terms of these treaties, although Minorca, a possession in Europe which had been secured to Great Britain by the Treaty of Utrecht, was attacked by France.

Two answers were given by the Dutch Government to the demand of the stipulated succours:—

1. That Great Britain was the aggressor in the war; and that, unless she had been first attacked by France, the *casus fœderis* did not arise.

2. That admitting that France was the aggressor in Europe, yet it was only in consequence of the hostilities previously commenced in America, which were expressly excepted from the terms of the guaranties.

Reply of Lord  
Liverpool.

To the first of these objections it was irresistibly replied by the elder Lord Liverpool, that although the treaties which contained



these guaranties were called defensive treaties only, yet the words of them, and particularly that of 1678, which was the basis of all the rest, by no means expressed the point clearly in the sense of the objection, since they guaranteed "all the rights and possessions" of both parties against "all kings, princes, republics, and states"; so that if either should "be attacked or molested by hostile act, or open war, or in any other manner disturbed in the possession of his states, territories, rights, immunities, and freedom of commerce," it was then declared what should be done in defence of these objects of the guaranty, by the ally who was not at war, but it was nowhere mentioned as necessary that the attack of these should be the first injury or attack. "Nor," continues Lord Liverpool, "doth this loose manner of expression appear to have been an omission or inaccuracy. They who framed these guaranties certainly chose to leave this question, without any further explanation, to that good faith which must ultimately decide upon all contracts between sovereign States. It is not presumed that they hereby meant, that either party should be obliged to support every act of violence or injustice which his ally might be prompted to commit through views of interest or ambition; but, on the other hand, they were cautious of affording too frequent opportunities to pretend that the case of the guaranties did not exist, and of eluding thereby the principal intention of the alliance; both these inconveniences were equally to be avoided; and they wisely thought fit to guard against the latter, no less than the former. They knew that in every war between civilized nations, each party endeavours to throw upon the other the odium and guilt of the first act of provocation and aggression; and that the worst of causes was never without its excuse. They foresaw that this alone would unavoidably give sufficient occasion to endless cavils and disputes, whenever the infidelity of an ally inclined him to avail himself of them. To have confined, therefore, the case of the guaranty by a more minute description of it, and under closer restrictions of form, would have subjected to still greater uncertainty a point which, from the nature of the thing itself, was already too liable to doubt:—they were sensible that the cases would be infinitely various; that the motives to self-defence, though just, might not always be apparent; that an artful enemy might disguise the most alarming preparations; and that an injured nation might be necessitated to commit even a preventive hostility, before the danger which caused it could be publicly known. Upon such considerations, these negotiators wisely thought proper to give the greatest latitude to this question, and to leave it open to a fair

and liberal construction, such as might be expected from friends, whose interests these treaties were supposed to have for ever united" (*u*).

His lordship's answer to the next objection, that the hostilities, commenced by France in Europe, were only in consequence of hostilities previously commenced in America, seems equally satisfactory, and will serve to illustrate the good faith by which these contracts ought to be interpreted. "If the reasoning on which this objection is founded was admitted, it would alone be sufficient to destroy the effects of every guaranty, and to extinguish the confidence which nations mutually place in each other, on the faith of defensive alliances; it points out to the enemy a certain method of avoiding the inconvenience of such an alliance; it shows him where he ought to begin his attack. Let only the first effort be made upon some place not included in the guaranty, and, after that, he may pursue his views against its very object, without any apprehension of the consequence. Let France first attack some little spot belonging to Holland, in America, and her barrier would be no longer guaranteed. To argue in this manner is to trifle with the most solemn engagements. The proper object of guaranties is the preservation of some particular country to some particular Power. The treaties above mentioned promise the defence 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.

"Let us try, however, if we cannot discover what hath once been the opinion of Holland upon a point of this nature. It hath already been observed that the defensive alliance between England and Holland, of 1678, is but a copy of the first twelve Articles of the French Treaty of 1662. Soon after Holland had concluded this last alliance with France, she became engaged in a war with England. The attack then began, as in the present case, out of Europe, on the coast of Guinea; and the cause of the war was also the same—a disputed right to certain possessions out of the bounds of Europe, some in Africa, and others in the East Indies. Hostilities having continued for some time in those parts, they afterwards commenced also in Europe. Immediately upon this, Holland declared that the case of that guaranty did exist, and demanded the succours which were stipulated. I need not produce

(*u*) Earl of Liverpool, Discourse on Great Britain in respect to Neutral the Conduct of the Government of Nations (1st ed. 1757).

the memorials of their ministers to prove this; history sufficiently informs us that France acknowledged the claim, granted the succours, and entered even into open war in the defence of her ally. Here, then, we have the sentiments of Holland on the same Article, in a case minutely parallel. The conduct of France also pleads in favour of the same opinion, though her concession, in this respect, checked at that time her youthful monarch in the first essay of his ambition, delayed for some months his entrance into the Spanish provinces, and brought on him the enmity of England" (x).

The nature and extent of the obligations contracted by treaties of defensive alliance and guaranty, will be further illustrated by the case of the treaties subsisting between Great Britain and Portugal, which has been before alluded to for another purpose (y). The treaty of alliance, originally concluded between these Powers in 1642, immediately after the revolt of the Portuguese nation against Spain, and the establishment of the House of Braganza on the throne, was renewed, in 1654, by the Protector, Cromwell, and again confirmed by the Treaty of 1661, between Charles II. and Alfonso VI., for the marriage of the former prince with Catharine of Braganza. This last-mentioned treaty fixes the aid to be given, and declares that Great Britain will succour Portugal "on all occasions, when that country is attacked." By a secret Article, Charles II., in consideration of the cession of Tangier and Bombay, binds himself "to defend the colonies and conquests of Portugal against all enemies, present or future." In 1703, another treaty of defensive and perpetual alliance was concluded at Lisbon, between Great Britain and the States-General on the one side, and the King of Portugal on the other; the guaranties contained in which were again confirmed by the treaties of peace at Utrecht, between Portugal and France, in 1713, and between Portugal and Spain, in 1715. On the emigration of the Portuguese royal family to Brazil, in 1807, a convention was concluded between Great Britain and Portugal, by which the latter kingdom was guaranteed to the lawful heir of the House of Braganza, and the British Government promised never to recognise any other ruler. By the more recent treaty between the two Powers, concluded at Rio Janeiro, in 1810, it was declared "that the two Powers have agreed on an alliance for defence, and reciprocal guaranty against every hostile attack, conformably to the treaties already subsisting between them, the stipulations of which shall remain in full force,

Alliance  
between  
Great Britain  
and Portugal.

(x) Earl of Liverpool, Discourse, (y) *Vide ante*, pt. ii. ch. 1, p. 101.  
p. 86.



and are renewed by the present treaty in their fullest and most extensive interpretation." This treaty confirms the stipulation of Great Britain to acknowledge no other sovereign of Portugal but the heir of the House of Braganza. The Treaty of Vienna, of the 22nd January, 1815, between Great Britain and Portugal, contains the following Article:—"The treaty of alliance at Rio Janeiro, of the 19th February, 1810, being founded on temporary circumstances, which have happily ceased to exist, the said treaty is hereby declared to be of no effect; without prejudice, however, to the ancient treaties of alliance, friendship, and guaranty, which have so long and so happily subsisted between the two crowns, and which are hereby renewed by the high contracting parties, and acknowledged to be of full force and effect."

*Causa fœderis*  
of the  
alliance.

Such was the nature of the compacts of alliance and guaranty subsisting between Great Britain and Portugal, at the time when the interference of Spain in the affairs of the latter kingdom compelled the British Government to interfere, for the protection of the Portuguese nation against the hostile designs of the Spanish court. In addition to the grounds stated in the British Parliament, to justify this counteracting interference, it was urged, in a very able article on the affairs of Portugal, contemporaneously published in the Edinburgh Review, that although, in general, an alliance for defence and guaranty does not impose any obligation, nor, indeed, give any warrant to interfere in intestine divisions, the peculiar circumstances of the case did constitute the *casus fœderis* contemplated by the treaties in question. A defensive alliance is a contract between several States, by which they agree to aid each other in their defensive (or, in other words, in their just) wars against other States. Morally speaking, no other species of alliance is just, because no other species of war can be just. The simplest case of defensive war is, where our ally is openly invaded with military force, by a Power to whom she has given no just cause of war. If France or Spain, for instance, had marched an army into Portugal to subvert its constitutional government, the duty of England would have been too evident to render a statement of it necessary. But this was not the only case to which the treaties were applicable. If troops were assembled and preparations made, with the manifest purpose of aggression against an ally; if his subjects were instigated to revolt, and his soldiers to mutiny; if insurgents on his territory were supplied with money, with arms, and with military stores; if, at the same time, his authority were treated as a usurpation, and all participation in the protection granted to other foreigners refused to the

well-affected part of his subjects, while those who proclaimed their hostility to his person were received as the most favoured strangers; in such a combination of circumstances, it could not be doubted that the case foreseen by defensive alliances would arise, and that he would be entitled to claim that succour, either general or specific, for which his alliances had stipulated. The wrong would be as complete, and the danger might be as great, as if his territory were invaded by a foreign force. The mode chosen by his enemy, might even be more effectual, and more certainly destructive, than open war. Whether the attack made on him be open or secret, or if it be equally unjust, and expose him to the same peril, he is equally authorized to call for aid. All contracts, under the law of nations, are interpreted as extending to every case manifestly and certainly parallel to those cases for which they provide by express words. In that law, which has no tribunal but the conscience of mankind, there is no distinction between the evasion and the violation of a contract. It requires aid against disguised as much as against avowed injustice; and it does not fall into so gross an absurdity as to make the obligation to succour less where the danger is greater. The only rule for the interpretation of defensive alliances seems to be, that every wrong which gives to one ally a just cause of war entitles him to succour from the other ally. The right to aid is a secondary right, incident to that of repelling injustice by force. Wherever he may morally employ his own strength for that purpose, he may, with reason, demand the auxiliary strength of his ally (*z*). Fraud neither gives nor takes away any right. Had France, in the year 1715, assembled squadrons in her harbours and troops on her coasts; had she prompted and distributed writings against the legitimate government of George I.; had she received with open arms battalions of deserters from his troops, and furnished the army of the Earl of Mar with pay and arms when he proclaimed the Pretender; Great Britain, after demand and refusal of reparation, would have had a perfect right to declare war against France, and, consequently, as complete a title to the succour which the States-General were bound to furnish, by their treaties of alliance and guaranty of the succession of the House of Hanover, as if the pretended king, James III., at the head of the French army, were marching on London. The war would be equally defensive on the part of England, and the obligation equally incumbent on Holland. It

(*z*) Vattel's reasoning is still more conclusive in a case of guaranty; liv. iii. ch. 6, § 91.



would show a more than ordinary defect of understanding, to confound a war defensive in its principles with a war defensive in its operations. 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 wrongdoer 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. Accordingly, it is not every attack made on a State that will entitle it to aid under a defensive alliance; for if that State had given just cause of war to the invader, the war would not be, on its part, defensive in principle (a).

Alliance  
between  
Great Britain  
and Japan.

A recent example of a treaty of guarantee is that which was concluded between Great Britain and Japan in 1902, in which the contracting parties mutually guaranteed the territorial independence of China and Korea. They further undertook that if either were assailed by more than one foreign Power on any question of dispute arising in Asia, the other would come to her assistance (b). Thus, Article 2 says: If either Great Britain or Japan in the defence of their respective interests as above described [viz., in reference to China and Korea], should become involved in war with another Power, the other High Contracting Party will maintain a strict neutrality, and use its efforts to prevent other Powers from joining in hostilities against its ally. Article 3: If in the above event any other Power or Powers should join in hostilities against that ally, the other High Contracting Party will come to its assistance, and will conduct the war in common, and make peace in mutual agreement with it.

The Great  
War of 1914.

The Great War of 1914 furnishes examples of the operation of treaties of alliance. Thus the Austro-German alliance, entered into in 1879 by Bismarck and Andrassy, provided to this effect: Should, contrary to the hope and against the sincere wish of the two High Contracting Parties, one of the two Empires be attacked by another Power, the High Contracting Parties are bound to stand by each other with the whole of the armed forces of their Empires, and, in consequence thereof, only to conclude peace jointly or in agreement. The two parties, holding that Russia was the first to commence active hostilities, took common action

(a) Vattel, liv. iii. ch. 6, § 90.

(b) Annual Register, 1902, p. 58. It has already been pointed out (see *supra*, p. 68) that in 1904 Japan guaranteed the integrity of Korea, subject to certain reservations; by a

treaty of 1905 she established a protectorate over the latter country; and in 1910 annexed it. The Anglo-Japanese alliance was renewed in August, 1905, and replaced by a fresh agreement, July, 1911.



against her. On the other hand, Italy, having been bound to Germany and Austria by a defensive alliance (1882), did not hold that Russia was the aggressor; and accordingly elected to remain neutral, on the ground that the *casus fœderis* did not in this case apply.

Again, Japan, in accordance with the above-mentioned Anglo-Japanese treaty of alliance, 1902, delivered an ultimatum to Germany (August 15, 1914), calling upon her to evacuate the port of Kiaochau, and to withdraw or dismantle her warships in Japanese and Chinese waters. No reply having been received, Japan declared war on Germany.

The execution of a treaty was sometimes secured by hostages given by one party to the other. The most recent and remarkable example of this practice occurred at the peace of Aix-la-Chapelle, in 1748, where the restitution of Cape Breton, in North America, by Great Britain to France, was secured by several British peers sent as hostages to Paris (c).

Hostages for the execution of treaties.

Public treaties are to be interpreted like other laws and contracts. Such is the inevitable imperfection and ambiguity of all human language, that the mere words alone of any writing, literally expounded, will go a very little way towards explaining its meaning. Certain technical rules of interpretation have, therefore, been adopted by writers on ethics and public law, to explain the meaning of international compacts, in cases of doubt. These rules are fully expounded by Grotius and his commentators; and the reader is referred especially to the principles laid down by Vattel and Rutherford, as containing the most complete view of this important subject (d).

Interpretation of treaties.

The dispute between England and the United States respecting the settlement of the north-west boundary between the Union and Canada, turned on the interpretation to be put upon existing treaties. England submitted to the German Emperor, who was appointed arbitrator, the following rules of interpretation:—

Rules for interpretation.

1. The words of a treaty are to be taken to be used in the sense in which they were commonly used at the time when the treaty was entered into.

2. In interpreting any expressions in a treaty, regard must be had to the context and spirit of the whole treaty.

(c) Vattel, liv. ii. ch. 16, §§ 245—261.

(d) Grotius, De Jur. Bel. ac Pac. lib. ii. cap. 16. Vattel, liv. ii. ch. 17. Rutherford, Inst. b. ii. ch. 7.

3. The interpretation should be drawn from the connection and relation of the different parts.

4. The interpretation should be suitable to the reason of the treaty.

5. Treaties are to be interpreted in a favourable, rather than an odious sense.

6. Whatever interpretation tends to change the existing state of things at the time the treaty was made is to be ranked in the class of odious things (*e*).

#### Mediation.

Negotiations are sometimes conducted under the mediation of a third Power, spontaneously tendering its good offices for that purpose, or upon the request of one or both of the litigating Powers, or in virtue of a previous stipulation for that purpose. If the mediation is spontaneously offered, it may be refused by either party; but if it is the result of a previous agreement between the two parties, it cannot be refused without a breach of good faith. When accepted by both parties, it becomes the right and the duty of the mediating Power to interpose its advice, with a view to the adjustment of their differences. It thus becomes a party to the negotiation, but has no authority to constrain either party to adopt its opinion. Nor is it obliged to guarantee the performance of the treaty concluded under its mediation, though, in point of fact, it frequently does so (*f*).

#### The Treaty of Paris, 1856.

It was stipulated at the Treaty of Paris (1856), that "If there should arise between the Sublime Porte and one or more of the other signing Powers, any misunderstanding which might endanger the maintenance of their relations, the Sublime Porte and each of such Powers, before having recourse to the use of force, shall afford the other contracting parties the opportunity of preventing such an extremity by means of their mediation" (*g*). At a Conference of the Powers who signed the Treaty of Paris, their Plenipotentiaries, in a protocol dated 14th April, 1856, expressed "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.

(*e*) Parl. Papers, N. America, 1873 (No. 3), pp. 6—9. Vattel, liv. ii. ch. 17, §§ 271, 285—287, 301; ch. 18, § 305; and see *ante*, pp. 280 *seq.* For a case relating to the interpretation of treaties generally, and in particular to the interpretation of the "most favoured nation clause" fre-

quently inserted in commercial treaties, see *Whitney v. Robertson* (1887), 124 U. S. 190.

(*f*) Klüber, *Droit des Gens Moderne de l'Europe*, pt. ii. tit. 2, § 1; ch. 2, § 160.

(*g*) Art. viii. See Hertslet, *Map of Europe*, vol. ii. p. 1255.

The Plenipotentiaries hope that the governments not represented at the Congress will unite in the sentiment which has inspired the wish recorded in the present protocol" (*h*).

Nevertheless, it can hardly be said that wars have been less frequent since these declarations, even among the Powers actually making them. The protocol was invoked to prevent the Dano-German war of 1864, and the Austro-Prussian war of 1866, but without effect. The Conference which met at Constantinople in 1876 attempted to settle the dispute between Russia and Turkey in a peaceable manner, but it failed to bring about such a result. Lord Granville, in 1870, appealed to France and Prussia to have recourse to mediation, but in vain (*i*). Even after hostilities had commenced, Her Majesty's Government assured France that "if at any time recourse should be had to their good offices, they would be freely given and zealously exerted" (*k*). There have been several recent cases of successful mediation; for example, the mediation of the Pope between Germany and Spain, 1885; that of Spain between Italy and Colombia, 1888; that of Portugal between Great Britain and Brazil, 1895; that of the Great Powers between Greece and Turkey, 1897; that of the United States between Russia and Japan, 1905, resulting in the Treaty of Portsmouth.

A great number of international disputes and differences have in the past been amicably settled not only by means of negotiation, mediation, and good offices, but also by arbitration (*l*). The theory and practice of arbitration are, indeed, as old as international relationships. There are many records of interstate arbitration in ancient Greece, and some in Rome (*m*). In the Middle Ages we find monarchs, jurists, ecclesiastics, and especially the Pope, acting as arbitrators between princes and communities. In the fourteenth and fifteenth centuries the practice became much less frequent, and in the seventeenth and eighteenth very rare. From time to time jurists, philosophers, and publicists took up the question, and suggested various schemes

INTER-  
NATIONAL  
ARBITRATION.

(*h*) *Ibid.* p. 1279.

(*i*) Annual Register, 1870. Pub. Documents, p. 204.

(*k*) Annual Register, 1871. Pub. Documents, p. 248.

(*l*) On the subject of arbitration, see W. E. Darby, International Tribunals (1904); J. B. Moore, History of the International Arbitrations to which the United States has been a

party, 6 vols. (Washington, 1899); Phillipson, Studies in International Law (1908), pp. 1—49; A. de Lapradelle et N. Politis, Recueil des Arbitrages Internationaux (Paris, 1905, &c.).

(*m*) Cf. Phillipson, Int. Law and Custom of Ancient Greece and Rome, vol. ii. chaps. xx., xxi.



for settling disputes by means of arbitral tribunals. Towards the end of the eighteenth century this pacific movement received a noteworthy impetus by the Jay treaty of 1794, between England and the United States, whereby several questions were to be submitted to arbitrators; and after the Napoleonic wars it made greater progress. Such associations as the Society of Friends and the American Peace Association, the London Peace Society, exerted salutary influence in the same direction. In England men like Cobden advocated arbitration, though they found opponents in the House of Commons.

Arbitration  
Treaties.

From about the middle of the nineteenth century States begin to show a tendency to enter into general arbitration treaties, that is, relating not to specific points of difference, but to all kinds of controversies, present or future, arising out of such comprehensive subjects as commerce or navigation. Since 1862 compromise clauses were agreed to between Great Britain on the one part, and Italy, Greece, Portugal, Mexico, Uruguay respectively on the other; between Belgium on the one hand, and Italy, Greece, Sweden, Norway, and Denmark respectively on the other; between Spain and Sweden and Norway; between Denmark and Venezuela; between Italy and Montenegro; between France and Korea; between Austria-Hungary and Siam; and many other cases. In the treaty of peace concluded at Guadalupe-Hidalgo (1848), between the United States and Mexico, the principle of permanent arbitration was established between the two parties as to any differences that might arise between them. Other States soon entered into treaties of general arbitration, *e.g.*, Belgium with Venezuela (1884), with Ecuador (1887); Switzerland with San Salvador and Ecuador (1888); Spain with Honduras and Colombia (1894). The leading Powers did not manifest the same readiness to bind themselves in this manner; attempts were, in truth, made by Great Britain and the United States in 1897, but they did not prove successful. It may also be mentioned that by the 11th Article of the General Act of the Berlin Conference, 1885, the signatory Powers declared that in case a serious disagreement originating on the subject thereof, or in the limits of the territories mentioned in Article 1 (the Congo Basin and circumjacent regions), and placed under the free trade system, shall arise between any of them, or the Powers which may become parties to the Act, these Powers bind themselves, before appealing to arms, to have recourse to the mediation of one or more of the friendly Powers, and in a similar case reserve to themselves the

option of having recourse to arbitration (*n*). It has been estimated that from the Jay treaty in 1794 to the end of the nineteenth century there were 228 cases of "formal" arbitration, of which 137 came after the famous Geneva Arbitration of 1872. Great Britain was a party in 81 of these; United States, 62; France, 28; Prussia and Germany, 17; Russia, 8 (*o*). During the same period there were also some 250 instances of informal arbitration, namely, by Boards or Commissions. Since the Hague Peace Conference arbitration treaties have multiplied enormously; thus, between 1900 and 1908, there were 67 treaties of this kind (*p*).

A few important cases of arbitration that took place before the Hague Peace Conference may be referred to. A large variety of questions were involved, *e.g.*, the delimitation of boundaries, territorial waters, the rights and obligations of neutrality, and in particular the responsibility of a neutral Power for hostilities committed within its territory by a belligerent, the right to seize vessels and confiscate cargoes, the effects of declaration of war, the nature of contraband goods, questions relating to slavery, the force of *res adjudicata*, and many other matters.

Instances of arbitration prior to the Hague Conference.

The arbitration by mixed Anglo-American commission, under the treaty of 1794, had some influence on later procedure, which tended to become more judicial and less diplomatic. Many points connected with some of the subjects enumerated in the previous paragraph were dealt with. Soon afterwards, the United States endeavoured to apply the principles of the Jay treaty in its relations with other countries, *e.g.*, with Spain (1802), resulting eventually in the cession of Florida (1819); with France (1813), for the cession of Louisiana.

A dispute between Great Britain and the United States as to the interpretation of Article 1 of the Treaty of Ghent (1814), was submitted to Alexander I. of Russia; the question of belligerent occupation was also involved.

William I. of Holland acted as arbitrator in the North-Eastern frontier dispute between Great Britain and the United States. His decision was, however, rejected (1831), because he suggested a line that went beyond the terms of the reference.

A British claim for compensation against France for blockading the coast of Portendic without giving notification to the owners of British vessels trading there in gum, &c., was referred

(*n*) Cf. Art. viii. of the Treaty of Paris. Tribunals (1904), pp. 769 *seq.*  
 (*p*) Cf. American Journ. of Int. Law, vol. ii. pp. 824 *seq.*

(*o*) Cf. W. E. Darby, International

to the King of Prussia, who decided (1843) in favour of the claimants.

In 1844 Queen Victoria gave a decision in a dispute between France and Mexico, the former claiming indemnity for the expulsion of French subjects from Mexico, the latter for the capture of Mexican warships after the fall of Fort Ulloa. The claims of both parties were dismissed, on the ground that the acts of both were justified by the state of war between them.

In 1845 Great Britain complained that a fortnight's notice given by the Argentine Republic, during the war with Uruguay, as to the closure of its ports, was too short, and demanded compensation in respect of six vessels which were refused admittance to Buenos Ayres. The President of Chile decided that the measures were justified by the exigencies of war.

In 1814, during the war between Great Britain and the United States, an American privateer, the *General Armstrong*, fired upon British boats in a Portuguese port, but was soon fired at in return and destroyed within the limits of the port. The United States claimed indemnity from Portugal for not intervening as a neutral. The matter was settled in 1851 by Louis Napoleon.

The mixed Commission of London, 1853—1885, adjusted differences between Great Britain and the United States, in reference to various claims and counterclaims arising out of the "Florida Bonds" dispute, the *MacLeod* case, the *Creole* case.

Several differences due to arrests and seizures of private property were decided by arbitration; thus the claim of the United States in respect of the American brig *Macedonian*, that was seized by Chile in her war with Peru (1821), was upheld by the King of the Belgians (1863); the same arbitrator settled the dispute between Great Britain and Brazil, in respect of H.M.S. *Forte*; the case of the packet *Costa Rica* (1897), involving a British subject's claim against the Netherlands, was referred to Russia.

Questions of occupation and title arising in the Delagoa Bay case (1875), between Great Britain and Portugal, were referred to the French Government.

The subject of neutrality received elaborate treatment in the famous *Alabama* case (1872), between Great Britain and the United States, submitted to arbitration under the Treaty of Washington, May, 1871 (*q*).

Another arbitral award of great importance was given in the Behring Sea case (1893) (*r*).

(*q*) See *infra*, p. 677.

(*r*) See *supra*, p. 300.



The British-Venezuelan boundary dispute, dating from 1841, was settled in 1899, through the intervention of the United States.

In the year 1898 the Emperor Nicholas II. of Russia invited the States of the world to send representatives to a Conference which should consider how best to check the progressive increase of military and naval armaments, study any possible means of effecting their eventual reduction, and devise means for averting armed conflicts between States by the employment of pacific methods for settling international disputes (s). The invitation was accepted by twenty-six States, of which twenty were European, four Asiatic, and two American: Great Britain, Austria, Belgium, China, Denmark, Spain, the United States, Mexico, France, Germany, Greece, Italy, Japan, Luxemburg, Montenegro, Holland, Persia, Portugal, Roumania, Russia, Serbia, Siam, Sweden and Norway, Switzerland, Turkey, and Bulgaria. From the 18th of May to the 29th of July the International Peace Conference, as it was designated, held continual session at the Hague, the members being divided for greater convenience into three commissions to deal with the various topics propounded. The labours of the Conference with regard to formulating a scheme for the gradual reduction of existing armaments and for checking any further increase were doomed to failure from the first. But it did not separate until some highly important conventions and declarations dealing with the amelioration of the laws and customs of war had been concluded and executed. These will find their place in the later pages of this book. The most striking success, however, of the Conference was the "Convention for the pacific settlement of international disputes" which was agreed to by the delegates of all the Powers represented, and was subsequently ratified by their respective Governments.

The Hague  
Peace Confer-  
ence, 1899.

In accordance with a wish expressed by the delegates at the Conference of 1899, a second Conference of the Powers assembled at the Hague on June 15, 1907, and continued its sittings till October 18. On this occasion forty-four States (out of the fifty-seven claiming sovereignty) were represented. The work was divided out among four committees, which considered respectively international arbitration and cognate questions, the law of war on land, the law of naval war, and prize law. The final Act comprised thirteen Conventions, one declaration, three wishes (*vœux*), and several recommendations. For the present we are concerned with

The Hague  
Peace Confer-  
ence, 1907.

(s) Rescript of the Czar, August 24, 1898.

the first two Conventions; the first, containing ninety-seven Articles, deals with the pacific settlement of international disputes, and is a revision—with numerous additions—of the Convention of 1899 on the same subject; the second, consisting of seven Articles, deals with the employment of force for the recovery of contract debts. The first Convention, after expressing the engagement of the signatory parties to endeavour to settle international differences by pacific means (Article 1) goes on to deal with good offices and mediation, international commissions of inquiry, and international arbitration.

Good offices  
and media-  
tion.

In case of serious disagreement or dispute, the contracting Powers agree to resort to mediation before appealing to arms (Article 2). Other Powers may offer their good offices, either before or after the outbreak of hostilities; and such offer is not to be considered an unfriendly act (Article 3). Good offices and mediation have the character of advice only, and never have binding force (Article 6). The acceptance of mediation does not necessarily interfere with mobilisation (Article 7). Apart from this a special method of mediation is recommended, whereby each contending State chooses another Power as mediator, and the two mediators then control all negotiations for adjusting the dispute, to the exclusion of the States at variance, for a period of thirty days (Article 8) (*t*).

International  
commissions  
of inquiry.

In international differences on questions of fact, involving neither the honour nor the vital interests of the parties, the disputants, who have not been able to come to an agreement by diplomatic means, should set up an international commission for examining and reporting on the facts (Article 9). It is to be constituted by special agreement defining the subject-matter and scope of the inquiry and the powers of the commissioners, who will be appointed—if not agreed upon otherwise—in the way provided for the appointment of the court of arbitration (Articles 10—12). Rules are suggested for regulating the procedure to be followed in conducting such inquiries (Articles 13—36). The report is limited to a statement of facts, and does not possess the character of an arbitral award; it leaves to the parties entire freedom as to the effect to be given to the statement (Article 35).

International  
arbitration.

International arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for law. Recourse to arbitration implies an

(*t*) This special method of mediation is due to the suggestion of one of the United States delegates, but

it has not yet been tried. Cf. F. W. Holls, *The Peace Conference at the Hague* (New York, 1900), pp. 187 *seq.*

engagement to submit in good faith to the award (Article 37). The signatory Powers recognise it to be the most effective and most equitable means of settling disputes, when diplomacy has failed, in questions of a legal nature, especially on the interpretation or application of treaties; and recommend its adoption so far as circumstances permit. The Powers may conclude special agreements for the purpose of extending compulsory arbitration so far as it is possible (Articles 38—40).

For some time the establishment of a permanent arbitral tribunal was advocated by jurists and publicists. It was to some extent realized at the first Conference, 1899; and in 1907 improvements in its organization and procedure were made. The Convention declares: With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the contracting Powers undertake to maintain the permanent court of arbitration, as established by the first Peace Conference, accessible at all times, and acting, unless otherwise stipulated by the parties, in accordance with the rules of procedure inserted in the present Convention (Article 41). The permanent court is competent for all arbitration cases, unless the parties agree to institute a special tribunal (Article 42). Its organization comprises an international bureau, serving as the registry of the court, and conducting the administrative business (Article 43); a permanent administrative council (consisting of the diplomatic agents of the signatory Powers accredited to the Hague, with the Dutch Minister for Foreign Affairs as President), which is charged with the direction and control of the bureau (Article 49); and a court of arbitration. The arbitrators are to be selected thus: each contracting Power selects four persons of known competence, and of the highest moral reputation; such persons are appointed for six years, and are inscribed on a list notified to all the contracting Powers. When recourse to the court is desired, the arbitrators are to be chosen from this list (Article 44). If the parties fail to agree on the composition of the tribunal, each appoints two arbitrators, chosen from the list, who choose an umpire; failing an agreement as to the umpire, he is chosen by a third Power agreed upon by the parties. Should they not agree on this subject, each party selects a different Power, and the umpire is then chosen by the two nominated Powers. If, within two months, these two Powers cannot themselves come to an agreement, each presents two candidates taken from the list of members of the permanent court, exclusive of the members selected by the parties and not being nationals of either of them, and from

The Permanent Court at the Hague.



among such candidates an umpire is chosen by lot (Article 45). The court having been constituted, the parties send to the bureau the text of their *compromis* (the preliminary agreement stating the points at issue and indicating the procedure to be followed), and the names of the arbitrators; whereupon the bureau makes the necessary arrangements for the meeting at the date fixed by the parties. The members of the tribunal, in the exercise of their duties and out of their own country, enjoy diplomatic privileges and immunities (Article 46). All signatory Powers should remind disputants that the permanent court is open to them (Article 48), to which non-contracting Powers, too, may, by agreement, have recourse (Article 47).

The Hague  
Code of  
Procedure.

The parties draw up the *compromis* by mutual agreement, but the court may do so if requested by them. If all other attempts to reach an agreement fail, it may be settled by the court at the request of one party in certain cases: where the dispute is covered by a general arbitration treaty (made or renewed after the Convention) providing for a *compromis* and not precluding its settlement by the Court; and where the dispute arises out of contract debts claimed by one party as due to its subjects, with regard to which an offer of arbitration has been accepted, unless the settlement of the *compromis* has otherwise been provided for (Article 53). In such cases the *compromis* is settled by a commission comprising five members selected in the same manner as an arbitral court (Article 54); and, unless otherwise agreed, such commission afterwards becomes the court of arbitration (Article 58). Provision is also made for replacing arbitrators who have died or resigned (Article 59); for the place of meeting (Article 60); the languages to be used (Article 61); matters of pleading, evidence, and discussion (Articles 63—77); for the secrecy of the proceedings and decision by a majority (*u*), against which there is no appeal; the effects of the award and the question of expenses

(*u*) It may be mentioned that several years before the Hague Conferences, a question was raised under the Treaty of Washington between England and the United States as to the effect to be given to an award in which only a majority of the arbitrators concurred, and when no provision had been made for this in the agreement of reference. The treaty had constituted four boards of arbitrators. As regards three of these boards, it was provided that the votes of a majority should be conclusive; but as regards the fourth, viz., the one to meet at Halifax and decide the fishery question, no such provision

was made. When the award was published, Mr. Evarts, the American Foreign Secretary, raised an objection to its validity on the ground (among others) that only two out of the three arbitrators had concurred in it. Lord Salisbury declined to give any weight to this objection, and asserted it to be a principle of international law that, in arbitrations of a public nature, the majority of the arbitrators binds the minority, unless the contrary be expressed. [Lord Salisbury to Mr. Welsh, 7th Nov. 1878. See Supplement to London Gazette, 16th Nov. 1878.]

(Articles 78—85). There are additional rules for facilitating arbitration in disputes admitting of a summary procedure (Articles 86—90).

Finally, the Convention contains provisions for ratification by the contracting parties, how it is to be notified and registered (Articles 91, 92); for adherence thereto by non-signatory Powers that were invited to the second Peace Conference, and even Powers that were not invited (subject to agreement between the contracting Powers) (Articles 93, 94); and for the denunciation of the Convention (Article 96).

The development of international arbitration since 1899 constitutes one of the most remarkable features of modern international law and practice. The disputes that have since been settled by this pacific method are not numerous, but they are of great importance. In October, 1902, it brought to a satisfactory termination a long-standing pecuniary dispute between the United States and Mexico with regard to the "Pious Fund of the Californias," a great Roman Catholic missionary charity founded during the closing years of the sixteenth century. This was the first case submitted to a court of arbitration set up under the Hague Convention of 1899. The award affirmed the applicability of the principle of *res judicata* in international law (*x*).

In February, 1904, it pronounced judgment on the preferential claims made against Venezuela by Great Britain, Germany, and Italy, arising out of the pacific blockade of December, 1902. The award, however, has been described as bad, both legally and morally, inasmuch as it decided in favour of claimants who had used force as against those who had not done so (*y*).

In 1905 came the Japanese house tax case, in reference to the perpetual leases of European Powers in Japan. The award of the court was to the effect that these leases confer an immunity on all the lands and buildings thereon from "all imposts, taxes, charges, contributions, or conditions whatsoever other than those expressly stipulated in the leases in question" (*z*).

The Muscat Dhows case (between Great Britain and France) was decided in the same year (*a*).

There have been similar instances of arbitration since the second Hague Conference, 1907. Thus in 1909 a dispute between France

General provisions.

Instances of arbitration since the Hague Conference.

(*x*) British and Foreign State Papers, vol. xcvi. (1901—2); Moore, International Arbitrations, vol. ii. 1349 *seq.*; Cobbett, Cases, vol. i. pp. 23 *seq.*

(*y*) The text of the award is given

in Amer. Journ. of Int. Law, vol. ii. (1908), pp. 902 *seq.* Cf. Moore, Digest, § 967.

(*z*) Amer. Journ. of Int. Law, vol. ii. (1908), pp. 911 *seq.*

(*a*) *Ibid.* pp. 923 *seq.*

and Germany, arising out of the French military occupation of Casablanca in Morocco, was submitted to an arbitral tribunal. The German consul and his staff had aided deserters from the French army, of whom three were German subjects, in an unsuccessful attempt to escape. It was held that in these circumstances the rights of the military occupant are superior to the consular right of protection (*b*). It is to be noted that in this case, as in the North Sea incident, 1904, the arbitrators were called upon to decide not merely questions of fact but also of law.

In October, 1909, the Maritime Boundary case, between Norway and Sweden, was decided. The case of the North Atlantic coast fisheries (*c*) was investigated by the Hague Court (June 1—August 12, 1910), which, by its award (September 6), put an end to a controversy that existed between Great Britain and the United States for some seventy years. The answers given to the questions submitted were favourable to the United States; but British sovereignty over the shores and waters, as to which the United States had acquired special rights, remained. It was also decided that “bays” in the treaty of 1818 meant *geographical* bays regardless of their size or depth, but the “headland theory” was not dealt with. In England the result of the arbitration was in several quarters regarded as unsatisfactory.

On October 25, 1910, was decided also the *Orinoco Steamship Company* case, between the United States and Venezuela. The effect of the award was to annul the judgment previously pronounced by another international tribunal (*d*).

This was immediately followed by the *Savarkar* case, between Great Britain and France (*e*). An Indian law student, Savarkar, was ordered to be extradited from London to India on the ground that he had committed political offences in the latter country. The vessel on which he was placed having reached Marseilles, he escaped and swam ashore. He was, however, arrested by a French police officer and handed over to the English police. The French Government claimed that the British Government was not entitled to bring a political fugitive within its jurisdiction without due consent from the proper authorities, and that as soon as the vessel in question—being a merchantman—entered French waters, Great Britain lost her jurisdiction over the prisoner. The award of the Hague court has been criticised on the ground that it derogated from the

(*b*) Amer. Journ. of Int. Law, vol. iii. (1909), pp. 698—701, 755—760.

(*c*) Cf. Amer. Journ. of Int. Law,

vol. iv. (1910), pp. 948 *seq.*

(*d*) *Ibid.* vol. v. (1911), pp. 230 *seq.*

(*e*) See Amer. Journ. of Int. Law,

vol. v. (1911), pp. 520—523.



principle of territoriality, in not calling upon Great Britain to restore the prisoner to the French authorities.

There were other instances of international arbitration, *e.g.*, the Chamizal arbitration between the United States and Mexico (June, 1911) (*f*), the Canevaro case between Italy and Peru (May, 1912) (*g*), the question of the payment of certain indemnity as between Russia and Turkey (November, 1912) (*h*), the case of the French mail steamer *Carthage* between France and Italy, and that of the French mail steamer *Manouba* between France and Italy (May, 1913) (*i*).

Besides these, there has been a considerable number of recent cases of arbitration decided by tribunals other than that of the Hague.

With regard to the scope of arbitration, there has never been and there is not now unanimity of opinion. Apart from express conventions stipulating submission to an arbitral tribunal in the case of certain disputes, no State is bound to refer its grievance to arbitrators. Those that are ready to go to arbitration on some questions are not necessarily ready to do so on others. Some of the smaller States, indeed, have undertaken to submit *all* their differences in this way (*e.g.*, Holland and Denmark); others (*e.g.*, Brazil, Argentina, Chile) all differences save those affecting their respective constitutions. But most Powers prefer to limit arbitration to disputes of a legal character (and this is the view taken, as above stated, in Article 38 of the Hague Convention), and to exclude, in their treaties of arbitration, questions involving national honour, independence, vital interests, and matters affecting the interests of third Powers. Thus, by the terms of an agreement entered into between England and France in October, 1903, all differences of a judicial order, or such as relate to the interpretation of the treaties existing between the parties which it may not be possible to settle by means of diplomacy, are to be submitted to the Hague tribunal, "on condition, however, that they do not involve either the vital interests or the independence or honour of the two contracting parties, and that they do not affect the interests of a third Power." Similar agreements have been entered into between several Powers (*k*). Thus limited, it is probable that the Hague tribunal will fill a gradually increasing rôle of usefulness, and will save much of that friction which constantly militates

Scope of  
arbitration.

(*f*) *Ibid.* p. 782.

(*g*) *Ibid.* vol. vi. (1912), p. 746.

(*h*) *Ibid.* vol. vii. (1913), pp. 178  
*seq.*

(*i*) *Ibid.* vol. vii. (1913), pp. 623,  
629.

(*k*) For several examples of these, see *Amer. Journ. of Int. Law*, vol. ii. (1908), Supplement, pp. 296 *seq.*

against international goodwill. The fact that questions of "vital interest" or "involving national honour" are excluded from its jurisdiction must largely limit its scope, and it cannot be accepted as offering any reasonable probability of acting as a check on popular passions when once excited. But by showing that it is possible in smaller matters to submit to a pacific solution without a sacrifice of national self-esteem, it may eventually help to render public opinion more and more averse to the arbitrament of war, and prepare it to accept an adverse decision in the spirit of resignation which society enforces upon a civil litigant.

Compulsory  
arbitration.

In recent times, remarkable efforts have been made to introduce compulsory arbitration. In 1890 the Pan-American Conference adopted it as a "principle of American international law," and arrived at a project for a general treaty of compulsory arbitration; but it was not ratified. The question was discussed at the first Hague Conference, 1899. It was suggested that pecuniary claims and controversies arising out of several kinds of treaties might be compulsorily referred to an arbitral tribunal. Most of the delegates were in favour of the proposal, but the German representative opposed it, and so it was dropped. This, however, did not preclude States from entering into treaties of obligatory arbitration; and many, indeed, were entered into. At the second Hague Conference the matter was brought forward again. A large number of subjects were proposed as being suitable for compulsory arbitration; the majority of the States accepted the project, but the opposition included two great Powers, Germany and Austria-Hungary; accordingly the scheme fell through once more. However, the Conference declared, in its final Act, its admission of the principle of compulsory arbitration, and that certain kinds of disputes, especially such as arise from the interpretation or application of treaties, might well be submitted without restriction to compulsory arbitration.

Moreover, a progressive movement in this direction was definitely made by the second Convention (1907), viz., the "Convention respecting the limitation of the employment of force for the recovery of contract debts." Article 1 says: The contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals. This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on,

or, after the arbitration, fails to submit to the award. Article 2 made provision for the procedure (which is assimilated to that of the first Convention), and for the effect of the award.

By June 30, 1908, which was the final date fixed for signing the Convention, thirty-four out of the forty-four States represented had given their signatures, and some of them with reservations. Most of the leading States of Europe and America signed and also ratified this Convention, which may, therefore, be regarded as binding upon them.

It will have been seen that the so-called Permanent Court of Arbitration established by the Hague Conferences is not, strictly speaking, a Court; it is rather a panel or list of judges from which courts may be constituted as required. Obviously, the constituting of each particular court for every case that arises means delay and expense, and involves a cumbrous, uncertain process; also, harmony and continuity between the successive arbitral courts could not be ensured. To make good this defect, an attempt was made at the second Hague Conference to set up "une Cour de Justice Arbitrale" (a court of arbitral justice). A draft convention was prepared, which prescribed its organization, jurisdiction, and procedure. Judges of known capacity and character were to be appointed by their respective countries for a period of twelve years, and were to receive an annual salary. They were to meet in session once a year at the Hague, and were to nominate annually a special delegation of three of their number (and three others as deputy delegates). This delegation was to perform the functions of a commission of inquiry, to settle the *compromis* if the contending parties agree, and in certain cases even at the request of one party, and was made competent to decide certain cases.

Proposed  
Judicial  
Arbitration  
Court.

The plan failed, because the States could not agree on the constitution of the court. The principle of equality was invoked, whereby several of the smaller Powers claimed that each State—the least equally with the greatest—should be entitled to nominate a judge. The applicability of this principle to conditions such as these was naturally scouted by some of the greater Powers (*l*).

(*l*) Bibliographical references to arbitration and relative subjects will be found in the excellently compiled

lists of Hershey, *Essentials of Int. Public Law* (1912), pp. 340 *seq.*



## PART FOURTH.

INTERNATIONAL RIGHTS OF STATES IN THEIR HOSTILE  
RELATIONS.

## CHAPTER I.

## COMMENCEMENT OF WAR, AND ITS IMMEDIATE EFFECTS.

Redress by  
forcible means  
between  
nations.

THE independent societies of men, called States, acknowledge no common arbiter or judge, except such as are constituted by special compact. The law by which they are governed, or profess to be governed, is deficient in those positive sanctions which are annexed to the municipal code of each distinct society. Every State has therefore a right to resort to force, as the only means of redress for injuries inflicted upon it by others, in the same manner as individuals would be entitled to that remedy were they not subject to the laws of civil society. Each State is also entitled to judge for itself what are the nature and extent of the injuries which will justify such a means of redress.

forcible  
means short  
of actual  
war.

Among the various modes of terminating the differences between nations, by forcible means short of actual war, are the following:—

1. By laying an embargo or sequestration on the ships and goods, or other property of the offending nation, found within the territory of the injured State. (This is sometimes described as ‘hostile’ embargo, in contradistinction to ‘pacific’ or ‘civil’ embargo, whereby a State compels, in certain circumstances, its own merchantmen to remain in port).

2. By taking forcible possession of the thing in controversy, by securing to yourself by force, and refusing to the other nation, the enjoyment of the right drawn in question.

3. By exercising the right of vindictive retaliation (‘retorsio facti’), or of amicable retaliation (‘rétorsion de droit’); by which last, the one nation applies, in its transactions with the other,

the same rule of conduct by which that other is governed under similar circumstances.

Thus, before the outbreak of the Russo-Japanese war in 1904, Russia made regulations excluding Japanese fishermen from the waters of Saghalien, which was then Russian territory. Accordingly Japan retorted by threatening to impose differential duties on Russian imports—a proceeding which brought about the withdrawal of the obnoxious regulations (*a*).

4. By making reprisals upon the persons and things belonging to the offending nation, until a satisfactory reparation is made for the alleged injury (*b*).

This last seems to extend to every species of forcible means for procuring redress, short of actual war, and, of course, to include all the others above enumerated. Reprisals are negative, when a State refuses to fulfil a perfect obligation which it has contracted, or to permit another nation to enjoy a right which it claims (*c*). They are positive, when they consist in seizing the persons and effects belonging to the other nation, in order to obtain satisfaction (*d*). Reprisals.

Reprisals are also either general or special. They are general, when a State which has received, or supposes it has received, an injury from another nation, delivers commissions to its officers and subjects to take the persons and property belonging to the other nation, wherever the same may be found. It is, according to present usage, the first step which is usually taken at the commencement of a public war, and may be considered as amounting to a declaration of hostilities, unless satisfaction is made by the offending State. Special reprisals are, where letters of marque were formerly granted, in time of peace, to particular individuals who had suffered an injury from the government or subjects of another nation (*e*).

Reprisals are to be granted only in case of a clear and open denial of justice. The right of granting them is vested in the sovereign or supreme power of the State, and, in former times, was regulated by treaties and by the municipal ordinances of different nations. Thus, in England, the statute of 4 Hen. V., cap. 7, declares, "That if any subjects of the realm are oppressed in time of peace by any foreigners, the king will grant marque

(*a*) For other examples of retaliation in kind, see Moore, *Digest*, vol. vii. § 1090.

(*b*) Vattel, liv. ii. ch. 18. Klüber, *Droit des Gens Moderne de l'Europe*, § 234.

(*c*) Cf. the case of the Silesian loan, *infra*, p. 418.

(*d*) Klüber, § 234, note (*c*).

(*e*) Bynkershoek, *Quæst. Jur. Pub.* lib. i. (Duponcean's Transl. p. 182, note).

in due form to all that feel themselves grieved;" which form is specially pointed out, and directed to be observed in the statute. So also, in France, the celebrated marine ordinance of Louis XIV. of 1681, prescribed the forms to be observed for obtaining special letters of marque by French subjects against those of other nations. But these special reprisals in time of peace have entirely fallen into disuse (f).

Effect of  
reprisals.

Any of these acts of reprisal, or resort to forcible means of redress between nations, may assume the character of war in case adequate satisfaction is refused by the offending State. "Reprisals," says Vattel, "are used between nation and nation, in order to do themselves justice when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another, if it refuses to pay a debt, to repair an injury, or give adequate satisfaction for it, the latter may seize something belonging to the former, and apply it to its own advantage, till it obtains payment of what is due, together with interest and damages; or keep it as a pledge till the offending nation has refused ample satisfaction. The effects thus seized are preserved, while there is any hope of obtaining satisfaction or justice. As soon as that hope disappears they are confiscated, and then reprisals are accomplished. If the two nations, upon this ground of quarrel, come to an open rupture, satisfaction is considered as refused from the moment that war is declared, or hostilities commenced; and then, also, the effects seized may be confiscated" (g).

Embargo  
previous to  
declaration of  
hostilities.

Thus, where an embargo was laid on Dutch property in the ports of Great Britain, on the rupture of the peace of Amiens, in 1803, under such circumstances as were considered by the British Government as constituting a hostile aggression on the part of Holland, Sir W. Scott (Lord Stowell), in delivering his judgment in this case, said, that "the seizure was at first equivocal; and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo, so terminated. Such would have been the retroactive effect of that course of circumstances. On the contrary, if the transaction end in hostility, the retroactive effect is exactly the other way. It impresses the direct hostile character upon the original seizure; it is declared to be no embargo; it is no longer an equivocal act, subject to two interpretations; there is a declaration of the *animus*

(f) Vattel, *Droit des Gens*, liv. ii. ch. 18, §§ 342—346. Bynkershoek, *Quæst. Jur. Pub. lib. i. cap. 24*. Martens, *Précis*, liv. viii. ch. 2, § 260.

Martens, *Essai concernant les Armateurs*, § 4.

(g) Vattel, *Droit des Gens*, liv. ii. ch. 18, § 342.



by which it is done; that it was done *hostili animo*, and it is to be considered as a hostile measure, *ab initio*, against persons guilty of injuries which they refuse to redeem, by any amicable alteration of their measures. This is the necessary course, if no particular compact intervenes for the restoration of such property, taken before a formal declaration of hostilities" (*h*).

The recourse to reprisals by Great Britain in the Don Pacifico affair was not a very dignified proceeding, and ended in something like a farce. Don Pacifico, a native of Gibraltar, and consequently a British subject, went to reside at Athens, and while there, in 1849, a mob, aided, it was said, by Greek soldiers, broke into and plundered his house. Pacifico did not apply to the Greek tribunals for redress, but invoked the aid of England. On the refusal of Greece to grant compensation, the British fleet was ordered to lay an embargo on all Greek vessels in Greek ports. France offered her mediation, but Greece was practically compelled to accept the terms imposed by England. Three commissioners were appointed to examine Pacifico's claims. These had now swollen to £21,295 1s. 4*d.*, and the commissioners, after duly examining them, awarded him £150! (*i*). The English Foreign Secretary defended these proceedings by alleging that to have recourse to the Greek tribunals was at that time ridiculous, and that no justice could be expected from them. Sir R. Phillimore, however, thinks that the evidence of this was "not of that overwhelming character which alone could warrant an exception from the well-known and valuable rule of international law upon questions of this description" (*k*), viz., the rule that application must first be made to the local courts.

Case of Don Pacifico.

In 1884 France, in her operations against Tonquin, felt aggrieved against China, because she permitted Chinese bands to take part with the enemy. The French Government, not desiring to adopt the extreme measure of war, ordered the bombardment of Foo-chow, and took possession of certain localities on the Chinese island of Formosa. In 1895, Great Britain seized the port of Corinto, in Nicaragua, and levied the customs duties there, until reparation was made for injuries inflicted on British subjects. In 1901, France seized the custom-house at Mitylene, in order to induce Turkey to satisfy certain contractual claims on the part of

Other cases of reprisal.

(*h*) *The Bœdes Lust* (1804), 5 C. Rob. 246. Cf. *The Gertruyda*, 2 C. Rob. 219; *The Theresa Bonita*, 4 C. Rob. 236. With regard to the status of enemy merchantmen at the outbreak of hostilities, the Hague Convention

(1907) now applies; see *infra*, p. 423.

(*i*) Correspondence respecting M. Pacifico's claims. Parl. Papers, 1851; Annual Register (1850), p. 281.

(*k*) Phillimore, vol. iii. p. 41 (2nd ed.).

French subjects. In 1908, Holland seized two Venezuelan gun-boats to exact reparation for various grievances, after having unsuccessfully tried diplomatic methods.

Pacific  
blockade.

Another means of bringing pressure to bear on a recalcitrant State is that known as "pacific blockade," whereby the aggrieved Power blockades the latter's coast or ports in time of peace, without the intention of making war. The earliest affair of this kind was the blockade, in 1814, of Norwegian ports by English and Swedish ships. In 1827, Great Britain, France and Russia blockaded the coasts of Greece occupied by Turkish forces. Later, France blockaded the Tagus in 1831; in 1833, France and Great Britain blockaded the ports of Holland; in 1838, France blockaded Mexico; from 1838 to 1848, France and Great Britain blockaded the ports of the Argentine Republic; in 1850, Great Britain blockaded Greek ports; in 1860, the King of Piedmont joined the revolutionary government in Naples in blockading Sicilian ports held by the King of Naples. In 1861, a British ship, the *Prince of Wales*, was wrecked on the Brazilian coast, and the English consul came to the conclusion that the wreck had been plundered, and some of the sailors murdered. Compensation was demanded by England, and, on its refusal, a British ship of war blockaded Rio de Janeiro for six days, and five Brazilian ships were captured. These were shortly afterwards restored, and the sum of £3,200 paid by Brazil under protest. International relations were suspended between England and Brazil until 1865, when the affair was settled by the mediation of the King of Portugal (*l*). In 1879, Chile blockaded the coast of Bolivia; in 1880, the "naval demonstration" by the six Great Powers at Dulcigno would have become a pacific blockade if Turkey had delayed giving up that town to Montenegro (*m*); and, in 1886, the Great Powers, with the exception of France, blockaded parts of the Greek coast (*n*). In 1897, an endeavour was made by the same Powers, this time including France, to localise the Cretan insurrection and to prevent the landing of Greek troops on that island. Ships from their various navies blockaded it for this purpose, and effectually prevented the landing of reinforcements for Colonel Vassos and the supply of arms or stores to the insurgents. Greece, within a very few days, went to war with Turkey, and had events taken a course different from what actually hap-

(*l*) Calvo, vol. ii. § 605.

(*m*) Wharton, Digest, § 364.

(*n*) *Ante*, p. 119; *post*, p. 772, which see for the conditions of the blockade.

pened, it is difficult to see how Powers professedly neutral could have forbidden one belligerent access to the territory of another. The whole incident is an illustration of the difficulties attending pacific blockade; and in a more recent instance, when in December, 1902, the fleets of Great Britain and Germany instituted a pacific blockade of the ports of Venezuela, the sinking of Venezuelan ships by the latter Power was an act of war which would fully have justified Venezuela in having recourse to retaliatory measures which would not have been confined to the German fleet. The legality of thus instituting a blockade in time of peace has been much disputed (*o*). It will be observed that the practice of the Great European Powers is in its favour; but great irritation, partly due, no doubt, to sensitiveness on the score of the Monroe doctrine, was caused in the United States by the Venezuela blockade.

The modern view as to the conditions under which the establishment of a blockade without war is permissible is expressed in the rules adopted by the Institute of International Law in 1887: (1) Ships under a foreign flag may enter freely notwithstanding the blockade. (2) The pacific blockade must be officially declared and notified, and maintained by a sufficient force. (3) The ships of the blockaded Power which do not respect such a blockade may be sequestered; and when the blockade is at an end they must be restored to their owners with their cargoes, but without indemnity on any ground (*p*).

“There is yet another measure,” says Sir R. Phillimore, “partaking also of a belligerent character, though exercised, strictly speaking, in time of peace, called by the French *le droit d'angarie*. 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” (*q*).

Right of  
angary.

During the Franco-German war of 1870, the German troops seized upon six English vessels in the Seine, and scuttled them in order to block the passage of the river, and so prevent the approach of French gunboats. Prince Bismarck admitted their destruction,

(*o*) Wharton, *loc. cit.*

(*p*) *Annuaire de l'Institut de Droit Int.* vol. ix. (1887), p. 300. On the subject of pacific blockade, see Westlake, *Pacific Blockade*, in his *Collected*

*Papers* (1914), pp. 572 *seq.*; A. E. Hogan, *Pacific Blockade* (Oxford, 1908); Calvo, *Droit Int.* vol. iii. §§ 1832 *seq.*

(*q*) Phillimore, vol. iii. p. 49.



and offered to pay the value according to equitable estimation. He contended "that the measure in question, however exceptional in its nature, did not overstep the bounds of international warlike usages. A pressing danger was at hand, and every other means of averting 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 reservation of indemnification." The German Chancellor then quoted the above passage from Sir R. Phillimore's work (*r*). The English ship-owners were afterwards compensated for their loss.

Further, the Hague Regulations on neutrality specifically recognise this right of angary, in allowing a belligerent to utilize, in case of necessity, railway material belonging to neutrals, subject to the payment of compensation (*s*). Other neutral property is also liable to be used, or even destroyed by a belligerent, if military necessity demand (*t*).

The right of making war, as well as of authorizing reprisals, or other acts of vindictive retaliation, belongs in every civilized nation to the supreme power of the State. The exercise of this right is regulated by the fundamental laws or municipal constitution in each country, and may be delegated to its inferior authorities in remote possessions, or even to a commercial corporation—such, for example, as the former British East India Company—exercising, under the authority of the State, sovereign rights in respect to foreign nations (*u*).

A contest by force between independent sovereign States is called a public war. If it is declared in form, or duly commenced, it entitles both the belligerent parties to all the rights of war against each other. The voluntary or positive law of nations makes no distinction in this respect between a just and an unjust war. "The justice of war in general or of a certain war in particular, are questions of the gravest importance and of the most vital interest, but they belong to the domain of international ethics or morality rather than to that of international law" (*x*). A war in form, or duly commenced, is to be considered, as to its effects, as just on both sides. Whatever is permitted, by the laws of war,

(*r*) Annual Register (1870), p. 110; (1871), p. 257.

(*s*) Hague Convention (1907), No. V: Art. 19.

(*t*) See *infra*, p. 653.

(*u*) Vattel, liv. iii. ch. 1, § 4. Mar-

tens, Précis, liv. viii. ch. 2, §§ 260, 264. See *ante*, p. 32.

(*x*) Hershey, Int. Law and Diplomacy of the Russo-Japanese War (1906), p. 67.

Right of making war, in whom vested.

Public or solemn war.

to one of the belligerent parties, is equally permitted to the other (*y*).

A 'perfect' war is where one whole nation is at war with another nation, and all the members of both nations are authorized to commit hostilities against all the members of the other, in every case and under every circumstance permitted by the general laws of war. An 'imperfect' war is limited as to places, persons, and things (*z*). The latter may arise, not necessarily through the sanction of law, but through the exigencies of policy or in consequence of a special engagement. Thus—as an instance of limitation with regard to locality—in the Turco-Italian war, 1911, Italy at first declared her intention not to land troops in any part of the Ottoman Empire except Cyrenaica and Tripolitana, and to confine her naval operations to certain specified objects; but eventually departures were made from this declaration (*a*).

Perfect or  
imperfect  
war.

A civil war between the different members of the same society is what Grotius calls a 'mixed' war; it is, according to him, public on the side of the established government, and private on the part of the people resisting its authority. But the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations (*b*).

It seems to be now settled that it is unnecessary in order to constitute a war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other (*c*). Whether the struggle is a war, or is not, is to be determined, not from the relation of the combatants to each other, but from the mode in which it is carried on. Certain tests may be applied to determine whether insurgents are to be considered as possessing the status of belligerency. "Among the tests are the existence of a *de facto* political organization of the insurgents sufficient in character, population, and resources to constitute it, if left to itself, a State among nations capable of discharging the duties of a State; the actual employment of military forces on each side, acting in accordance with the rules and customs of war . . . ; and, at sea, employment by the insurgents of commissioned

Civil war.

(*y*) Vattel, *Droit des Gens*, liv. iii. ch. 12. Rutherford, *Inst.* bk. ii. ch. 9, § 15.

(*z*) Such were the limited hostilities authorized by the United States against France in 1798. Cf. *Bas v. Tingy*, 4 Dall. 37.

(*a*) Cf. Sir T. Barclay, *The Turco-Italian War* (1907), p. 96.

(*b*) *Vide ante*, pt. i. ch. 2, pp. 39 *et seq.*

(*c*) *The Prize Causes* (1862), 2 Black. 666; *Rose v. Himely* (1808), 4 Cranch, 272.

cruisers, and the exercise by the parent government of the rights of blockade of insurgent ports against neutral commerce, and of stopping and searching neutral vessels at sea. If all these elements exist, the condition of things is undoubtedly war; and it may be war before they are all ripened into activity" (*d*). 'As President Grant said in his Message of June 13, 1870: "The question of belligerency is one of fact not to be decided by sympathies for or prejudices against either party. The relations between the parent State and the insurgents must amount, in fact, to war in the sense of international law" (*e*).

During the Civil War, the United States Government treated the Confederates as belligerents in all matters relating to the war. President Lincoln proclaimed (April 19, 1861) a blockade of the Southern ports. Thus their territory was for the time being considered as enemy territory, and the subjects of the rebellious States as alien enemies (*f*). But this was only a belligerent status. The union was declared to be indissoluble, and the Confederate States, while endeavouring to leave it, never legally ceased to be within it, or their subjects citizens of the Union (*g*). It was, however, necessary to accord a *de facto* existence to the Confederate government, in certain matters not strictly rights of war. Thus the Supreme Court held, that where land was sold to the rebel government, and was then captured by the United States, it became the property of the United States, thus recognising the validity of a sale from the owner to the Confederate government (*h*). Again, contracts payable in Confederate notes were enforced, and the parties compelled to pay at the real, and not the nominal, value of the notes, at the time when payment was due. The notes were treated as a currency imposed upon the community by irresistible force (*i*).

Declaration  
of war, how  
far necessary.

A formal declaration of war to the enemy was once considered necessary to legalize hostilities between nations. It was uniformly practised by the ancient Romans, and by the States of modern Europe until about the middle of the seventeenth century. The latest example of this kind was the declaration of war by France against Spain, at Brussels, in 1635, by heralds at arms, according

(*d*) Wheaton (ed. Dana), note 15, p. 34.

(*e*) Moore, Digest, vol. i. p. 194.

(*f*) *Thorington v. Smith* (1868), 8 Wallace, 10; *Mrs. Alexander's Cotton* (1864), 2 Wallace, 404.

(*g*) *Texas v. White* (1868), 7 Wallace, 726; *White v. Hart*, 13 Wallace,

646.

(*h*) *U. S., Lyon et al. v. Huckabee* (1872), 16 Wallace, 414.

(*i*) *The Confederate Note case*, 19 Wallace, 556; *Thorington v. Smith* (1868), 8 Wallace, 1; *Hardner v. Woodruff*, 15 Wallace, 448.



to the forms observed during the middle ages. In the seventeenth century formal declarations were not regarded as essential. Grotius declared, indeed, that a public proclamation must be made; but in his own time and right down to modern times the rule laid down by him was not observed by belligerents. The policy adopted depended on the circumstances of each case. From the eighteenth century previous notifications became exceptional. In 1754 war commenced between England and France, but it was not until two years later that the formal declaration was made. In 1787 Austria began hostilities against Turkey, and did not openly proclaim a state of war until several months had elapsed. It has been estimated that of some 120 wars that took place between 1700 and 1872 there were barely ten cases in which a formal declaration preceded hostilities (*k*). In the latter part of the nineteenth century, however, it became customary to publish a manifesto, within the territory of the State declaring war, announcing the existence of hostilities and the motives for commencing them. This publication may be necessary for the instruction and direction of the subjects of the belligerent State in respect to their intercourse with the enemy, and regarding certain effects which the voluntary law of nations attributes to war in form. Without such a declaration, it might be difficult to distinguish in a treaty of peace those acts which are to be accounted lawful effects of war, from those which either nation may consider as naked wrongs, and for which they may, under certain circumstances, claim reparation (*l*).

Apart from the conclusions to be drawn from actual practice, there has by no means been unanimity of opinion among jurists and publicists. On the whole, Continental writers urged the necessity of a previous declaration, "pour légitimer l'état de guerre," as one jurist says (*m*). The British view was contrary to this. Thus Lord Stowell held that a war might properly exist without a prior notification, which constituted merely the formal evidence of a fact. "A declaration of war by one country," he said, "was not a mere challenge to be accepted or refused at pleasure by the other. On the contrary, it served to show the existence of actual hostilities on one side at least; and hence put the other party also into a state of war, even though he might think proper to act on the defensive only" (*n*).

(*k*) Major-Gen. J. F. Maurice, *Hostilities without Declaration of War* (London, 1883).

(*l*) Grotius, *De Jur. Bel. ac Pac.* lib. i. cap. 3, § 4. Bynkershoek, *Quæst. Jur. Pub.* lib. i. cap. 2.

Rutherford, *Inst.* b. ii. ch. 9, § 10. Vattel, *Droit des Gens*, liv. iii. ch. 4, § 56. Klüber, *Droit des Gens Moderne de l'Europe*, §§ 238, 239.

(*m*) Calvo, *Droit Int.* vol. iii. p. 40.

(*n*) *The Eliza Ann* (1813), 1 Dods.

No declaration of a civil war.

A civil war is never declared, it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. The American Civil War “sprang forth suddenly from the parent brain, a Minerva in the full panoply of war” (*o*).

Recent examples.

The Crimean war was preceded by every possible formality between England and Russia. In 1870, war was formally declared by France on July 19th, and the first hostilities, with the exception of a skirmish of outposts, took place at Saarbrück on August 2nd; but in 1877 the Russian troops entered Turkish territory some hours before any declaration of war was issued (*p*). The hostilities of 1884-5 between France and China were commenced and continued without any formal declaration of war. But early in 1885 Great Britain decided to regard the French notification of the blockade of Formosa as tantamount to a declaration so far as concerned the rights and duties of neutrals (*q*). In 1884, the French admiral, under cover of a nominal state of peace, passed, without opposition, the forts and obstructions in the Min river, and subsequently availed himself of the position thus obtained to destroy the Chinese vessels and arsenal at Foochow, bombard and fire the neighbouring villages, and take the forts in flank and rear. This conduct was deservedly the subject of much hostile criticism in the European press. In 1885, the Serbian army invaded Bulgaria without any previous declaration of war; and the war between China and Japan began with the sinking of a British merchant steamer laden with Chinese troops, the *Kowshing*, on July 25th, 1894, by a Japanese cruiser; early in the following month Japan made a formal declaration of war. In 1897, Greek irregulars crossed the Turkish frontier on April 8th, and after several engagements, Turkey declared war on the 17th of that month. In 1898, the Spanish Cortes formally recognised a state of war on April 24th, and on the next day the American Congress voted that war had existed between the United States and Spain from April 21st, for on that day the President had proclaimed the blockade of the Cuban coast, and on the 23rd he had issued a proclamation calling for 125,000 volunteers to serve for two years or for the war. On October 10th, 1899, the Transvaal Government presented the British agent with an ultimatum, and on the evening of the following day, the time allowed for the withdrawal of the British troops from the frontier districts having

244. Cf. *The Nayado*, 4 C. Rob. 253; *The Success*, 1 Dods. 133; *The Teutonia* (1870), L. R. 4 P. C. 179.

(*o*) *The Prize Causes* (1862), 2

Black. 669.

(*p*) Phillimore, vol. iii. § 64; Parl. Papers. Turkey, 1877 (No. 26), p. 86.

(*q*) See p. 775, *post*.

expired, the Boer burghers crossed Laing's Nek into Natal. On the 17th of June, 1900, the allied fleets bombarded and took the Taku forts, while the nations to which they belonged were still at peace with China. The Tsung-li-yamen treated this as a declaration of war, and ordered all the foreign ministers to quit Peking within twenty-four hours, a request with which events rendered it impossible to comply; from that date the Chinese regular army was ranged by the side of the Boxers. In the Russo-Japanese war, 1904, Japan attacked the Russian fleets at Chemulpo and at Port Arthur on February 8, two days before she formally proclaimed war. Russia thereupon accused the Japanese of treacherous conduct; but as there had been no surprise attack, the charge was hardly maintainable. Diplomatic relations between the two Powers had been going on fruitlessly since the preceding July, and were severed on February 6, by the Japanese note declaring that "the Imperial Government of Japan reserve to themselves the right to take such independent action as they may deem best to consolidate and defend their menaced position, as well as to protect their established rights and legitimate interests." A few hours before the delivery of this note, however, the Japanese captured a Russian cruiser, as the Russian fleet appeared on February 4 between Port Arthur and the Japanese coast (*r*).

We have seen above that it had become customary to issue a general manifesto, in order to fix the date from which would begin the liabilities of neutrals, &c. But this practice was uncertain, and was a matter of courtesy rather than of legal obligation. Accordingly, the Hague Conference of 1907 took up the question, and laid down definite rules in its third Convention, which is now binding on belligerents. Article 1: The contracting Powers recognise that hostilities between them must not commence without a previous and explicit warning, in the form of either a declaration of war giving reasons, or an ultimatum with a conditional declaration of war. Article 2: The existence of a state of war must be notified to the neutral Powers without delay, and shall not be held to affect them until after the receipt of a notification, which may, however, be given by telegraph. Nevertheless, neutral Powers may not rely on the absence of notification, if it be established beyond doubt that they were in fact aware of the existence of a state of war. Article 3: Article 1 of the present Convention shall take effect in case of war between two or more of the contracting

The Hague  
Rules, 1907.

(*r*) Cf. S. Takahashi, *International Law applied to the Russo-Japanese War* (London, 1908), pp. 8, 14, 15, 761; Hershey, *The Int. Law and Diplomacy of the Russo-Japanese War* (1906), chap. i.



Powers. Article 2 applies as between a belligerent Power which is a party to the Convention and neutral Powers which are also parties to the Convention.

We see from Article 1 that a formal declaration is not essential; an ultimatum may be substituted therefor. If one State makes certain demands on another, together with an intimation that failing a satisfactory reply by a certain time it will proceed to protect its interests, this is an ultimatum implying a conditional notification of war; so that if the demands are not satisfied, or if no answer be returned, further declaration of war is not necessary, as it will be considered to have commenced at the time indicated. Moreover, it appears that it is not necessary to allow any definite interval to elapse between the declaration and the actual opening of hostile operations; a delay of twenty-four hours was suggested at the Conference, but it was not approved. None the less, the rule must be interpreted as condemning sudden surprise and treachery.

These rules were followed in the Turco-Italian war, 1911, when Italy, after alleging certain grievances, sent by telegraph an ultimatum to Turkey, demanding a reply within twenty-four hours of its receipt. An answer was despatched at once; but as it was regarded as unsatisfactory, Italy immediately forwarded a declaration of war to Turkey and a notification to neutrals, and began hostilities without delay.

Similarly, in the Great War of 1914, Austria-Hungary despatched an ultimatum to Serbia, which involved a complicated and extraordinary issue, and demanded a reply within forty-eight hours. The reply received was considered "inadequate," and the Austro-Hungarian minister at once left Serbian territory. Shortly afterwards the following announcement was made in Vienna: "The Royal Government of Serbia not having given a satisfactory reply to the note presented to it by the Austro-Hungarian minister in Belgrade on July 23, 1914, the Imperial and Royal Government of Austria-Hungary finds it necessary itself to safeguard its rights and interests, and to have recourse for this purpose to force of arms. Austria-Hungary, therefore, considers itself from this moment in a state of war with Serbia." Germany, desiring to proceed against France through Belgium, demanded an unmolested passage from the latter in an ultimatum, to which a reply was expected within twelve hours (August 2). Great Britain called upon Germany to respect her treaty obligations with regard to the neutralization of Belgium; and afterwards was compelled to send her an ultimatum, to which a satisfactory reply was demanded

by midnight of the same day (August 4). Japan delivered an ultimatum to Germany on August 15; and as no reply was received, declared war on August 23 (s).

As no declaration, or other notice to the enemy, of the existence of war, is necessary, in order to legalize hostilities—though now the commencement of hostilities without a declaration or ultimatum would amount to a breach of international law—and as the property of the enemy is, in general, liable to seizure and confiscation as prize of war, it would seem to follow as a consequence, that the property belonging to him and found within the territory of the belligerent State at the commencement of hostilities, is liable to the same fate with his other property wheresoever situated. But there is a great diversity of opinions upon this subject among institutional writers, and the tendency of modern usage between nations seems to be to exempt such property from the operations of war.

Enemy's property found in the territory on the commencement of war, how far liable to confiscation.

One of the exceptions to the general rule, laid down by the text writers, which subjects all the property of the enemy to capture, respects property locally situated within the jurisdiction of a neutral State; but this exemption is referred to the right of the neutral State, not to any privilege which the situation gives to the hostile owner. Does reason, or the approved practice of nations, suggest any other exception?

Earlier views and practice.

With the Romans, who considered it lawful to enslave, or even to kill an enemy found within the territory of the State on the breaking out of war, it would very naturally follow that his property found in the same situation would become the spoil of the first taker. Grotius, whose great work on the laws of war and peace appeared in 1625, adopts as the basis of his opinion upon this question the rules of the Roman law, but qualifies them by the more humane sentiments which began to prevail in the intercourse of mankind at the time he wrote. In respect to debts, due to private persons, he considers the right to demand them as suspended only during the war, and reviving with the peace (t). Bynkershoek, who wrote about the year 1737, adopts the same rules, and follows them to all their consequences. He holds that, as no declaration of war to the enemy is necessary, no notice is necessary to legalize the capture of his property, unless he has, by express compact, reserved the right to withdraw it on the breaking

Grotius.

Bynkershoek.

(s) Cf. Phillipson, *Int. Law and the Great War* (1915), chaps. i., iii.

(t) Grotius, *De Jur. Bel. ac Pac.* lib. iii. cap. 20, § 16.

out of hostilities. This rule he extends to things in action, as debts and credits, as well as to things in possession. He adduces, in confirmation of this doctrine, a variety of examples from the conduct of different States, embracing a period of something more than a century, beginning in the year 1556 and ending in 1657. But he acknowledges that the right had been questioned, and especially by the States-General of Holland; and he adduces no precedent of its exercise later than the year 1667, seventy years before his publication (*u*). Against the ancient examples cited by him, there is the negative usage of the subsequent period of nearly a century and a half previous to the wars of the French Revolution.

The Silesian  
Loan, 1753.

During all this period, the only exception to be found is the case of the Silesian loan, in 1753. In the argument of the English civilians against the reprisals made by the King of Prussia in that case, on account of the capture of Prussian vessels by the cruisers of Great Britain, it is stated that "it would not be easy to find an instance where a prince had thought fit to make reprisals upon a debt due from himself to private men. There is a confidence that this will not be done. A private man lends money to a prince upon an engagement of honour; because a prince cannot be compelled, like other men, by a court of justice. So scrupulously did England and France adhere to this public faith, that even during the war" (alluding to the war terminated by the peace of Aix-la-Chapelle), "they suffered no inquiry to be made whether any part of the public debt was due to the subjects of the enemy, though it is certain many English had money in the French funds, and many French had money in ours" (*x*).

Opinion of  
Vattel.

Vattel, who wrote about twenty years after Bynkershoek, after laying down the general principle, that the property of the enemy is liable to seizure and confiscation, qualifies it by the exception of real property ('les immeubles') held by the enemy's subjects within the belligerent State, which, having been acquired by the consent of the sovereign, is to be considered as on the same footing with the property of his own subjects, and not liable to confiscation *jure belli*. But he adds that the rents and profits may be sequestered, in order to prevent their being remitted to the enemy. As

(*u*) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 2, 7.

(*x*) On the Silesian Loan controversy, see Wheaton, Hist. Law of Nations, pp. 206 *seq.*; Martens, Causes Célèbres, vol. ii. pp. 1 *seq.*; Cobbett, Cases, vol. i. p. 334.

Vattel calls the report of the English civilians "un excellent morceau de droit des Gens" (liv. ii. ch. 7, § 34, note (*a*)); and Montesquieu terms it "une réponse sans réplique" (Œuvres, tom. vi. p. 445).



to debts, and other things in action, he holds that war gives the same right to them as to the other property belonging to the enemy. He then quotes the example referred to by Grotius, of the hundred talents due by the Thebans to the Thessalians, of which Alexander had become master by right of conquest, but which he remitted to the Thessalians as an act of favour; and proceeds to state, that the "sovereign has naturally the same right over what his subjects may be indebted to the enemy; therefore he may confiscate debts of this nature, if the term of payment happen in time of war, or at least he may prohibit his subjects from paying while the war lasts. But at present, the advantage and safety of commerce have induced all the sovereigns of Europe to relax from this rigour. And as this custom has been generally received, he who should act contrary to it would injure the public faith; since foreigners have confided in his subjects only in the firm persuasion that the general usage would be observed. The State does not even touch the sums which it owes to the enemy; everywhere, in case of war, the funds confided to the public are exempt from seizure and confiscation." In another passage, Vattel gives the reason of this exemption. "In reprisals, the property of subjects is seized, as well as that belonging to the sovereign or State. Everything which belongs to the nation is liable to reprisals as soon as it can be seized, provided it be not a deposit confided to the public faith. This deposit, being found in our hands only on account of that confidence which the proprietor has reposed in our good faith, ought to be respected even in case of open war. Such is the usage in France, in England, and elsewhere, in respect to money placed by foreigners in the public funds." Again, he says: "The sovereign declaring war can detain neither those subjects of the enemy, who were within his dominions at the time of the declaration, nor their effects. They came into his country on the public faith; by permitting them to enter his territories, and continue there, he has tacitly promised them liberty and perfect security for their return. He ought, then, to allow them a reasonable time to retire with their effects, and if they remain beyond the time fixed, he may treat them as enemies; but only as enemies disarmed" (y).

It appears, then, to be the modern rule of international usage, The modern rule. that property of the enemy found within the territory of the belligerent State, or debts due to his subjects by the Government or individuals, at the commencement of hostilities, are not liable to

(y) Vattel, *Droit des Gens*, liv. ii. ch. 18, § 344; liv. iii. ch. 4, § 63; ch. 5, §§ 73—77.

be seized and confiscated as prize of war. This rule is frequently enforced by treaty stipulations, but unless it be thus enforced, it cannot be considered as an inflexible, though an established, rule. "The rule," as has been observed, "like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign—it is a guide which he follows or abandons at his will; and although it cannot be disregarded by him without obloquy, yet it may be disregarded. It is not an immutable rule of law, but depends on political considerations, which may continually vary" (z).

Rule of  
reciprocity.

Among these considerations is the conduct observed by the enemy. If he confiscates property found within his territory, or debts due to our subjects on the breaking out of war, it would certainly be just, and it may, under certain circumstances, be politic, to retort upon his subjects by a similar proceeding. This principle of reciprocity operates in many cases of international law. It is stated by Sir W. Scott to be the constant practice of Great Britain, on the breaking out of war, to condemn property seized before the war, if the enemy condemns, and to restore if the enemy restores. "It is," says he, "a principle sanctioned by that great foundation of the law of England, Magna Charta itself, which prescribes, that, at the commencement of a war, the enemy's merchants shall be kept and treated as our own merchants are kept and treated in their country" (a). And it is also stated in the report of the English civilians, in 1753, before referred to, in order to enforce their argument that the King of Prussia could not justly extend his reprisals to the Silesian loan, that "French ships and effects, wrongfully taken, after the Spanish war, and before the French war, have, during the heat of the war with France, and since, been restored by sentence of your Majesty's courts to the French owners. No such ships or effects ever were attempted to be confiscated as enemy's property, here, during the war; because, had it not been for the wrong first done, these effects would not have been in your Majesty's dominions."

Droits of  
Admiralty.

The ancient law of England seems thus to have surpassed in liberality its later practice. In some earlier maritime wars commenced by that country, it has been the constant usage to seize and condemn as droits of admiralty (perquisites of the Crown) the property of the enemy found in its ports at the breaking out of hostilities, and this practice does not appear to have been influ-

(z) Chief Justice Marshall, in *Brown v. United States* (1814), 8 Cranch, 110.

(a) *The Santa Cruz* (1798), 1 C. Rob. 64. Magna Carta, Art. 41.

enced by the corresponding conduct of the enemy in that respect. As has been observed by an English writer, commenting on the judgment of Sir W. Scott in the case of the Dutch ships, "there seems something of subtlety in the distinction between the virtual and the actual declaration of hostilities, and in the device of giving to the actual declaration a retrospective efficacy, in order to cover the defect of the virtual declaration previously implied" (b).

During the war between Great Britain and the United States, which commenced in 1812, it was determined by the American Supreme Court, that the enemy's property, found within the territory of the United States on the declaration of war, could not be seized and condemned as prize of war, without some legislative act expressly authorizing its confiscation. The court held that the law of Congress declaring war was not such an act. That declaration did not, by its own operation, so vest the property of the enemy in the Government, as to support judicial proceedings for its seizure and confiscation. It vested only a right to confiscate, the assertion of which depended on the will of the sovereign power.

*Brown v.  
United States  
(1814).*

The universal practice of forbearing to seize and confiscate debts and credits, and the recognition of their revival on the restoration of peace, would seem to prove that war did not in itself work an absolute confiscation, but that it simply conferred the right of confiscation. Between debts contracted under the faith of the territorial law, and property acquired in the course of trade on the faith of the same law, reason drew no distinction; and although, in practice, vessels with their cargoes found in port at the declaration of war may have been seized, it was not believed that modern usage would sanction the seizure of the goods of an enemy on land, which were acquired in peace in the course of trade. Such a proceeding was rare, and would be deemed a harsh exercise of the rights of war. But although the practice in this respect might not be uniform, that circumstance did not essentially affect the question whether such property vested in the sovereign by the mere declaration of war, or remained subject to a right of confiscation, the exercise of which depended upon the national will.

After referring to the views of Bynkershoek and Vattel, to the effect that war did not necessarily transfer to the belligerent enemy property found within his jurisdiction, the court held that the modern rule was that tangible property belonging to an enemy, and found in the country at the commencement of war, ought not

(b) Chitty, Law of Nations, ch. 3, p. 80.



to be immediately confiscated. In almost every commercial treaty an article was inserted, stipulating for the right to withdraw such property (*c*). The general opinion, then, was that though war gave a right to confiscate, it did not in itself imply confiscation.

As to the bearing on the question of the United States Constitution, a construction ought not lightly to be admitted, which would give to a declaration of war an effect in this country it did not possess elsewhere, and which would fetter the exercise of that entire discretion respecting enemy's property, which might enable the Government to apply to the enemy the rule which he applied to us. The constitutional and other legal provisions on the subject were not contrary to the general principle indicated. The question of confiscation was to be determined by the legislature, rather than by the executive or judiciary; and in the present case there was no act of Congress directing the confiscation of enemy property within the territory at the outbreak of the war (*d*).

From about the middle of the nineteenth century, the practice of immediately sequestering enemy merchant vessels found in a belligerent port on the outbreak of war began to fall into disuse. It became customary to allow them a certain length of time for making their departure. Thus, on the outbreak of the Crimean War, Russia permitted Turkish vessels to leave her ports on the ground that a similar indulgence had been granted to Russian vessels by Turkey. When England and France took part in the war, they allowed Russian vessels in their ports six weeks to complete their cargoes and depart. This exemption from the effects of the war was afterwards extended to all Russian ships that put to sea before the 15th of May, 1854. Russia also allowed English and French vessels a period of six weeks for departure, and for vessels in the White Sea the period of six weeks commenced from the date when the navigation was opened. A similar principle was followed in the Franco-Austrian war of 1859, the Danish war in 1862, the war of 1866 between Austria and Prussia, the Franco-German war, 1870, the Russo-Turkish war, 1877, the Spanish-American war, 1898, when Spanish merchantmen in American ports were allowed a month for loading their cargoes and clearing (*e*), and in the Russo-Japanese war. Thus the prac-

(*c*) For lists of these treaties, see Hall, *International Law* (4th ed.), pp. 409, 410, 457.

(*d*) *Brown v. United States* (1814), 8 Cranch, 123.

(*e*) Hertilet, *Commercial Treaties*, vol. xxi. p. 1075. Cf. *The Buena Ventura* (1899), 175 U. S. 338, where

the United States Supreme Court interpreted the President's proclamation as extending the immunity to merchantmen that had left American ports even before the war began. See also *The Panama* (1899), 175 U. S. 535; *The Pedro* (1899), 175 U. S. 354.

Permitted  
departure of  
vessels in  
enemy ports  
at outbreak  
of war.

Earlier  
practice.

tice became frequent, though the underlying principle was not a result of legal sanction.

An attempt, however, was made in 1907 by the Hague Conference (sixth Convention) to lay down definite provisions on the subject. Some of these are progressive, whilst others are reactionary, as will be seen from the following Articles. Article 1 : When a merchant ship belonging to one of the belligerent Powers is found, at the commencement of hostilities, in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a reasonable term of grace, and to proceed, after being furnished with a pass, straight to its port of destination or to some other port indicated to it. The same rule shall apply in the case of a ship which, having left its port of departure before the commencement of the war, has entered an enemy port in ignorance of hostilities. Article 2 : A merchant ship which, owing to circumstances beyond its control ('force majeure') may have been unable to leave the enemy port within the period contemplated in the preceding Article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war without payment of compensation, or he may requisition it on payment of compensation. Article 3 : Enemy merchant ships which left their last port of departure before the commencement of the war, and are encountered on the high seas while still ignorant of the outbreak of hostilities, may not be confiscated. They are merely liable to be detained on condition that they are restored after the war without payment of compensation; or to be requisitioned, or even destroyed, on payment of compensation, but in such case provision must be made for the safety of the persons on board as well as the preservation of the ship's papers. After touching at a port in their own country, or at a neutral port, such ships are subject to the laws and customs of naval war. Article 4 : Enemy cargo on board the vessels referred to in Articles 1 and 2 is likewise liable to be detained, and restored after the war without indemnity, or to be requisitioned on payment of indemnity, with or without the ship. The same rule applies in the case of cargo on board the vessels referred to in Article 3. Article 5 : The present Convention does not refer to merchant ships whose construction indicates that they are intended to be converted into warships (*f*).

The Hague  
rules.

Thus, the above provisions abolish the right of confiscation, but do not impose an obligation to grant a term of grace at all. Ger-

(*f*) Hague Conf. 1907, Convent. vi. Arts. 1—5.

many and Russia entered reservations against Article 3, on the ground that only States holding naval stations in different parts of the world would be able to take such vessels into port; other States would have to destroy them and so encumber themselves with pecuniary liabilities. The United States refused to sign the Convention because she held it to be retrogressive. Objection was also taken to the clause making ignorance of the outbreak of the war a condition of immunity (*g*).

Practice in the  
Great War  
of 1914.

The practice adopted in the Great War, 1914, may here be noted. Great Britain allowed enemy merchantmen under 6,000 tons in burden ten days to load or unload and depart from British ports (*h*). But as the new rule was merely a "desirable" one, that is, optional, this permission was granted subject to reciprocity of treatment. Germany failed to give the necessary undertaking; hence her vessels found within the British jurisdiction at the beginning of the war were liable to seizure. Austria-Hungary agreed to reciprocal treatment, and so received the benefit under the regulations.

The *Chile*, a German merchantman, arrived in Cardiff, August 4; the war broke out soon afterwards on the same day. She was seized by the Customs officers; and the Prize Court, in view of the fact that Germany had given no assurance of reciprocal treatment, made an order for her detention (September 4) (*i*).

Another German vessel, the *Perkeo*, was seized at sea on the outbreak of war; so that Article 3 applied. But owing to Germany's reservation, she was not entitled to the benefit of it; therefore the vessel was condemned.

In the case of *The Möwe*, a German vessel was seized, August 5, immediately after the outbreak of the war, in the Firth of Forth. The enemy owner claimed immunity under Article 1, on the ground that the ship was "in port" after the hostilities began. The Court held that the word "port" in the Article does not mean fiscal port, but must be taken in its commercial sense. Hence the vessel having been captured outside the port of Leith was liable to condemnation, and not merely to detention (*k*).

Debts due to  
the enemy.

In respect to debts due to an enemy, previously to the commencement of hostilities, the law of Great Britain pursued a policy of a more liberal, or at least of a wiser character, than in respect to

(*g*) Cf. J. B. Scott, *The Hague Peace Conferences*, 2 vols. (Baltimore, 1909), vol. ii. p. 568.

(*h*) Order in Council, Aug. 4, 1914.

(*i*) *The Chile* (1914), 31 T. L. R. 3.  
(*k*) *The Möwe* (1914), 31 T. L. R. 46.



droits of admiralty. A maritime Power, which has an overwhelming naval superiority, may have an interest, or may suppose it has an interest, in asserting the right of confiscating enemy's property, seized before an actual declaration of war; but a nation which, by the extent of its capital, must generally be the creditor of every other commercial country, can certainly have no interest in confiscating debts due to an enemy, since that enemy might, in almost every instance, retaliate with much more injurious effect. Hence, though the prerogative of confiscating such debts, and compelling their payment to the crown, still theoretically exists, it is seldom or never practically exerted. The right of the original creditor to sue for the recovery of the debt is not extinguished; it is only suspended during the war, and revives, in full force, on the restoration of peace (*l*).

Such, too, is the law and practice of the United States. The debts due by American citizens to British subjects before the war of the Revolution, and not actually confiscated, were judicially considered as revived, together with the right to sue for their recovery on the restoration of peace between the two countries. The impediments which had existed to the collection of British debts, under the local laws of the different States of the Confederation, were stipulated to be removed by the treaty of peace, in 1783; but this stipulation proving ineffectual for the complete indemnification of the creditors, the controversy between the two countries on this subject was finally adjusted by the payment of a sum *en bloc* by the Government of the United States, for the use of the British creditors. The commercial treaty of 1794 also contained an express declaration, that it was unjust and impolitic that private contracts should be impaired by national differences; with a mutual stipulation, that "neither the debts due from individuals of the one nation to individuals of the other, nor shares, nor moneys which they may have in the public funds, or in the public or private banks, shall ever, in any event of war, or national differences, be sequestered or confiscated" (*m*).

Practice of  
the United  
States.

On the commencement of hostilities between France and Great Britain, in 1793, the former Power sequestered the debts and other property belonging to the subjects of her enemy, which action was retaliated by a countervailing measure on the part of the British Government. By the additional Articles to the treaty of peace between the two Powers, concluded at Paris, in April, 1814,

Of England  
and France.

(*l*) *Furtado v. Rogers* (1802), 3 Bos. & Pul. 191; *Ex parte Boussmaker* (1806), 12 Ves. 71; *The Nuestra Sig-*

*nora de los Dolores*, Edw. Ad. 60.  
(*m*) *Ware v. Hilton* (1796), 3 Dall. 199.

the sequestrations were removed on both sides, and commissaries were appointed to liquidate the claims of British subjects for the value of their property unduly confiscated by the French authorities, and also for the total or partial loss of the debts due to them, or other property unduly retained under sequestration, subsequently to 1792. The engagement thus extorted from France may be considered as a severe application of the rights of conquest to a fallen enemy, rather than a measure of even-handed justice; since it does not appear that French property, seized in the ports of Great Britain and at sea, in anticipation of hostilities, and subsequently condemned as droits of admiralty, was restored to the original owners under this treaty, on the return of peace between the two countries (*n*).

Of England  
and Denmark.

So, also, on the rupture between Great Britain and Denmark, in 1807, the Danish ships and other property, which had been seized in the British ports and on the high seas, before the actual declaration of hostilities, were condemned as droits of admiralty by the retrospective operation of the declaration. The Danish Government issued an ordinance, retaliating this seizure by sequestrating all debts due from Danish to British subjects, and causing them to be paid into the Danish royal treasury. The English Court of King's Bench determined that this ordinance was not a legal defence to a suit in England for such a debt, not being conformable to the usage of nations; the text writers having condemned the practice, and no instance having occurred of the exercise of the right, except the ordinance in question, for upwards of a century. The soundness of this judgment may well be questioned. It has been justly observed, that between debts contracted under the faith of laws, and property acquired on the faith of the same laws, reason draws no distinction; and the right of the sovereign to confiscate debts is precisely the same with the right to confiscate other property found within the country on the breaking out of the war. Both require some special act expressing the sovereign will, and both depend, not on any inflexible rule of international law, but on political considerations by which the judgment of the sovereign may be guided (*o*).

Public and  
private debts.

Some writers have drawn a distinction between debts due from a subject of one belligerent to a subject of the other, and debts due from a belligerent State to the subjects of the other. It is said that there exists a right to confiscate the former, while the latter

(*n*) Martens, *Nouveau Recueil*,  
tom. ii. p. 16.

(*o*) *Wolff v. Oxholm* (1817), 6 M.  
& S. 92; *Brown v. United States*  
(1814), 8 Cranch, 110.

are to be exempt. The Confederate States acted upon this distinction, and confiscated all property and all rights, credits and interests held within the confederacy, by or for any alien enemy, except public stocks and securities. Lord Russell strongly protested against this as being an act as unusual as it was unjust (*p*). Many of the individual inhabitants of the South carried this principle further, and repudiated all their debts due to citizens of the Northern States (*q*). But this is the only instance in recent times of such measures having been adopted, and it is an example that seems unlikely to be imitated. The confiscation of private debts of any sort, besides exposing the State doing so to retaliation, only cripples the enemy in a very indirect way. It has no effect at all on the military or naval operations of the war, and cannot, therefore, be justified on any principle.

One of the immediate consequences of the commencement of hostilities is, the interdiction of all commercial intercourse between the subjects of the States at war without the license of their respective governments. In Sir W. Scott's judgment, in the case of *The Hoop*, this is stated to be a principle of universal law, and not peculiar to the maritime jurisprudence of England. It is laid down by Bynkershoek as a universal principle of law. "There can be no doubt," says that writer, "that, from the nature of war itself, all commercial intercourse ceases between enemies. Although there be no special interdiction of such intercourse, as is often the case, commerce is forbidden by the mere operation of the law of war. Declarations of war themselves sufficiently manifest it, for they enjoin on every subject to attack the subjects of the other prince, seize on their goods, and do them all the harm in their power. The utility, however, of merchants, and the mutual wants of nations, have almost got the better of the law of war, as to commerce. Hence it is alternately permitted and forbidden in time of war, as princes think it most for the interests of their subjects. A commercial nation is anxious to trade, and accommodates the laws of war to the greater or lesser want that it may be in of the goods of others. Thus, sometimes a mutual commerce is permitted generally; sometimes as to certain merchandises only, while others are prohibited; and sometimes it is prohibited altogether. But in whatever manner it may be permitted, whether generally or specially, it is always, in my opinion, so far a suspension of the

TRADING WITH  
THE ENEMY.

*The Hoop.*

(*p*) Parl. Papers, 1852. Correspondence relating to Civil War, p. 108.

(*q*) Draper, Hist. of American Civil War, vol. i. p. 537.



laws of war; and in this manner there is partly war and partly peace between the subjects of both countries" (r).

It appears from these passages to have been the law of Holland. Valin states it to have been the law of France, whether the trade was attempted to be carried on in national or in neutral vessels; and it appears from a case cited (in *The Hoop*) to have been the law of Spain; and it may without rashness be affirmed to be a general principle of law in most of the countries in Europe (s).

Grounds of prohibition.

Sir W. Scott proceeds to state two grounds upon which this sort of communication is forbidden. The first is, that "by the law and constitution of Great Britain the sovereign alone has the power of declaring war and peace. He alone, therefore, who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient; but it is not for individuals to determine on the expediency of such occasions, on their own notions of commerce merely, and possibly on grounds of private advantage, not very reconcilable with the general interests of the State. It is for the State alone, on more enlarged views of policy, and of all the circumstances that may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. No principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the State. Who can be insensible to the consequences that might follow, if every person in time of war had a right to carry on a commercial intercourse with the enemy, and, under colour of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them (if necessary) under the eye and control of the government charged with the care of the public safety?

"Another principle of law, of a less politic nature, but equally general in its reception and direct in its application, forbids this sort of communication, as fundamentally inconsistent with the relation existing between the two belligerent countries; and that is, the total inability to sustain any contract, by an appeal to the

(r) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 3.

(s) Valin, Comm. sur l'Ordonn. de la Marine, liv. iii. tit. 6, Art. 3.

tribunals of the one country, on the part of the subjects of the other. In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain, in the language of the civilians, a *persona standi in judicio*. A state in which contracts cannot be enforced, cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? To such transactions it gives no sanction; they have no legal existence; and the whole of such commerce is attempted without its protection, and against its authority. Bynkershoek expresses himself with force upon this argument, in his first book, chapter VII., where he lays down that the legality of commerce and the mutual use of courts of justice are inseparable. He says that, in this respect, cases of commerce are undistinguishable from any other kinds of case: 'But if the enemy be once permitted to bring actions, it is difficult to distinguish from what causes they may arise; nor have I been able to observe that this distinction has ever been carried into practice.'

Sir W. Scott then notices the constant current of decision in the British Courts of Prize, where the rule had been rigidly enforced in cases where acts of parliament had, on different occasions, been made to relax the Navigation Law, and other revenue laws; where the government had authorized, under the sanction of an act of parliament, a homeward trade from the enemy's possessions, but had not specifically protected an outward trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence; where strong claims, not merely of convenience, but of necessity, excused it on the part of the individual; where cargoes had been laden before the war, but the parties had not used all possible diligence to countermand the voyage, after the first notice of hostilities; and where it had been enforced, not only against British subjects, but also against those of its allies in the war, upon the supposition that the rule was founded upon a universal principle, which States allied in war had a right to notice and apply mutually to each other's subjects.

Such, according to this eminent judge, are the general principles of the rule under which the public law of Europe, and the municipal law of its different States, have interdicted all commerce with an enemy. It is thus sanctioned by the double authority of public and of private jurisprudence; and is founded

both upon the sound and salutary principle forbidding all intercourse with an enemy, unless by permission of the sovereign or State, and upon the doctrine that he who is 'hostis'—who has no *persona standi in judicio*, no means of enforcing contracts,—cannot make contracts, unless by such permission (*t*).

Decisions of  
the American  
Courts, as to  
trading with  
the public  
enemy.

*The Rapid.*

The same principles were applied by the American courts of justice to the intercourse of their citizens with the enemy, on the breaking out of the war (1812) between the United States and Great Britain. A case occurred in which a citizen had purchased a quantity of goods within the British territory, a long time previous to the declaration of hostilities, and had deposited them on an island near the frontier; upon the breaking out of hostilities, his agents had hired a vessel to proceed to the place of deposit, and bring away the goods; on her return she was captured, and, with the cargo, condemned as prize of war. It was contended for the claimant that this was not a trading, within the meaning of the cases cited to support the condemnation; that, on the breaking out of war, every citizen had a right, and it was the interest of the community to permit its members, to withdraw property purchased before the war, and lying in the enemy's country. But the Supreme Court determined, that whatever relaxation of the strict rights of war the more mitigated and mild practice of modern times might have established, there had been none on this subject. The universal sense of nations had acknowledged the demoralizing effects which would result from the admission of individual intercourse between the States at war. The whole nation is embarked in one common bottom, and must be reconciled to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy, because he is the enemy of his country. This being the duty of the citizen, what is the consequence of a breach of that duty? The law of prize is a part of the law of nations. By it a hostile character is attached to trade, independent of the character of the trader who pursues or directs it. Condemnation to the captor is equally the fate of the enemy's property, and of that found engaged in an anti-neutral trade. But a citizen or ally may be engaged in a hostile trade, and thereby involve his property in the fate of those in whose cause he embarks. This liability of the property of a citizen to condemnation, as prize of war, may likewise be accounted for on other considerations. Every thing that issues from a hostile country is, *primâ facie*,

(*t*) *The Hoop* (1799), 1 C. Rob. 196.



the property of the enemy, and it is incumbent upon the claimant to support the negative of the proposition. But if the claimant be a citizen, or an ally, at the same time that he makes out his interest he confesses the commission of an offence, which, under a well-known rule of the municipal law, deprives him of his right to prosecute his claim. Nor did this doctrine rest upon abstract reasoning only; it was supported by the practice of the most enlightened, perhaps it might be said, of all commercial nations; and it afforded the Court full confidence in their judgment in this case, that they found, upon recurring to the records of the Court of Appeals in Prize Causes, established during the war of the Revolution, that, in various cases, it was reasoned upon as the established law of that Court. Certain it was, that it was the law of England before the American Revolution, and therefore formed a part of the admiralty and maritime jurisdiction conferred upon the United States Courts by their Federal Constitution. Whether the trading, in that case, was such as, in the eye of the prize law, subjects the property to capture and confiscation, depended on the legal force of the term. If by 'trading,' in the law of prize, were meant that signification of the term which consists in negotiation or contract, the case would certainly not come under the penalty of the rule. But the object, policy, and spirit of the rule are intended to cut off all communication, or actual locomotive intercourse between individuals of the States at war. Negotiation or contract had, therefore, no necessary connection with the offence. Intercourse inconsistent with actual hostility, is the offence against which the rule is directed; and by substituting this term for that of *trading with the enemy*, an answer was given to the argument, that this was not a trading within the meaning of the cases cited. Whether, on the breaking out of war, a citizen has a right to remove to his own country, with his property, or not, the claimant certainly had not a right to leave his own country for the purpose of bringing home his property from an enemy's country. As to the claim for the vessel, it was held to be founded upon no pretext whatever; for the undertaking was altogether voluntary and inexcusable (u).

So where hostilities had broken out, and the vessel in question, with a full knowledge of the war, and unpressed by any peculiar danger, changed her course and sought an enemy's port, where she traded and took in a cargo, it was determined to be a cause of con-

*The Alexander.*

(u) *The Rapid* (1814), 8 Cranch, 155.

fiscation. If such an act could be justified, it would be in vain to prohibit trade with an enemy. The subsequent traffic in the enemy's country, by which her return cargo was obtained, connected itself with a voluntary sailing for a hostile port; nor did the circumstance that she was carried by force into one part of the enemy's dominions, when her actual destination was another, break the chain. The conduct of this ship was much less to be defended than that of the *Rapid* (x).

*The St.  
Lawrence.*

So, also, where goods were purchased some time before the war, by the agent of an American citizen in Great Britain, but not shipped until nearly a year after the declaration of hostilities; they were pronounced liable to confiscation. Supposing a citizen had a right, on the breaking out of hostilities, to withdraw from the enemy's country his property purchased before the war (on which the Court gave no opinion), such right must be exercised with due diligence, and within a reasonable time after a knowledge of hostilities. To admit a citizen to withdraw property from a hostile country a long time after the commencement of war, upon the pretext of its having been purchased before the war, would lead to the most injurious consequences, and hold out temptations to every species of fraudulent and illegal traffic with the enemy. To such an unlimited extent the right could not exist (y).

Quitting  
hostile  
territory at  
the outbreak  
of war.

In December, 1863, the *Gray Jacket* sailed from Mobile Bay, a Confederate port at that time blockaded by the Federal fleets, and the next day was captured on the high seas by a Federal cruiser. The owner of the *Gray Jacket* asserted that he was endeavouring to quit the rebel States with the ship and as much property as he could take in her, in order to repair to one of the loyal States. The Court below, however, condemned the ship as prize. The Supreme Court, on appeal, said, the liability of the property was irrespective of the *status domicilii*, guilt or innocence of the owner. If it came from enemy territory, it bore the impress of enemy property. If it belonged to a loyal citizen of the country of the captors, it was nevertheless as much liable to condemnation as if owned by a citizen or subject of the hostile country or by the hostile Government itself. The only qualification of these rules is, that where, upon the breaking out of hostilities, or as soon after as possible, the owner escapes with such property as he can take with him, or in good faith thus early removes his property with a view of putting it beyond the dominion of the hostile power, the

(x) *The Alexander* (1814), 8 Cranch, 169.

(y) *The St. Lawrence*, 8 Cranch, 434; S. C., 9 Cranch, 120.

property in such cases is exempt from the liability which would otherwise attend it. The *Gray Jacket* having only sailed in December, 1863, whereas the war broke out in April, 1861, her removal was held to be too late, and she was condemned as prize (z).

In another case, the vessel, owned by citizens of the United States, sailed from thence before the war, with a cargo or freight, on a voyage to Liverpool and the north of Europe, and thence back to the United States. She arrived in Liverpool, there discharged her cargo, and took in another at Hull, and sailed for St. Petersburg under a British license, granted the 8th June, 1812, authorizing the export of mahogany to Russia, and the importation of a return cargo to England. On her arrival at St. Petersburg, she received news of the war, and sailed to London with a Russian cargo, consigned to British merchants; wintered in Sweden, and, in the spring of 1813, sailed under convoy of a British man-of-war for England, where she arrived and delivered her cargo, and sailed for the United States in ballast, under a British license, and was captured near Boston Lighthouse. The Court stated, in delivering its judgment, that, after the decisions above cited, it was not to be contended that the sailing with a cargo or freight, from Russia to the enemy's country, after a full knowledge of the war, did not amount to such a trading with the enemy as to subject both vessel and cargo to condemnation, as prize of war, had they been captured whilst proceeding on that voyage. As to the alleged necessity of undertaking that voyage to enable the master, out of the freight, to discharge his expenses at St. Petersburg, countenanced, as the master declared, by the opinion of the United States minister there, that, by undertaking such a voyage, he would violate no law of his own country; although those considerations, if founded in truth, presented a case of peculiar hardship, yet they afforded no legal excuse which it was competent for the Court to admit as the basis of its decision. The counsel for the claimant seemed to be aware of the insufficiency of this ground, and had applied their strength to show that the vessel was not taken *in delicto*, having finished the offensive voyage in which she was engaged in the enemy's country, and having been captured on her return home in ballast. It was not denied that, if she had been taken in the same voyage in which the offence was committed, she would be considered as still *in delicto*, and subject to confiscation; but it was contended that her voyage terminated at the enemy's port, and that she was, on her return, on a new voyage.

*The Joseph.*

(z) *The Gray Jacket* (1866), 5 Wallace, 342, 369.



But the Court said, that even admitting that the outward and homeward voyage could be separated, so as to render them two distinct voyages, still, it could not be denied that the termini of the homeward voyage were St. Petersburg and the United States. The continuity of such a voyage could not be broken by a voluntary deviation of the master, for the purpose of carrying on an intermediate trade. That the going from the neutral to the enemy's country was not undertaken as a new voyage, was admitted by the claimants, who alleged that it was undertaken as subsidiary to the voyage home. It was, in short, a voyage from the neutral country, by the way of the enemy's country; and, consequently, the vessel, during any part of that voyage, if seized for any conduct subjecting her to confiscation as prize of war, was seized *in delicto* (a).

Strictness of  
the rule.

We have seen what is the rule of public and municipal law on this subject, and what are the sanctions by which it is guarded. Various attempts have been made to evade its operation, and to escape its penalties; but its inflexible rigour has defeated all these attempts. The apparent exceptions to the rule, far from weakening its force, confirm and strengthen it. They all resolve themselves into cases where the trading was with a neutral, or the circumstances were considered as implying a license, or the trading was not consummated until the enemy had ceased to be such. In all other cases, an express license from the Government is held to be necessary to legalize commercial intercourse with the enemy (b).

*The Mashona.*

The case of *The Mashona*, which occurred in the South African war, is a more recent confirmation of the general rule. "This is a suit," said the Cape Supreme Court, "for the condemnation of the British ship *Mashona* and a portion of her cargo as prize by reason of her having been engaged, at the time of her capture, in trading with the Queen's enemies. The cargo in question was shipped at New York for conveyance to Delagoa Bay, and was consigned to various persons resident in the South African Republic, with which State Great Britain was at war at the time of such shipment. There is no question of contraband or of the rights of neutrals, the simple question being whether, at the time of her capture at Port Elizabeth, the *Mashona*, which is admitted to be a British ship, was engaged in carrying cargo for, and trading with, the Queen's enemies. The law is clear that one of the immediate consequences of the commencement of hostilities is the inter-

(a) *The Joseph* (1814), 8 Cranch, 451.

(b) *The Franklin* (1805), 6 C. Rob. 127; *The Madonna delle Grazie*, 4 C. Rob. 195; *The Juffrow Catharina*, 5 C. Rob. 141; *The Abby*, 5 C. Rob.

251. See Wheaton's Reports, vol. ii., App. note (i), p. 34; Wheaton on Captures, 220. *Mitchell v. U. S.*, 21 Wallace, 350; *Radich v. Hutchins*, 5 Otto, 210.

diction of all commercial intercourse between the subjects of the States at war without the license of their respective Governments.

. . . The prohibition applies to all persons domiciled within the hostile State. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and property to another country. If he does not avail himself of the opportunity, he is treated, for the purposes of the trade, as a subject of the Power under whose dominion he carries it on, and as an enemy of those with whom that Power is at war" (c).

With regard to the above-mentioned licenses, the adverse belligerent party may justly consider such documents of protection as *per se* a ground of capture and confiscation; but the maritime tribunals of the State, under whose authority they are issued, are bound to consider them as lawful relaxations of the ordinary state of war. A license is an act proceeding from the sovereign authority of the State, which alone is competent to decide on all the considerations of political and commercial expediency, by which such an exception from the ordinary consequences of war must be controlled. Licenses, being high acts of sovereignty, are necessarily *stricti juris*, and must not be carried further than the intention of the authority which grants them may be supposed to extend. Not that they are to be construed with pedantic accuracy, or that every small deviation should be held to vitiate their fair effect. An excess in the quantity of goods permitted might not be considered as noxious to any extent, but a variation in their quality or substance might be more significant, because a liberty assumed of importing one species of goods, under a license to import another, might lead to very dangerous consequences. The limitations of time, persons, and places, specified in the license, are also material. The great principle in these cases is, that subjects are not to trade with the enemy, nor the enemy's subjects with the belligerent State, without the special permission of the Government; and a material object of the control which the Government exercises over such a trade is, that it may judge of the fitness of the persons, and under what restrictions of time and place such an exemption from the ordinary laws of war may be extended. Such are the general principles laid down by Sir W. Scott for the interpretation of these documents; but Grotius lays

Licenses.

(c) *The Mashona* (1900), 10 Cape Times L. R. 450; Journal of the Society of Comparative Legislation, N. S. vol. ii. (1900), pp. 326—341.

Cf. also the judgment of the Court of Appeal in *Janson v. Driefontein Mines Co.*; (1902) App. C. 484.



down the general rule, that safe-conducts, of which these licenses are a species, are to be liberally construed—‘*laxa quam stricta interpretatio admittenda est.*’ And during the Napoleonic wars, licenses were eventually interpreted with great liberality in the British Courts of Prize (*d*).

Authority  
to grant  
licenses.

It was made a question in some cases in those Courts, how far these documents could protect against British capture, on account of the nature and extent of the authority of the persons by whom they were issued. The leading case on this subject is that of *The Hope*, an American ship, laden with corn and flour, captured whilst proceeding from the United States to the ports of the Peninsula occupied by the British troops, and claimed as protected by an instrument granted by the British consul at Boston, accompanied by a certified copy of a letter from the admiral on the Halifax station. In pronouncing judgment in this case, Sir W. Scott observed that the instrument of protection, in order to be effectual, must come from those who have a competent authority to grant such a protection, but that the papers in question came from persons who were vested with no such authority. To exempt the property of enemies from the effect of hostilities is a very high act of sovereign authority; if at any time delegated to persons in a subordinate station, it must be exercised either by those who have a special commission granted to them for the particular business, and who, in legal language, are called ‘mandatories’; or by persons in whom such a power is vested in virtue of any situation to which it may be considered incidental. It was quite clear that no consul in any country, particularly in an enemy’s country, is vested with any such power in virtue of his station. ‘*Ei rei non præponitur,*’ and, therefore, his acts in relation to it are not binding. Neither does the admiral, on any station, possess such authority. He has, indeed, power relative to the ships under his immediate command, and can restrain them from committing acts of hostility; but he cannot go beyond that; he cannot grant a safeguard of this kind beyond the limits of his own station. The protections, therefore, which had been set up did not result from any power incidental to the situation of the persons by whom they had been granted; and it was not pretended that any such power was specially entrusted to them for the particular occasion. If the instruments which had been relied upon by the claimants were to be considered as the naked acts of those persons, then they were, in every point of view, totally invalid. But the question

(*d*) Chitty, Law of Nations, ch. 7. Kent, Commentaries on American Law (5th ed.), vol. i. p. 163, note (*b*).



was, whether the British Government had taken any steps to ratify these proceedings, and thus to convert them into valid acts of state; for persons not having full power may make what, in law, are termed *sponsiones*, or, in diplomatic language, treaties *sub spe rati*, to which a subsequent ratification may give validity: 'ratihabitio mandato æquiparatur.' The learned judge proceeded to show that the British Government had confirmed the acts of its officers, by the Order in Council of the 26th October, 1813, and accordingly decreed restitution of the property (*e*). In the case of *The Reward* (*f*), before the Lords of Appeal, the principle of this judgment was substantially confirmed; but in that of *The Charles*, and other similar cases, where certificates or passports of the same kind, signed by Admiral Sawyer, and also by the Spanish minister in the United States, had been used for voyages from thence to the Spanish West Indies, the Lords of Appeal held that these documents, not being included within the terms of the confirmatory Order in Council, did not afford protection. In the cases of passports granted by the British minister in the United States, permitting American vessels to sail with provisions from thence to the island of St. Bartholomew, but not confirmed by an Order in Council, the Lords condemned in all the cases not expressly included within the terms of the Order in Council, by which certain descriptions of licenses granted by the minister had been confirmed (*g*).

A license may be vitiated by fraudulent conduct in obtaining it. The misrepresentation or suppression of material facts renders the license a nullity, and exposes the property it is invoked to protect to certain condemnation (*h*). A license must also be used in the manner intended by the grantor. "It is a mistake to suppose that the right of user may not be prejudiced by a construction of the grant that is merely erroneous. It is absolutely essential that the will of the grantor shall be observed; so that that only shall be done which he intended to permit; whatever he did not mean to permit is absolutely interdicted. Hence the party who uses the license, engages, not only for fair intentions, but for an accurate interpretation and execution of the grant" (*i*). In America it was determined that under the Act of the 13th July, 1861, the

Vitiatio of  
licenses.

(*e*) *The Hope* (1813), 1 Dods. Ad. 226.

(*f*) *The Reward* (1814), 1 Dods. Ad., Appendix D.

(*g*) *The Charles* (1814), Stewart, Vice-Adm. Rep. 367. See also *Usparicha v. Noble* (1811), 13 East, 332.

(*h*) Duer, *Marine Insurance*, I. p. 598. *The Cosmopolite*, 4 C. Rob. 11; *The Clio*, 6 C. Rob. 69. Halleck, *Int. Law* (1908), vol. ii. p. 376.

(*i*) Duer, *Marine Insurance*, I. p. 598. *Vandyck v. Whitmore*, 1 East, 475.

President was the only functionary who could grant a license to trade with the enemy. All other licenses were held to be void, and therefore ships licensed by any one else were condemned; and the persons acting under any but the President's licenses were held to be trading with the enemy (*k*).

Relaxation of rules against trade with the enemy.

These principles are still applicable to war except when belligerents have, of their own accord, chosen to modify them by regulations for the guidance of their subjects in any particular case. During the Crimean war, England, France, and Russia all permitted their respective subjects to trade with the enemy, provided the trade was carried on through the medium of a neutral flag (*l*). This relaxation of the rules of international law only applied to that particular war. England at the same time prohibited her subjects from dealing with any securities issued by the Russian Government during the war. Such an act was made a misdemeanour (*m*). At the outbreak of the Franco-German war, France permitted German vessels that had left Germany before the declaration of war, and were destined to carry goods to French ports, to proceed to such ports and discharge the goods, but German vessels which, under the same circumstances, were destined for neutral ports were held to be liable to capture as prize (*n*).

Extent of prohibition of intercourse between enemies.

The law of nations prohibits all intercourse between subjects of the two belligerents which is inconsistent with the state of war between their countries. This includes any act of voluntary submission to the enemy, or receiving his protection; any act or contract which tends to increase his resources, and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to, or involving such transmission, or by insurances upon trade by or with the enemy. Beyond this the prohibition does not extend (*o*). It does not apply to transactions which are to take place entirely in the territory of one belligerent. Thus, where a creditor residing in one of the States at war has an agent in the other State, to whom a debtor could pay the money,

(*k*) *The Sea Lion* (1866), 5 Wallace, 630; *The Owachita Cotton* (1867), 6 Wallace, 521; *M'Kee v. U. S.* (1868), 8 Wallace, 167; *The Reform*, 3 Wallace, 617.

(*l*) Kent, ed. by Abdy (2nd ed.), p. 190.

(*m*) 17 & 18 Vict. c. 123.

(*n*) Archives Diplomatiques, 1871-2,

Pt. I. pp. 246, 251.

(*o*) *Kershaw v. Kelsey* (1868), 100 Massachusetts, 572; *Jecker v. Montgomery* (1851), 13 Howard, 498; *Hanger v. Abbott* (1867), 6 Wallace, 535; *Montgomery v. U. S.* (1844), 15 Wallace, 395; *Snell v. Dwight*, 120 Massachusetts, 9.

which agent was appointed before the war broke out, the payment by the debtor to such agent is lawful. It does not follow that the agent, if he receives the money, will violate the law by remitting it to his principal (*p*).

If a debt between enemies is contracted during the war, it cannot be sued for when the war is over (*q*); but when debts have been contracted before war breaks out, the existence of the war does not extinguish the debts, it simply suspends the remedy of the creditor (*r*). If the debts are not confiscated during the war, the right to enforce payment revives with peace (*s*). As the creditor cannot sue for his debt during the war, it has been held in America that a statute of limitations does not run against the creditor while the war lasts (*t*). But there is no exception in this respect in the English Statute of Limitations (*u*). In a case where the parties had agreed in their contract that no suit or action should be sustainable unless commenced within twelve months after a certain event should occur, the Court held, that as this contract was followed by a war, by which the parties became enemies, the plaintiff was relieved from his disability to sue within the twelve months (*x*).

Debts  
between  
enemies.

Another result of war is, that a contract between a belligerent subject and a neutral cannot, so long as the war lasts, be performed if the belligerent subject has agreed to carry it out in the enemy's country. Before the outbreak of the war between France and Germany in 1870, a German vessel was chartered by a British subject to carry a cargo of nitrate of soda (contraband of war) from Pisagua to Cork, Cowes, or Falmouth, and then to receive orders to proceed to any safe port in Great Britain, or on the continent between Havre and Hamburg. On arriving at Falmouth the master received orders to go to Dunkirk, and started for that port. Shortly before arriving there, he was told by a French pilot that war had broken out between France and Germany, and thereupon he sailed to Dover to obtain accurate information. He had appeared off Dunkirk on the 16th of July, 1870, and war was actually declared on the 19th. At Dover he refused to give up the cargo unless the freight was paid. The ship was therefore

Contracts  
with neutrals  
to be per-  
formed in  
enemy's  
country.

*The Teutonia.*

(*p*) *Ward v. Smith* (1868), 7 Wallace, 452; *U. S. v. Grossmayer* (1869), 9 Wallace, 75.

(*q*) *Willison v. Paterson* (1817), 7 Taunton, 439.

(*r*) *Ware v. Hilton* (1796), 3 Dallas, 199; *Upton, Maritime Law*, p. 42.

(*s*) *Manning*, by Amos (ed. 1875), p. 176; *Hanger v. Abbott* (1867), 6

Wallace, 537.

(*t*) *Hanger v. Abbott* (1867), 6 Wallace, 532; *The Protector* (1871), 12 Wallace, 700; *U. S. v. Wiley*, 11 Wallace, 508.

(*u*) *De Wahl v. Braune*, 25 L. J. Ex. 343, 345.

(*x*) *Semmes v. Hartford Ins. Co.* (1871), 13 Wallace, 158.



sued by the consignees of the cargo. The Privy Council held that he was justified in putting back to Dover, and had been guilty of no improper delay or deviation from the voyage. As war was declared, his vessel, being German, could not go to Dunkirk, and he was therefore not bound to carry out his contract in that respect. In this particular case the Court allowed the master the freight from Pisagua to Dover, because Dunkirk was not the only port stipulated for in the charter party, and delivery at Dover was within the terms of the contract. They declined to decide whether the freight would have been earned if no other port but Dunkirk had been mentioned (*y*).

Trade with the common enemy unlawful on the part of allied subjects.

Not only is such intercourse with the enemy, on the part of subjects of the belligerent State, prohibited and punished with confiscation in the Prize Courts of their own country, but, during a conjoint war, no subject of an ally may trade with the common enemy, without being liable to the forfeiture, in the Prize Courts of the ally, of his property engaged in such trade. This rule is a corollary of the other; and is founded upon the principle that such trade is forbidden to the subjects of the co-belligerent by the municipal law of his own country, by the universal law of nations, and by the express or implied terms of the treaty of alliance subsisting between the allied Powers. And as the former rule can be relaxed only by the permission of the sovereign power of the State, so this can be relaxed only by the permission of the allied nations, according to their mutual agreement. A declaration of hostilities naturally carries with it an interdiction of all commercial intercourse. Where one State only is at war, this interdiction may be relaxed, as to its own subjects, without injuring any other State; but when allied nations are pursuing a common cause against a common enemy, there is an implied, if not an express contract, that neither of the co-belligerent States shall do anything to defeat the common object. If one State allows its subjects to carry on an uninterrupted trade with the enemy, the consequence will be, that it will supply aid and comfort to the enemy, which may be injurious to the common cause. It should seem that it is not enough, therefore, to satisfy the Prize Court of one of the allied States, to say that the other has allowed this practice to its own subjects; it should also be shown, either that the practice is of such a nature as cannot inter-

(*y*) *The Teutonia* (1870), L. R. 4 P. C. 171. See also *The San Roman*, L. R. 3 A. & E. 583; *The Express*, L. R. 3 A. & E. 597; *The Patria* (1871), L. R. 3 A. & E. 436.

ferre with the common operations, or that it has the allowance of the other confederate State (*z*).

In reference to this question a prize decision of special interest was delivered by the President (Sir S. Evans) on March 22, 1915 (*a*). Before the Great War broke out a French company contracted to sell to German purchasers some silver lead, f.o.b. at Ergasteria in Greece, and chartered a Greek vessel, the *Panariellos*, to take it to Newcastle. During the loading hostilities began, and a few days later the vessel sailed for Newcastle; but having been diverted to Swansea, she was there arrested, and the lead was seized. The Crown demanded condemnation of the proceeds of the sale of the lead on the ground that the transaction in question amounted to trading with the enemy on the part of allied subjects, who were under the same obligations in this respect as British citizens.

The President, in the course of his considered judgment, first stated certain general principles applicable to trading with the enemy: (1) On the outbreak of war, all commercial intercourse—save what is allowed by the head of the State—between citizens of the belligerents *ipso facto* becomes illegal. (2) If a belligerent has allies, the citizens of all the allied States are under the same obligations to each allied State as its own subjects would be to a single belligerent State, as regards intercourse with the enemy. (3) Where such illegal intercourse is proved between allied citizens and the enemy, their property engaged in such intercourse, whether ship or cargo, is subject to capture by any allied belligerent, and is subject to condemnation in that belligerent's own Prize Courts. (4) Where such intercourse in fact takes place, the property of the persons engaged in it is confiscable whether they were acting honestly and *bonâ fide* or not. After referring to various cases (*b*) in support of the propositions he advanced, he emphasised that "whatever intercourse with an enemy is prohibited by international law, no relaxation whatever can be allowed by one State in favour of its citizens which can affect the confederate State, unless expressly sanctioned by the latter." Applying these principles to the facts proved, the President condemned the proceeds as lawful prize.

It follows as a corollary from the principle, interdicting all commercial and other pacific intercourse with the public enemy,

Contracts with the enemy prohibited.

(*z*) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 10; *The Neptunus*, 6 C. Rob. 403; 4 C. Rob. 251.

(*a*) *The Panariellos (Cargo ex)* (March 15, 22, 1915), 31 T. L. R. 326.

(*b*) *The Hoop* (1799), 1 C. Rob. 190; *The Cosmopolite* (1801), 4 C. Rob. 8; and the American cases, *The Rapid* (1814), 8 Cranch, 155; and *The Julia* (1814), 8 Cranch, 181.

that every species of private contract made with his subjects during the war is unlawful. The rule thus deduced is applicable to insurance on enemy's property and trade; to the drawing and negotiating of bills of exchange between subjects of the Powers at war; to the remission of funds, in money or bills, to the enemy's country; to commercial partnerships entered into between the subjects of the two countries, after the declaration of war, or existing previous to the declaration; which last are dissolved by the mere force and act of the war itself, although, as to other contracts, it only suspends the remedy (*c*).

Persons domiciled in the enemy's country liable to reprisals, and acts of war.  
View of Grotius.

Grotius, in the second chapter of his third book, where he is treating of the liability of the property of subjects for the injuries committed by the State to other communities, lays down that "by the law of nations, all the subjects of the offending State, who are such from a permanent cause, whether natives, or emigrants from another country, are liable to reprisals, but not so those who are only travelling or sojourning for a little time;—for reprisals," says he, "have been introduced as a species of charge imposed in order to pay the debts of the public; from which are exempt those who are only temporarily subject to the laws. Ambassadors and their goods are, however, excepted from this liability of subjects, but not those sent to an enemy." In the fourth chapter of the same book, where he is treating of the right of killing and doing other bodily harm to enemies, in what he calls 'solemn war,' he holds that this right extends, "not only to those who bear arms, or are subjects of the author of the war, but to all those who are found within the enemy's territory. In fact, as we have reason to fear the hostile intentions even of strangers who are within the enemy's territory at the time, that is sufficient to render the right of which we are speaking applicable even to them in a general war. In which respect there is a distinction between war and reprisals, which last, as we have seen, are a kind of contribution paid by the subjects for the debts of the State" (*d*).

Criticism of Barbeyrac.

Barbeyrac, in a note collating these passages, observes, that "the late M. Cocceius, in a dissertation which I have already cited, *De Jure Belli in Amicos*, rejects this distinction, and

(*c*) Bynkershoek, *Quæst. Jur. Pub.* lib. i. cap. 21 (Duponceau's Transl. p. 165, Note). Kent, *Commentaries on American Law*, vol. i. pp. 67, 68 (5th ed.). *Griswold v. Waddington* (1818), 16 Johnson, 438; *Esposito v.*

*Bowden* (1857), 7 E. & B. 785; *The William Bagaley* (1866), 5 Wallace, 377.

(*d*) Grotius, *De Jur. Bel. ac Pac.* lib. iii. cap. ii. § 7, No. 1. *Ibid.* lib. iii. cap. iv. §§ 6—7.



insists that even those foreigners who have not been allowed time to retire ought to be considered as adhering to the enemy, and for that reason justly exposed to acts of hostility. In order to supply this pretended defect, he afterwards distinguishes foreigners, who remain in the country, from those who only transiently pass through it, and are constrained by sickness or the necessity of their affairs. But this is alone sufficient to show that, in this place, as in many others, he criticized our author without understanding him. In the following paragraph, Grotius manifestly distinguishes from the foreigners of whom he has just spoken those who are the permanent subjects of the enemy, by whom he doubtless understands, as the learned Gronovius has already explained, those who are 'domiciled' in the country. Our author explains his own meaning in the second chapter of this book, in speaking of reprisals, which he allows against this species of foreigners, whilst he does not grant them against those who only pass through the country, or are temporarily resident in it" (e).

Whatever may be the extent of the claims of a man's native country upon his political allegiance, there can be no doubt that the natural-born subject of one country may become assimilated to the citizens of another, in time of peace, for the purposes of trade, and may become entitled to all the commercial privileges attached to his acquired domicile. On the other hand, if war breaks out between his adopted country and his native country, or any other, his property becomes liable to reprisals in the same manner as the effects of those who owe a permanent allegiance to the enemy State.

Trade or war domicile.

As to what species of residence constitutes such a domicile as will render the party liable to reprisals, the text writers are deficient in definitions and details. Their defects are supplied by the precedents furnished by the British Prize Courts, which, if they have not applied the principle with undue severity in the case of neutrals, have certainly not mitigated it in its application to that of British subjects resident in the enemy's country on the commencement of hostilities.

Species of residence constituting such domicile.

In the judgment of the Lords of Appeal in Prize Causes, upon the cases arising out of the capture from the Dutch of the island of St. Eustatius by Admiral Rodney, delivered in 1785, by Lord Camden, he stated that "if a man went into a foreign country upon a visit, to travel for health, to settle a particular business,

(e) Grotius, par Barbeyrae, *in loc.* See on this point Whiting, War Powers under the Constitution of the United States, p. 334.

or the like, he thought it would be hard to seize upon his goods; but a residence, not attended with these circumstances, ought to be considered as a permanent residence." In applying the evidence and the law to the resident foreigners in St. Eustatius, he said, that "in every point of view, they ought to be considered resident subjects. Their persons, their lives, their industry, were employed for the benefit of the State under whose protection they lived; and if war broke out, they, continuing to reside there, paid their proportion of taxes, imposts, and the like, equally with natural-born subjects, and no doubt come within that description" (f).

*The Harmony.* "Time," says Sir W. Scott, "is the grand ingredient in constituting domicile. In most cases it is unavoidably conclusive. It is not unfrequently said that if a person comes only for a special purpose, that shall not fix a domicile. This is not to be taken in an unqualified latitude, and without some respect to the time which such a purpose may or shall occupy; for if the purpose be of such a nature as may probably, or does actually, detain the person for a great length of time, a general residence might grow upon the special purpose. A special purpose may lead a man to a country, where it shall detain him the whole of his life. Against such a long residence, the plea of an original special purpose could not be averred; it must be inferred in such a case that other purposes forced themselves upon him, and mixed themselves with the original design, and impressed upon him the character of the country where he resided. Supposing a man comes into a belligerent country at or before the beginning of the war, it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disentangle himself; but if he continues to reside during a good part of the war,—contributing by the payment of taxes and other means to the strength of that country, he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guard against the frauds and abuses of masked, pretended, original, and sole purposes of a long-continued residence. There is a time which will estop such a plea; no rule can fix the time *à priori*, but such a rule there must be. In proof of the efficacy of mere time, it is not impertinent to remark that the same quantity of business, which would not fix a domicile in a certain quantity of time, would nevertheless have that effect if distributed

(f) MS. Proceedings of the Commissioners under the Treaty of 1794, between Great Britain and the United

States; Opinion of Mr. W. Pinkney, in the case of *The Betsey*.

over a larger space of time. This matter is to be taken in the compound ratio of the time and the occupation, with a great preponderance on the article of time: be the occupation what it may, it cannot happen, with but few exceptions, that mere length of time shall not constitute a domicile" (g).

In the case of *The Indian Chief*, determined in 1800, Mr. Johnson, a citizen of the United States, domiciled in England, had engaged in a mercantile enterprise to the British East Indies, a trade prohibited to British subjects, but allowed to American citizens under the commercial treaty of 1794, between the United States and Great Britain. The vessel came into a British port on its return voyage, and was seized as engaged in illicit trade. Mr. Johnson, having then left England, was held not to be a British subject at the time of capture, and restitution was decreed. In delivering his judgment in this case, Sir W. Scott said, "Taking it to be clear that the national character of Mr. Johnson, as a British merchant, was founded in residence only, that it was acquired by residence, and rested on that circumstance alone, it must be held, that, from the moment he turned his back on the country where he had resided on his way to his own country, he was in the act of resuming his original character, and must be considered as an American. 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, *bonâ fide*, to quit the country, *sine animo revertendi*" (h).

*The Indian Chief.*

The native character easily reverts, and it requires fewer circumstances to constitute domicile, in the case of a native subject, than to impress the national character on one who is originally of another country. Thus, the property of a Frenchman who had been residing, and was probably naturalized, in the United States, but who had returned to St. Domingo, and shipped from thence the produce of that island to France, was condemned in the High Court of Admiralty (i).

The native character easily reverts.

In *The Indian Chief*, the case of Mr. Dutilth is referred to by the claimant's counsel as having obtained restitution, though at the time of sailing he was resident in the enemy's country; but the decision of the Lords of Appeal, in 1800, is mentioned by Sir C.

(g) *The Harmony* (1800), 2 C. Rob. 324.

(h) *The Indian Chief* (1800), 3 C. Rob. 12.

(i) *La Virginie*, 5 C. Rob. 99. The

same rule is also adopted in the prize law of France, Code des Prises, tom. i. pp. 92, 139, 303, and by the American Prize Courts. *The Dos Hermanos* (1817), 2 Wheaton, 76.



Robinson, in which different portions of Mr. Dutilth's property were condemned or restored, according to the circumstances of his residence at the time of capture.

*The Diana.*

The case of *The Diana*, decided by Sir W. Scott, in 1803, is also full of instruction on this subject. During the war which commenced in 1795 between Great Britain and Holland, the colony of Demerara surrendered to the British arms, and by the treaty of Amiens it was restored to the Dutch. That treaty contained an Article allowing the inhabitants, of whatever country they might be, a term of three years, to be computed from the notification of the treaty, for the purpose of disposing of their effects acquired before or during the war, in which term they might have the free enjoyment of their property. Previous to the declaration of war against Holland, in 1803, the *Diana* and several other vessels, laden with colonial produce, were captured on a voyage from Demerara to Holland. Immediately after the declaration, and before the expiration of the three years from the notification of the treaty of Amiens, Demerara again surrendered to Great Britain. Claims to the captured property were filed by original British subjects, inhabitants of Demerara, some of whom had settled in the colony while it was in possession of Great Britain; others before that event. The cause came on for hearing after it had again become a British colony.

Sir W. Scott decreed restitution to those British subjects who had settled in the colony while in British possession, but condemned the property of those who had settled there before that time. He held that those of the first class, by settling in Demerara while belonging to Great Britain, afforded a presumption of their intending to return, if the island should be transferred to a foreign power, which presumption, recognised by the treaty, relieved those claimants from the necessity of proving such intention. He thought it reasonable that they should be admitted to their *jus postliminii*, and he held them entitled to the protection of British subjects. But he was clearly of opinion that "mere recency of establishment would not avail, if the intention of making a permanent residence there was fixed upon the party. The case of Mr. Whitehill fully established this point. He had arrived at St. Eustatius only a day or two before Admiral Rodney and the British forces made their appearance; but it was proved that he had gone to establish himself there, and his property was condemned. Here recency, therefore, would not be sufficient."

But the property of those claimants who had settled in Demerara before that colony came into the possession of Great Britain was

condemned. "Having settled without any faith in British possession, it cannot be supposed," he said, "that they would have relinquished their residence because that possession had ceased. They had passed from one sovereignty with indifference, and if they may be supposed to have looked again to a connection with this country, they must have viewed it as a circumstance that was in no degree likely to affect their intention of remaining there. On the situation of persons settled there previous to the time of British possession, I feel myself obliged to pronounce, that they must be considered in the same light as persons resident in Amsterdam. It must be understood, however, that if there were among these any who were actually removing, and that fact is properly ascertained, their goods may be capable of restitution. All that I mean to express is, that there must be evidence of an intention to remove on the part of those who settled prior to British possession, the presumption not being in their favour" (k).

The case of *The Ocean*, determined in 1804, was a claim relating to British subjects settled in foreign States in time of amity, and taking early measures to withdraw themselves on the breaking out of war. It appeared that the claimant had been settled as a partner in a house of trade in Holland, but that he had made arrangements for the dissolution of the partnership, and was prevented from removing personally only by the violent detention of all British subjects who happened to be within the territories of the enemy at the breaking out of the war. In this case Sir W. Scott said: "It would, I think, be going farther than the law requires, to conclude this person by his former occupation, and by his present constrained residence in France, so as not to admit him to have taken himself out of the effect of supervening hostilities, by the means which he had used for his removal. On sufficient proof being made of the property, I shall be disposed to hold him entitled to restitution" (l).

Case of persons removing from the enemy's country on the breaking out of war.  
*The Ocean.*

In a note to this case, Sir C. Robinson states that the situation of British subjects wishing to remove from the enemy's country on the event of a war, but prevented by the sudden occurrence of hostilities from taking measures sufficiently early to obtain restitution, formed not unfrequently a case of considerable hardship in the Prize Court. He advises persons so situated, on their actual removal, to make application to Government for a special pass, rather than to trust valuable property to the effect of a mere intention to remove, dubious as that intention may frequently

(k) *The Diana* (1803), 5 C. Rob. 60. (l) *The Ocean* (1804), 5 C. Rob. 91.



appear under the circumstances that prevent it from being carried into execution. And Sir W. Scott, in the case of *The Dree Gebroeders* (m), observes, "that pretences of withdrawing funds are at all times to be watched with considerable jealousy; but when the transaction appears to have been conducted *bonâ fide* with that view, and to be directed only to the removal of property, which the accidents of war may have lodged in the belligerent country, cases of this kind are entitled to be treated with some indulgence." But in a subsequent case, where an indulgence was allowed by the Court for the withdrawal of British property under peculiar circumstances, he intimated that the decree of restitution, in that particular case, was not to be understood as in any degree relaxing the necessity of obtaining a license, wherever property is to be withdrawn from the enemy's country (n).

Decisions of  
the American  
courts.

*The Venus.*

The same principles, as to the effect of domicile, or commercial inhabitancy in the enemy's country, were adopted by the prize tribunals of the United States, during the war with Great Britain. The rule was applied to the case of native British subjects, who had emigrated to the United States long before the war, and became naturalized citizens under the laws of the Union, as well as to native citizens residing in Great Britain at the time of the declaration. The naturalized citizens in question had, long prior to the declaration of war, returned to their native country, where they were domiciled and engaged in trade at the time the shipments in question were made. The goods were shipped before they had a knowledge of the war. At the time of the capture, one of the claimants was yet in the enemy's country, but had, since he heard of the capture, expressed his anxiety to return to the United States, but had been prevented by various causes set forth in his affidavit. Another had actually returned some time after the capture, and a third was still in the enemy's country.

In pronouncing its judgment in this case, the Supreme Court stated that, there being no dispute as to the facts upon which the domicile of the claimants was asserted, the questions of law to be considered were two: First, by what means, and to what extent, a national character may be impressed upon a person, different from that which permanent allegiance gives him; and, secondly, what are the legal consequences to which this acquired character may expose him, in the event of a war taking place

(m) (1802), 4 C. Rob. 234.

(n) *The Juffrow Catharina* (1804).  
5 C. Rob. 141.



between the country of his residence and that of his birth, or that in which he had been naturalized.

Upon the first of these questions, the opinions of the text writers and the decisions of the British Courts of Prize already cited, were referred to; but it was added that, in deciding whether a person has obtained the right of an acquired domicile, it was not to be expected that much, if any assistance, should be derived from mere elementary writers on the law of nations. They can only lay down the general principles of law; and it becomes the duty of courts of justice to establish rules for the proper application of those principles. The question, whether the person to be affected by the right of domicile has sufficiently made known his intention of fixing himself permanently in the foreign country, must depend upon all the circumstances of the case. If he has made no express declaration on the subject, and his secret intention is to be discovered, his acts must be attended to as affording the most satisfactory evidence of his intention. On this ground the courts of England have decided, that a person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes by these acts such evidences of an intention permanently to reside there, as to stamp him with the national character of the State where he resides. In questions on this subject, the chief point to be considered is the *animus manendi*; and courts are to devise such reasonable rules of evidence as may establish the fact of intention. If it sufficiently appears that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicile is acquired by residence even of a few days. This was one of the rules of the British Prize Courts, and it appeared to be perfectly reasonable. Another was that a neutral or subject, found residing in a foreign country, is presumed to be there *animo manendi*; and if a State at war should bring his national character into question, it lies upon him to explain the circumstances of his residence. As to some other rules of the Prize Courts of England, particularly those which fix the national character of a person, on the ground of constructive residence or the peculiar nature of his trade, the Court was not called upon to give an opinion at that time; because, in the present case, it was admitted that the claimants had acquired a right of domicile in Great Britain at the time of the breaking out of the war between that country and the United States.

The next question was, what are the consequences to which this acquired domicile may legally expose the person entitled

Domicile distinguished from allegiance.

Effect of domicile in a foreign State.

to it, in the event of a war taking place between the government under which he resides and that to which he owes permanent allegiance. A neutral, in this situation, if he should engage in open hostilities with the other belligerent, would be considered and treated as an enemy. A citizen of the other belligerent could not be so considered, because he could not, by any act of hostility, render himself, strictly speaking, an enemy, contrary to his permanent allegiance; but although he cannot be considered an enemy, in the strict sense of the word, yet he is deemed such with reference to the seizure of so much of his property concerned in the enemy's trade, as is connected with his residence. It is found adhering to the enemy; he is himself adhering to the enemy, although not criminally so, unless he engages in acts of hostility against his native country, or perhaps refuses, when required by his country, to return. The same rule, as to property engaged in the commerce of the enemy, applies to neutrals, and for the same reason. The converse of this rule inevitably applies to the subject of a belligerent State domiciled in a neutral country; he is deemed a neutral by both belligerents, with reference to the trade which he carries on with the adverse belligerent, and with the rest of the world.

Renunciation  
of domicile.

But this national character which a man requires by residence may be thrown off at pleasure, by a return to his native country, or even by turning his back on the country in which he resided, on his way to another. The reasonableness of this rule can hardly be disputed. Having once acquired a national character, by residence in a foreign country, he ought to be bound by all the consequences of it until he has thrown it off, either by an actual return to his native country, or to that where he was naturalized, or by commencing his removal, *bonâ fide*, and without an intention of returning. If anything short of actual removal be admitted to work a change in the national character acquired by residence, it seems perfectly reasonable that the evidence of a *bonâ fide* intention should be such as to leave no doubt of its sincerity. Mere declarations of such an intention ought never to be relied upon, when contradicted, or at least rendered doubtful, by a continuance of that residence which impressed the character. They may have been made to deceive; or, if sincerely made, they may never be executed. Even the party himself ought not to be bound by them, because he may afterwards find reason to change his determination, and ought to be permitted to do so. But when he accompanies these declarations by acts which speak a language not to be mistaken, and can hardly fail to be consummated

by actual removal, the strongest evidence is afforded which the nature of such a case can furnish. And is it not proper that the Courts of a belligerent nation should deny to any person the right to use a character so equivocal as to put it in his power to claim whichever may best suit his purpose, when it is called in question? If his property be taken trading with the enemy, shall he be allowed to shield it from confiscation by alleging that he had intended to remove from the enemy's country to his own, then neutral, and therefore that, as a neutral, the trade was to him lawful? If war exists between the country of his residence and his native country, and his property be seized by the former or by the latter, shall he be heard to say, in the former case, that he was a domiciled subject in the country of the captor; and in the latter, that he was a native subject of the country of that captor also, because he had declared an intention to resume his native character, and thus to parry the belligerent rights of both? It was to guard against such inconsistencies, and against the frauds which such pretensions, if tolerated, would sanction, that the rule above mentioned had been adopted. Upon what sound principle could a distinction be framed between the case of a neutral, and the subject of one belligerent domiciled in the country of the other, at the breaking out of the war? The property of each, found engaged in the commerce of their adopted country, belonged to them, before the war, in the character of subjects of that country, so long as they continued to retain their domicile; and when war takes place between that country and any other, by which the two nations and all their subjects become enemies to each other, it follows that this property, which was once the property of a friend, belongs now to him who, in reference to that property, is an enemy.

This doctrine of the common-law Courts and prize tribunals of England is founded, like that mentioned under the first head, upon international law, and was believed to be strongly supported by reason and justice. And why, it might be confidently asked, should not the property of enemy's subjects be exposed to the law of reprisals and of war, so long as the owner retains his acquired domicile, or, in the words of Grotius, continues a permanent residence in the country of the enemy? They were before, and continue after the war, bound by such residence to the society of which they were members, subject to the laws of the State, and owing a qualified allegiance thereto. They are obliged to defend it (with an exception of such subject with relation to his native country), in return for the protection it affords them, and the privileges

Effect of retaining foreign domicile.



which the laws bestow upon them as subjects. The property of such persons, equally with that of the native subjects in their locality is to be considered as the goods of the nation, in regard to other States. It belongs in some sort to the State, from the right which the State has over the goods of its citizens, which make a part of the sum total of its riches and augment its power (o). "In reprisals," says Vattel, "we seize on the property of the subject, just as on that of the sovereign; everything that belongs to the nation is subject to reprisals, wherever it can be seized, with the exception of a deposit intrusted to the public faith" (p). Now, if a permanent residence constitutes the person a subject of the country where he is settled, so long as he continues to reside there, and subjects his property to the law of reprisals, as a part of the property of the nation, it would seem difficult to maintain that the same consequences would not follow, in the case of an open and public war, whether between the adopted and native countries of persons so domiciled, or between the former and any other nation.

If, then, nothing but an actual removal, or a *bonâ fide* beginning to remove, could change a national character acquired by domicile; and if, at the time of the inception of the voyage, as well as at the time of capture, the property belonged to such domiciled person, in his character of a subject; what was there that did or ought to exempt it from capture by the cruisers of his native country, if, at the time of capture, he continues to reside in the country of the adverse belligerent?

Time for  
election to  
change  
domicile not  
allowed.

It was contended that a native or naturalized subject of one country, who is surprised in the country where he was domiciled, by a declaration of war, ought to have time to make his election to continue there, or to remove to the country to which he owes permanent allegiance; and that, until such election be made, his property ought to be protected from capture by the cruisers of the latter. This doctrine was believed to be as unfounded in reason and justice, as it clearly was in law. In the first place it was founded upon a presumption that the person will certainly remove, before it can possibly be known whether he may elect to do so or not. It was said, that the presumption ought to be made, because, upon receiving information of the war, it would be his duty to return home. This position was denied. It was his duty to commit no acts of hostility against his native country, and to return to her assistance when required to do so; nor would any just nation, regarding the mild principles of the law of nations,

(o) Vattel, liv. i. ch. 14, § 182.

(p) Liv. ii. ch. 18, § 344.

require him to take arms against his native country, or refuse permission to him to withdraw whenever he wished to do so, unless under peculiar circumstances, which, by such removal, at a critical period, might endanger the public safety. The conventional law of nations was in conformity with these principles. It is not uncommon to stipulate in treaties, that the subjects of each party shall be allowed to remove with their property, or to remain unmolested. Such a stipulation does not coerce those subjects to remove or remain. They are left free to choose for themselves; and, when they have made their election, may claim the right of enjoying it, under the treaty. But until the election is made, their former character continues unchanged. Until this election is made, if the claimant's property found upon the high seas, engaged in the commerce of his adopted country, should be permitted by the cruisers of the other belligerent to pass free, under a notion that he may elect to remove upon notice of the war, and should arrive safe; what is to be done, in case the owner of it should elect to remain where he is? For if captured, and brought immediately to adjudication, it must, upon this doctrine, be acquitted, until the election to remain is made and known. In short, the point contended for would apply the doctrine of relation to cases where the party claiming the benefit of it may gain all and can lose nothing. If he, after the capture, should find it for his interest to remain where he is domiciled, his property, embarked before his election was made, is safe; and if he finds it best to return, it is safe, of course. It is safe, whether he goes or stays. This doctrine producing such contradictory consequences was not only unsupported by any authority, but would violate principles long and well established in the Prize Courts of England, and which ought not, without strong reasons which may render them inapplicable to America, to be disregarded by the Court. The rule there was, that the character of property during war cannot be changed *in transitu*, by any act of the party, subsequent to the capture. The rule indeed went further: as to the correctness of which, in its greatest extension, no judgment needed then to be given; but it might safely be affirmed, that the change could not and ought not to be effected by an election of the owner and shipper, made subsequent to the capture, and more especially after a knowledge of the capture is obtained by the owner. Observe the consequences. The capture is made and known. The owner is allowed to deliberate whether it is his intention to remain a subject of his adopted or of his native country. If the capture be made by the former, then he elects to become a subject of that

country; if by the latter, then a subject of that. Could such a privileged situation be tolerated by either belligerent? Could any system of law be correct which places an individual, who adheres to one belligerent, and down to the period of his election to remove, contributes to increase her wealth, in so anomalous a situation as to be clothed with the privileges of a neutral as to both belligerents? This notion about a temporary state of neutrality impressed upon a subject of one of the belligerents, and the consequent exemption of his property from capture by either, until he has had notice of the war and made his election, was altogether a novel theory, and seemed from the course of the argument to owe its origin to a supposed hardship to which the contrary doctrine exposes him. But if the reasoning employed on the subject was correct, no such hardship could exist; for if before the election is made, his property on the ocean is liable to capture by the cruisers of his native and deserted country, it is not only free from capture by those of his adopted country, but is under its protection. This privilege is supposed to be equal to the disadvantage, and is therefore just. The double privilege claimed seems too unreasonable to be granted (*q*).

Merchants  
residing in  
the East.

The national character of merchants residing in Europe and America is derived from that of the country in which they reside. In the eastern parts of the world, European persons, trading under the shelter and protection of the factories founded there, take their national character from that association under which they live and carry on their trade: this distinction arises from the nature and habits of the countries. In the western part of the world, alien merchants mix in the society of the natives; access and intermixture are permitted, and they become incorporated to nearly the full extent. But in the east, from almost the oldest times, an immiscible character has been kept up; foreigners are not admitted into the general body and mass of the nation; they continue strangers and sojourners, as all their fathers were. Thus, with respect to establishments in Turkey, the British Courts of Prize, during war with Holland, determined that a merchant, carrying on trade at Smyrna, under the protection of the Dutch consul, was to be considered a Dutchman, and condemned his property as belonging to an enemy. And thus in China, and generally throughout the east, persons admitted into a factory are not known in their own peculiar national character: and not being permitted

(*q*) *The Venus* (1814), 8 Cranch, 54; *U. S. v. Guillem* (1850), 11 253; *The Mary and Susan*, 1 Wheaton, Howard, 47.



to assume the character of the country, are considered only in the character of that association or factory.

But these principles are considered not to be applicable to the vast territories occupied by the British in Hindostan; because, as Sir W. Scott observes, "though the sovereignty of the Mogul is occasionally brought forward for the purposes of policy, it hardly exists otherwise than as a phantom: it is not applied in any way for the regulation of their establishments. Great Britain exercises the power of declaring war and peace, which is among the strongest marks of actual sovereignty; and if the high and empyrean sovereignty of the Mogul is sometimes brought down from the clouds, as it were, for the purposes of policy, it by no means interferes with the actual authority which that country, and the East India Company, a creature of that country, exercise there with full effect. Merchants residing there are hence considered as British subjects" (r).

In general, the national character of a person, as neutral or enemy, is determined by that of his domicile; but the property of a person may acquire a hostile character, independently of his national character, derived from personal residence. Thus, the property of a house of trade established in the enemy's country is considered liable to capture and condemnation as prize. This rule does not apply to cases arising at the commencement of a war, in reference to persons who, during peace, had habitually carried on trade in the enemy's country, though not resident there, and are therefore entitled to time to withdraw from that commerce. But if a person enters into a house of trade in the enemy's country, or continues that connection during the war, he cannot protect himself by mere residence in a neutral country (s).

House of trade in the enemy's country.

The converse of this rule of the British Prize Courts, which has also been adopted by those of America, is not extended to the case of a merchant residing in a hostile country, and having a share in a house of trade in a neutral country. Residence in a neutral country will not protect his share in a house established in the enemy's country, though residence in the enemy's country will condemn his share in a house established in a neutral country. It is impossible not to see, in this want of reciprocity, strong

Converse of the rule.

(r) *The Indian Chief* (1800), 3 C. Rob. 12.

(s) *The Vigilantia*, 1 C. Rob. 1; *The Susa* (1799), 2 C. Rob. 255; *The Portland* (1800), 3 C. Rob. 41; *The*

*Jonge Klassina* (1804), 5 C. Rob. 297; *The Antonia Johanna* (1816), 1 Wheaton, 159; *The Freundschaft* (1819), 4 Wheaton, 105.

marks of the partiality towards the interests of captors, which is perhaps inseparable from a prize code framed by judicial legislation in a belligerent country, and adapted to encourage its naval exertions (*t*).

Produce of the enemy's territory considered as hostile, so long as it belongs to the owner of the soil, whatever may be his national character or personal domicile.

The produce of an enemy's colony, or other territory, is to be considered as hostile property so long as it belongs to the owner of the soil, whatever may be his national character in other respects, or wherever may be his place of residence.

This rule of the British Prize Courts was adopted by the Supreme Court of the United States during the war (1812) with Great Britain, in the following case (*u*). The island of Santa Cruz, belonging to the King of Denmark, had been subdued during the European war by the arms of his Britannic Majesty. One Bentzon, an officer of the Danish Government, and a proprietor of land in the island, withdrew from the island on its surrender, and had since resided in Denmark. The property of the inhabitants being secured to them by the capitulation, he still retained his estate in the island under the management of an agent, who shipped thirty hogsheads of sugar, the produce of that estate, on board a British ship, and consigned to a commercial house in London, on account and risk of the owner. On her passage the vessel was captured by an American privateer, and brought in for adjudication. The sugars were condemned in the Court below as prize of war, and the sentence of condemnation was affirmed on appeal by the Supreme Court.

*The Thirty Hogsheads of Sugar.*

In pronouncing its judgment, the Court stated that some doubt had been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there could be no foundation. 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. The question was, whether the produce of a plantation in that island, shipped by the proprietor himself, who was a Dane residing in Denmark, must be considered as British, and therefore enemy's property. In arguing this question the counsel for the claimants had made two points: (1) that the case did not come

(*t*) Chief Justice Marshall, in *The Venus* (1814), 8 Cranch, 253.

(*u*) *The Thirty Hogsheads of Sugar (Bentzon v. Boyle)* (1815), 9 Cranch, 191.

within the rule applicable to shipments from an enemy's country, even as laid down in the British Courts of Admiralty; (2) that the rule had not been rightly laid down in those Courts, and consequently would not be adopted in those of the United States.

1. Did the rule laid down in the British Courts of Admiralty embrace this case? It appeared to the Court that the case of *The Phoenix* was precisely in point. In that case a vessel was captured in a voyage from Surinam to Holland, and a part of the cargo was claimed by persons residing in Germany, then a neutral country, as the produce of their estates in Surinam. The counsel for the captors considered the law of the case as entirely settled. The counsel for the claimants did not controvert this position. They admitted it, but endeavoured to extricate their case from the general principle by giving it the protection of the Treaty of Amiens. In pronouncing his judgment, Sir William Scott laid down the general rule thus: "Certainly nothing can be more decided and fixed, as the principle of this Court, and of the Supreme Court, upon very solemn argument there, than that the possession of the soil does impress upon the owner the character of the country, so far as the produce of that plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be. This has been so repeatedly decided, both in this and the Superior Court, that it is no longer open to discussion. No question can be made upon the point of law at this day" (x).

Examination  
of British  
cases by the  
American  
Supreme  
Court.

Afterwards, in the case of *The Vrow Anna Catharina*, Sir William Scott laid down the rule, and stated its reason: "It cannot be doubted," said he, "that there are transactions so radically and fundamentally national as to impress the national character, independent of peace or war, and the local residence of the parties. The produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation as a holder of the soil, and is to be taken as a part of that country in that particular transaction, independent of his own personal residence and occupation" (y).

It was contended that this rule, laid down with so much precision, did not embrace Mr. Bentzon's claim, because he had "not incorporated himself with the permanent interests of the

(x) *The Phoenix* (1803), 5 C. Rob. 21.

(y) *The Vrow Anna Catharina* (1806), 5 C. Rob. 167.



nation." He acquired the property while Santa Cruz was a Danish colony, and he withdrew from the island when it became British.

This distinction did not appear to the Court to be a sound one. The identification of the national character of the owner with that of the soil, in the particular transaction, is not placed on the dispositions with which he acquires the soil, or on his general national character. The acquisition of land in Santa Cruz bound the claimant, so far as respects that land, to the fate of Santa Cruz, whatever its destiny might be. While that island belonged to Denmark, the produce of the soil, while unsold, was, according to this rule, Danish property, whatever might be the general national character of the particular proprietor. When the island became British, the soil and its produce, while that produce remained unsold, were British. The general commercial or political character of Mr. Bentzon could not, according to this rule, affect that particular transaction. Although incorporated, so far as respects his general national character, with the permanent interests of Denmark, he was incorporated, so far as respected his plantation in Santa Cruz, with the permanent interests of Santa Cruz, which was at that time British; and though, as a Dane, he was at war with Great Britain, and an enemy, yet as a proprietor of land in Santa Cruz, he was no enemy: he could ship his produce to Great Britain in perfect safety.

2. The case was therefore certainly within the rule as laid down by the British Prize Courts. The next inquiry was, how far that rule will be adopted in this country?

Adoption of  
the English  
rule in  
America.

The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognised by all civilized and commercial States throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice: but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the Courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this. Without taking a comparative view of the justice or fairness of the rules established in the

British Prize Courts, and of those established in the Courts of other nations, there were circumstances not to be excluded from consideration, which give to those rules a claim to our consideration that we cannot entirely disregard. The United States having, at one time, formed a component part of the British empire, *their* prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances, and was not varied by the power which was capable of changing it. It would not be advanced, in consequence of this former relation between the two countries, that any obvious misconstruction of public law made by the British Courts is entitled to more respect than the recent rules of other countries. But a case professing to be decided entirely on ancient principles, will not be entirely disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations.

The rule laid down in *The Phoenix* was said to be a recent rule, because a case solemnly decided before the Lords Commissioners, in 1783, is quoted in the margin as its authority. But that case was not suggested to have been determined contrary to former practice or former opinions. Nor did the Court perceive any reason for supposing it to be contrary to the rule of other nations in a similar case.

The opinion that ownership of the soil does, in some degree, connect the owner with the property, so far as respects that soil, was an opinion which certainly prevailed very extensively. It was not an unreasonable opinion. Personal property may follow the person anywhere; and its character, if found on the ocean, may depend on the domicile of the owner. But land is fixed. Wherever the owner may reside, that land is hostile or friendly according to the condition of the country in which it is placed. It was no extravagant perversion of principle, nor was it a violent offence to the course of human opinion to say, that the proprietor, so far as respects his interest in the land, partakes of its character, and that its produce, while the owner remains unchanged, is subject to the same disabilities (z).

So, also, in general, and unless under special circumstances, the character of ships depends on the national character of the owner, as ascertained by his domicile; but if a vessel is navigating under the flag and pass of a foreign country, she is to be considered as bearing the national character of the country under

National  
character of  
ships.

(z) *Thirty Hogsheads of Sugar (Bentzon v. Boyle)* (1815), 9 Cranch, 191.

whose flag she sails: she makes a part of its navigation, and is in every respect liable to be considered as a vessel of the country; for ships have a peculiar character impressed upon them by the special nature of their documents, and are always held to the character with which they are so invested, to the exclusion of any claims of interest which persons resident in neutral countries may actually have in them. But where the cargo is laden on board in time of peace, and documented as foreign property in the same manner with the ship, with the view of avoiding alien duties, the sailing under the foreign flag and pass is not held conclusive as to the cargo. A distinction is made between the ship, which is held bound by the character imposed upon it by the authority of the Government from which all the documents issue, and the goods, whose character has no such dependence upon the authority of the State. In time of war a more strict principle may be necessary; but where the transaction takes place in peace, and without any expectation of war, the cargo ought not to be involved in the condemnation of the vessel, which, under these circumstances, is considered as incorporated into the navigation of that country whose flag and pass she bears (a).

The Declaration of London, 1909 (the outcome of a conference of the leading maritime Powers, 1908—1909), affirms the established test of the flag. Thus Article 57 says, that subject to the provisions respecting transfer of flag (b), the neutral or enemy character of a vessel is determined by the flag which she has the right to fly.

The flag as evidence of ship's nationality.

An exceptional case was decided by the French Prize Court (the Conseil des Prises) in 1872, in which the flag carried by the vessel was held not to be conclusive as to her national character. The *Palme* was, in 1871, captured by a French cruiser, on a voyage from Acera to Bremen. She carried the German flag, and was therefore *primâ facie* lawful prize. Evidence was produced which showed that the *Palme* was a German-built vessel; that in 1866 she was sold to the Société du Commerce des Missions Protestantes, a Swiss corporation; and that she still belonged to the Société at the time of capture, though she then carried the German flag. It also appeared that the Swiss Federal Council did not permit Swiss subjects to fly the Federal flag, and that France had, in 1854, refused to acknowledge any Swiss maritime flag. Thus, the Société being compelled to sail its ship under some flag,

(a) *The Vigilantia*, 1 C. Rob. 1; Ad. 131.  
*The Vrow Anna Catharina* (1806), 5 C. Rob. 161; *The Success*, 1 Dods. (b) See *infra*, p. 572.



that of Germany had been retained. In order to do this, the ship was nominally assigned to an agent of the Société at Bremen, while the real owners were the Société itself. Under these circumstances, the vessel being in reality owned by Swiss, and consequently neutral subjects, the Conseil des Prises held that she was not a German vessel, and therefore restored her to the owners, reversing the decree of the Court below (*c*).

By the law of England, no ship shall be deemed to be a British ship unless she belongs wholly to owners of the following description:—1. Natural born British subjects. 2. Persons made denizens or naturalized, by letters of denization, or by Act of Parliament, or the proper authority in any British possession. 3. Bodies corporate established under, and subject to the laws of, and having their principal place of business in the United Kingdom or some British possession (*d*). If any person uses the British flag and assumes the British national character on board any ship owned in whole or in part by any persons not entitled by law to own British ships, for the purpose of making such ship appear to be a British ship, such ship shall be forfeited to His Majesty, unless such assumption has been made for the purpose of escaping capture by an enemy, or by a foreign ship of war in exercise of some belligerent right; and in any proceeding for enforcing any such forfeiture, the burden of proving a title to use the British flag and assume the British national character shall lie upon the person using and assuming the same (*e*). When a ship has become forfeited for such an offence, she may be seized by the Crown whenever she returns within British jurisdiction, and even if transferred to a *bonâ fide* purchaser (*f*).

Ownership of  
British ships.

We have already seen that no commercial intercourse can be lawfully carried on between the subjects of States at war with each other, except by the special permission of their respective Governments. As such intercourse can only be legalized in the subjects of one belligerent State by a license from their own Government, it is evident that the use of such a license from the enemy must be illegal unless authorized by their own Government; for it is the sovereign power of the State alone which is competent to act on the considerations of policy by which such

Sailing under  
the enemy's  
license.

(*c*) Dalloz, *Jurisprudence Générale* (1872), Pt. III. p. 94.

(*d*) 57 & 58 Vict. c. 60, s. 1; and see Scrutton, *Merchant Shipping Act*, 1891, p. 8.

(*e*) 57 & 58 Vict. c. 60, s. 69; and see Scrutton, p. 55; *R. v. Seberg*, L. R. 1 C. C. R. 264.

(*f*) *The Annandale*, 2 P. D. 218.

an exception from the ordinary consequences of war must be controlled. And this principle is applicable not only to a license protecting a direct commercial intercourse with the enemy, but to a voyage to a country in alliance with the enemy, or even to a neutral port; for the very act of purchasing or procuring the license from the enemy is an intercourse with him prohibited by the laws of war; and even supposing it to be gratuitously issued, it must be for the special purpose of furthering the enemy's interests, by securing supplies necessary to prosecute the war, to which the subjects of the belligerent State have no right to lend their aid by sailing under these documents of protection (*g*).

The Continental view and Art. 23 (*h*) of the Hague Regulations.

The continental view as to the effect of war on commercial intercourse has, on the whole, been contrary to that of the Anglo-American Courts; that is, commercial intercourse was not regarded as being necessarily prohibited on the outbreak of war, but its interdiction depended on special provisions to that effect. Moreover, it has recently been held on the continent that this latter doctrine was adopted by the representatives of the States of the world assembled at the Hague, 1907, inasmuch as a right to appear in Court on the part of an enemy alien was alleged to have been recognised. The Article in question, 23 (*h*), says that it is forbidden to declare extinguished, suspended, or unenforceable in a court of law the right or rights of action of the subjects of the hostile party. The wide sense claimed for this rule by continental writers could not possibly have been accepted by the British delegates, in view of the long-established rule of English common law. On more than one occasion, however, the British Foreign Office clearly intimated that Article 23 (*h*) concerns only the obligations of an invading commander (*h*); and this interpretation was supported by United States authorities, including General Davis, one of the American plenipotentiaries at the Hague Conference (*i*).

Illustrations furnished during the Great War, 1914.

With regard to the immediate effects of war on commercial intercourse, the Anglo-American principle expounded above received numerous illustrations in the Great War, 1914. (It may be added that owing to wide difference of opinion and diversity of practice among the States of the world, these principles cannot be regarded as universal or even general principles of inter-

(*g*) *The Julia*, 8 Cranch, 181; *The Aurora*, 8 Cranch, 203; *The Ariadne*, 2 Wheaton, 143; *The Caledonia*, 4 Wheaton, 100.

(*h*) Cf. a communication made by the Foreign Office; in *Zeitschrift für*

*Völkerrecht und Bundesstaatsrecht*, vol. v. (1911), pp. 389—391. See also, *infra*, p. 466, the decision of the Court of Appeal.

(*i*) See *Amer. Journ. of Int. Law*, vol. ii. (1908), p. 70.

national law; they depend, rather, on the provisions of municipal jurisprudence.)

As soon as the war broke out (Aug. 4), a rapid succession of British Proclamations, Acts, Orders, and regulations appeared (*k*): Prohibitions were imposed on trading with "alien enemies." An official announcement (Aug. 22), interpreting the Proclamation (of Aug. 5), adopted the test of commercial or war domicile for determining enemy or neutral character. Thus a foreign trader, though an enemy subject, residing and carrying on business in neutral territory, was not to be considered an alien enemy; so that the interdiction of trading with "alien enemies" did not apply to him. Trading with a branch firm in a friendly country, when the principal house of business was in enemy territory, was in general permitted, so long as no transactions with the principal house were involved. Commercial contracts made before the war with firms or persons in enemy territory were not to be executed during the war, and payments under them were not to be made, except for goods already delivered and services already rendered. Dividends accrued due to alien enemies since the outbreak of war were not to be paid; such as were declared before the war were sequestered during the war. Transfers of shares and debentures from enemy aliens to friendly or neutral subjects were not to be registered. Indulgences at first permitted were soon discontinued by later Proclamations, which forbade the discharge of debts due to persons in the enemy country before the war, the acceptance, payment, or dealing with negotiable instruments held by or on behalf of an enemy, the making or honouring of contracts of insurance and re-insurance with or for the benefit of the enemy. The making of certain payments was licensed by departmental Orders, which were meant to benefit British merchants. A great many other regulations were enforced; indeed, their multiplicity and complexity were well-nigh overwhelming.

The interpretation of the term "alien enemy" gave rise to doubt and difficulty. Different definitions were attached thereto in different contexts. Thus, the Aliens Restriction Order (August 5) defined it in the broad sense as "an alien whose sovereign or State is at war with His Majesty." The Patents, &c. Amendment Act, August 28, adopted the commercial application, and so considered also as alien enemies British companies controlled by, or wholly or mainly carried on for the benefit of

Meaning of  
"alien  
enemy."

(*k*) See Manual of Emergency Phillipson, *Int. Law and the Great War* (1915), pp. 100 *seq.*  
Legislation (1914), ed. A. Pulling;



enemy subjects. Again, the Proclamation of September 9, whilst including under the designation of "enemy," persons or bodies of persons resident or carrying on business in the enemy country, expressly excluded persons of enemy nationality who neither reside nor carry on business in the enemy country, and declared only such companies as were incorporated in an enemy country to be vested with enemy character.

In *Ingle v. Continental Insurance Company of Mannheim* (l), it was held that the defendant company was not an "alien enemy" for the purpose of enforcing a policy of insurance effected before the war through underwriters employed by the company in this country. The principle governing the decision was that the company was not divided from us, as regards this business, by the "war line," which alone, and not necessarily domicile or nationality, was the test of enemy character, at least for commercial purposes.

In *Duncan, Fox & Co. v. Schrempt and Bonke* (m), goods were shipped before the war, under a contract between two British firms, and were to be delivered at Hamburg. The buyers refused, after the outbreak of war, to accept the tender of the documents or to pay for the goods. It was held that the refusal was justified.

In *Amorduct Manufacturing Co. v. Defries & Co.* (n), an English company, the bulk of whose shareholders were alien enemies, sued for the price of goods. The defendants contended that the action was not maintainable, as the majority of the shareholders in the plaintiff company were alien enemies. But the Court held that as it was registered here according to English law it was an English company, and therefore was not debarred from suing.

A similar point arose in *The Continental Tyre and Rubber Co. v. Thomas Tilling* (o). The plaintiff company—a branch of a German parent company—was registered here; the greater part of its shares were held by the German company, and all the rest, except one, by Germans resident in this country. The plaintiff company sued for the price of goods sold and delivered before the war; but the defendants pleaded that the payment would be illegal, as it would enure to the benefit of alien enemies. The Court held, however, that if nationality were the criterion, the plaintiff company was English; and the transaction was not for-

(l) (1914), 31 T. L. R. 41.  
(m) (1914), 31 T. L. R. 66.

(n) (1914), 31 T. L. R. 69.  
(o) (1914), 31 T. L. R. 77.

bidden by any Act or Proclamation. Besides, the case could be decided on a broader ground: the purchase by a British subject of goods from an alien enemy was not against public policy, where the vendor and the disposition of the price to be paid were under the control of the laws of this country; it was sending the money to the enemy country that would benefit the enemy. This decision was upheld in the Court of Appeal, Buckley, L. J., dissenting (*p*).

In several cases the question of the *locus standi* of alien enemies arose. The plaintiff in *Princess Thurn and Taxis v. Moffitt* (*q*), sought to restrain the defendant from continuing certain alleged libels; but the defendant urged that the plaintiff, being an alien enemy, was not entitled to relief in our courts. Held, that the plaintiff having duly registered herself, came under the King's protection, and acquired the right to enforce her claim.

*Locus standi*  
of enemy  
aliens.

In *Robinson & Co. v. Continental Insurance Co. of Mannheim* (*r*), the defendants pleaded that as they were alien enemies they were debarred from appearing in the courts here during the war, and asked that proceedings against them should be stayed. The Court held that to suspend a subject's right of suit against an alien enemy is to injure a British subject and favour an alien enemy, so that the object and reason of the suspensory rule would be defeated, by turning a disability into a relief. Hence an alien enemy could appear as a defendant.

The question of the *locus standi* of an enemy claimant came before the Prize Court in the case of *The Mōwe* (*s*). An enemy owner of the vessel claimed exemption from capture under the sixth Convention of the Hague (1907). The President, in the course of his judgment, pointed out that no rule of international law gave an enemy shipowner the right to appear in our Prize Courts to support a claim to immunity from capture. But the Court being empowered to regulate its practice in accordance with the demands of justice and equity, decided to allow an alien enemy to appear and support his claim when he considered himself entitled to any protection, privilege, or relief under any of the Hague Conventions of 1907.

The whole question of the *locus standi* of enemy aliens formed the subject of an authoritative judicial decision of the Court of

(*p*) See Phillipson, *Int. Law and the Great War*, pp. 107, 108, where the dissenting judgment is shown to be the more rational view.

(*q*) (1914), 31 T. L. R. 24.  
(*r*) (1914), 31 T. L. R. 20.  
(*s*) (1914), 31 T. L. R. 46.

Appeal (*t*). The Lord Chief Justice, delivering the unanimous judgment of the Court, said, that the term "alien enemy," when used in regard to civil rights and obligations, does not mean merely a person of enemy nationality, but applies also to a British or neutral subject voluntarily resident in enemy territory. The test is not nationality, but the place of carrying on business (*u*). Hence, for the purpose of enforcing civil rights, a person of British or neutral nationality may be regarded as a subject of an enemy State; and conversely, a person of enemy nationality may be regarded as a subject of the Crown (*x*). Alien enemies have no civil rights, unless they are here by permission and under the protection of the Crown. Under the old common law an alien enemy's goods or debts found within the realm were liable to confiscation (*y*). Whether the right of confiscation was exercised or not, there was no doubt that it existed (*z*). In early days, however, the severity of the rule was relaxed in favour of those who had the King's permission to come here. The decision in the recent case *Princess Thurn and Taxis v. Moffitt* (*a*) was right, because the plaintiff, being an enemy alien, was resident here by tacit permission of the Crown.

As to the bearing on these questions of Article 23 (h) of the Hague Regulations (1907), the old rule of the English common law is not thereby affected. The clause forbids a declaration abolishing, suspending, &c. the right of enemy subjects to institute legal proceedings. But in England there is no room for such a declaration; for by the existing English law the outbreak of war operates *ipso facto* to suspend an alien enemy's right of action. And this was recognised by German jurists. Moreover, the context shows that the paragraph refers only to the conduct of an army and its commander in the field and in occupied territory. In 1911 the Foreign Office publicly stated that it had no concern with municipal law.

Is an alien enemy liable to be sued during the war? It is contrary to public policy to allow an alien enemy an immunity from paying just debts or demands due to British or neutral subjects. This view was rightly adopted in a recent case (*b*). Therefore,

(*t*) *Porter v. Freundenberg, &c.* (1915), 31 T. L. R. 162.

(*u*) Cf. *Janson v. Driefontein Mines* (1902), App. C. 484.

(*x*) *Ibid.* per Lord Lindley.

(*y*) Hale, Pleas of the Crown, I. 95.

(*z*) Cf. *Wolff v. Ozholm* (1817), 6 M. & S. 102, per Lord Ellenborough;

*Attorney-General v. Wheeden* (1699), Parker's Reports, 267; *Antoine v. Morshead* (1815), 6 Taunt. 238.

(*a*) See *supra*, p. 465.

(*b*) *Robinson & Co. v. Continental Ins. Co. of Mannheim* (1914), 31 T. L. R. 20; cf. *supra*, p. 465.



as an alien enemy may be sued, he may appear and be heard in his defence. If he is brought at the suit of a party before a Court of Justice, he must have the right to submit his answer to the Court. To deny him that right would be a denial of justice, contrary to the fundamental principles guiding the King's Courts in the administration of justice. If judgment is given against him, he is entitled, too, to resort to the Court of Appeal, so that an error, if any, may be rectified. On the other hand, where notice of appeal had been given before the war by a person, who on the outbreak of war becomes an alien enemy, the hearing of his appeal must be suspended until the conclusion of peace (c).

(c) In a later case decided during the Great War (September 29th, 1915), *Schaffenius v. Goldberg*, 50 L. J. Notes of Cases, 483, it was held that

the fact that an alien enemy is interned does not deprive him of the right to sue.

## CHAPTER II.

## RIGHTS OF WAR AS BETWEEN ENEMIES—LAND WARFARE.

Rights of war  
against an  
enemy.

IN general it may be stated that the rights of war, in respect to the enemy, are to be measured by the object of the war. Until that object is attained, the belligerent has, strictly speaking, a right to use every means necessary to accomplish the end for which he has taken up arms, so long as the means adopted is not contrary to existing law or repugnant to the general sense of mankind. We have already seen that the practice of the ancient world, and even the opinion of some modern writers on public law, made no distinction as to the means to be employed for this purpose. Even such institutional writers as Bynkershoek and Wolf, who lived in the most learned and not least civilized countries of Europe, at the commencement of the eighteenth century, assert the broad principle, that everything done against an enemy is lawful; that he may be destroyed, though unarmed and defenceless; that fraud, and even poison, may be employed against him; and that an unlimited right is acquired by the victor to his person and property. Such, however, was not the sentiment and practice of enlightened Europe at the period when they wrote, since Grotius had long before inculcated milder and more humane principles, which Vattel subsequently enforced and illustrated, and which are adopted by the unanimous concurrence of all the public jurists of the present age (a).

Limits to the  
rights of war  
against the  
person of an  
enemy.

The law of nature has not precisely determined how far an individual is allowed to make use of force, either to defend himself against an attempted injury, or to obtain reparation when refused by the aggressor, or to bring an offender to punishment. We can only collect, from this law, the general rule, that such use of force as is necessary for obtaining these ends is not forbidden. The same principle applies to the conduct of sovereign States existing in a state of natural independence with respect to each other. No

(a) Bynkershoek, *Quæst. Jur. Pub.* lib. i. cap. 1. Wolfius, *Jus. Gent.* lib. iii. cap. 4, §§ 5—7. Vattel, *Droit des Gens*, liv. iii. ch. 8. § 878. Grotius, *De Jur. Bel. ac Pac.*

use of force is lawful, except so far as it is necessary. A belligerent has, therefore, no right to take away the lives of those subjects of the enemy whom he can subdue by any other means. Those who are actually in arms, and continue to resist, may be lawfully killed; but the inhabitants of the enemy's country who are not in arms, or who, being in arms, submit and surrender themselves, may not be slain, because their destruction is not necessary for obtaining the just ends of war. Those ends may be accomplished by making prisoners of those who are taken in arms, or compelling them to give security that they will not bear arms against the victor for a limited period, or during the continuance of the war. The killing of prisoners can only be justifiable in those extreme cases where resistance on their part, or on the part of others who come to their rescue, renders it impossible to keep them. Both reason and general opinion concur in showing that nothing but the strongest necessity will justify such an act (*b*).

From the immense armies at present maintained by most European States, there seems to be little prospect of their resorting to anything but hostilities for the settlement of their differences. But there is a very widespread desire to alleviate the horrors of war as much as possible, and to confine its operation to disabling the enemy without inflicting unnecessary suffering upon him. Civilization has a double effect upon war. It tends to make men more humane, but it also enables them to devise more terrible engines of destruction. The result is that while civilized nations are continually adopting more and more terrible weapons for defending themselves or attacking others, they are at the same time endeavouring to establish rules of international law which shall make the use of their weapons as consistent with humanity as the nature of things will permit.

Tendency in modern warfare.

War is an abnormal condition of States, but it is not, for that reason, a condition of unrestrained lawlessness and license. Not everything may be done that impetuous fury may dictate. War is primarily a relation between States and Governments, represented in the conflict by definite military and naval forces; it is only secondarily a relation between the respective subjects individually. Peaceable and inoffensive inhabitants taking no part in the contest should be immune from attack. Neither person nor property should be injured or damaged, if the legitimate purpose of the belligerent is not thereby clearly promoted, and the overcoming of

Fundamental principles.

(*b*) Rutherford, Inst. b. ii. ch. 9, § 15. See *post*, pp. 476 *seq.*



his enemy not facilitated. The instruments of warfare should be such as do not inflict unnecessary or superfluous injury or damage. The object of a belligerent is obviously attained if he puts *hors de combat* the adversary; the infliction of unnecessary suffering is not indispensable to achieve this object. The principle of humanity condemns all instruments and methods of warfare that involve gratuitous cruelty, savagery, or treachery; it reprobates, therefore, the ill-treatment of the helpless and the disarmed, including the wounded and prisoners, the aged and feeble, women and children. The principle of chivalry calls for the maintenance of pledged faith, the fulfilment of promises and engagements, the manifestation of generosity at a moment of triumph.

When  
reprisals  
justifiable.

Where, however, one of the belligerents persistently disregards the principles and prescriptions of the laws and usages of war, the other is then entitled to adopt measures of reprisal, to compel the law-breaking combatant to discontinue his conduct, and to exact reparation. Such measures of retaliation may be proceedings that are either different in kind from or more severe than those sanctioned by law and custom for regular and legitimate warfare. They should be resorted to only on the authority of the Government or the commander after the truth of the enemy's guilt has been established, and after the enemy has been called upon to put a stop to his misconduct. They should not be applied merely in a spirit of vindictiveness; for their purpose is to obtain redress or ensure compliance with established rules. They ought not to be widely disproportionate to the offences committed; and, in general, they should not be incompatible with the conceptions of justice and humanity (c).

Some of the fundamental principles of warfare set forth above were recognised by the Declaration of St. Petersburg, 1868. It observed, in its preamble, that the progress of civilization should have the effect of alleviating as much as possible the calamities of war, and laid down that the only legitimate object which States should endeavour to accomplish during war is to weaken the military power of the enemy.

In the last quarter of the nineteenth century the movement for mitigating the severities of warfare and regularizing its proceedings by way of establishing a written code of law gathered force.

(c) Cf. the rules of the Instit. of Arts. 85, 86; in *Annuaire de l'Institut. de Droit Int.* vol. v. p. 174.

In 1874, a Conference, attended by delegates from all the countries of Europe, assembled at Brussels, on the invitation of the Emperor of Russia, for the purpose of discussing a project of international rules on the laws and usages of war. A series of rules on warfare on land was agreed to, but no international compact was entered into. "A careful consideration of the whole matter," wrote Lord Derby, "has convinced Her Majesty's Government that it is their duty firmly to repudiate, on behalf of Great Britain and her allies in any future war, any project for altering the principles of international law upon which this country has hitherto acted, and above all to refuse to be a party to any agreement the effect of which would be to facilitate aggressive wars, and to paralyse the patriotic efforts of an invaded people" (*d*). Nevertheless, though not absolutely binding, the rules were of great value in exhibiting the prevailing ideas in a definite form (*e*); and many of them found a place in the Manuals of War issued by most civilized Governments for the instruction of their officers in the field (*f*).

The Brussels Conference, 1874.

At the Hague Peace Conference of 1899, the representatives of all the States there assembled, with the exception of China, signed a Convention concerning the laws and customs of land warfare, which was based to a large extent on the Declaration of Brussels. It allowed the adhesion of non-signatory Powers and denunciation by any one of the signatories on a year's notice to the Netherlands Government (*g*). The Convention comprised a systematized body of regulations, and required the parties thereto to issue instructions to their land forces in conformity with these regulations.

Hague Conventions of 1899, 1907.

The Second Hague Conference, 1907, reaffirmed this requirement, and re-established the Regulations (incorporating in them various improvements and additions) in its Fourth Convention, of which the preliminary Articles are as follows:—

1. The contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention.

2. The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention.

(*d*) Lord Derby to Lord A. Loftus, 20th January, 1875. Hertslet, Map of Europe, vol. iii. p. 1976.

Papers, Miscellaneous (No. 1), 1875.

(*f*) Maine, Int. Law, lect. X. p. 176.

(*e*) The whole of the proceedings of the Conference will be found in Parl.

(*g*) Parliamentary Papers, Miscellaneous, No. 1 (1899) [Cd. 9534].

3. A belligerent party that violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

4. The present Convention, duly ratified, shall replace, as between the contracting Powers, the Convention of the 29th July, 1899, respecting the Laws and Customs of War on Land. The Convention of 1899 remains in force as between the Powers which signed it, but which do not ratify the present Convention (*h*).

Persons  
exempt from  
acts of  
hostility.

All the members of the enemy State may lawfully be treated as enemies in a public war; but it does not therefore follow, that all these enemies may be lawfully treated alike; though we may lawfully destroy some of them, it does not therefore follow, that we may lawfully destroy all. For the general rule, derived from the natural law, is still the same, that no use of force against an enemy is lawful, unless it is necessary to accomplish the purposes of war. The custom of civilized nations, founded upon this principle, has therefore exempted the persons of the sovereign and his family, the members of the civil government (though modern views would sanction the capture of the latter and their treatment as prisoners of war, inasmuch as the administration of the enemy State would be disorganized, and its military capacity indirectly diminished), women and children, cultivators of the earth, artisans, labourers, merchants, men of science and letters, and, generally, all other public or private individuals engaged in the ordinary civil pursuits of life, from the direct effect of military operations, unless actually taken in arms, or guilty of some misconduct in violation of the usages of war, by which they forfeit their immunity (*i*).

In earlier times the unarmed inhabitants of an invaded country were liable to be treated very much like the armed combatants; practices varied according as the commanders were chivalrous or ferocious and cruel. Mitigations were repeatedly urged by councils and writers; thus it was urged that ecclesiastics, merchants, farmers, shepherds, and all peaceful inhabitants should not be attacked, and that the women and children of even infidel nations should not be subjected to violence. In the Thirty Years' War the belligerent proceedings were marked by an atrocious and retro-

(*h*) Hague Conf. (1907), 4th Conv. Arts. 1—4.

(*i*) Rutherford, *Inst. b. ii. ch. 9, § 15. Vattel, Droit des Gens, liv. iii.*

ch. 8, §§ 145—147, 159. Klüber, *Droit des Gens Moderne de l'Europe, Pt. II. tit. 2, sect. 2, ch. 1, §§ 245—247.*



gressive character. Later, owing to the influence of jurists like Grotius, excesses in warfare came to be repugnant to the conscience of mankind; and, with the establishment of standing armies and development of military organization and discipline, various relaxations were gradually introduced. Thus, a distinction grew up between armed forces and non-combatants; and by the beginning of the eighteenth century it became a generally recognised rule that the civilian sections of a country, if they did not participate in the fighting, were to be exempt from deliberate attack. Next, the conception spread that war was primarily a relation between States, and not necessarily between their respective subjects individually. Rousseau's exposition of this doctrine (*k*) exerted some influence for good.

In the wars of the nineteenth century we find this progressive principle applied. Wellington, in his campaigns, refrained from making direct war on civilians. In the American Civil War, generals like McLellan and Lee called upon their men to respect the persons, property, and honour of the civil population. In 1866, Prince Frederick Charles proclaimed, on invading Saxony, that his war was not with the people, but with the Government. In the Franco-Prussian war, the King of Prussia proclaimed, August, 1870: "I make war against French soldiers, not against French citizens. The latter will therefore continue to enjoy security for their persons and property, so long as they themselves shall not, by hostile attempts against the German troops, deprive me of the right of affording them my protection." Instructions to the same effect were issued in the war between China and Japan, 1895, and in that between Russia and Japan, 1904. Similarly, in the South African war, General Buller and Lord Roberts issued proclamations promising security to non-combatants if they played no part in the military operations (*l*). We may recall, too, the Declaration of St. Petersburg, 1868 (already referred to), which emphasized that the only object of belligerent operations is to weaken the military forces of the enemy.

The effect of a state of war, lawfully declared to exist, is to place all the subjects of each belligerent Power in a state of mutual hostility. The usage of nations has modified this maxim by legalizing such acts of hostility only as are committed by those who are authorized by the express or implied command of the State. Such are the regularly commissioned naval and military

LAWFUL  
BELLIGERENTS.

(*k*) *Contrat Social*, Bk. I. chap. iv. on Land (London, 1911), pp. 35 *seq.*,  
(*l*) Cf. J. M. Spaight, *War Rights* and the references there cited.

forces of the nation, and all others called out in its defence, or spontaneously defending themselves in cases of urgent necessity, without any express authority for that purpose. Cicero tells us, in his *Offices*, that by the Roman feacial law, no person could lawfully engage in battle with the public enemy, without being regularly enrolled and taking the military oath. This was a regulation sanctioned both by policy and religion. The horrors of war would indeed be greatly aggravated, if every individual of the belligerent States was allowed to plunder and slay indiscriminately the enemy's subjects without being in any manner accountable for his conduct. Hence it is that in land wars, irregular bands of marauders are liable to be treated as lawless banditti, not entitled to the protection of the mitigated usages of war as practised by civilized nations (*m*).

The Hague Regulations of 1907 specify the qualifications of belligerents as follows:—

The status of belligerents.

“The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps, fulfilling the following conditions:—(1) To be commanded by a person responsible for his subordinates; (2) To have a fixed distinctive emblem recognisable at a distance; (3) To carry arms openly; and (4) To conduct their operations in accordance with the laws and customs of war. In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination ‘army’” (*n*).

Levy *en masse*.

“The population of a territory which has not been occupied who, on the enemy's approach, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents, if they carry arms openly, and if they respect the laws and customs of war” (*o*).

“The armed forces of the belligerent parties may consist of combatants and non-combatants. In case of capture by the enemy both have a right to be treated as prisoners of war” (*p*).

[The non-combatants here referred to include those who carry out auxiliary services, *e.g.*, driving baggage wagons, working field telegraphs, orderlies, clerks, bandsmen, members of the Red Cross service, the veterinary service, army chaplains, &c.]

These rules were in practice recognised long before the Hague

(*m*) Vattel, *Droit des Gens*, liv. iii. ch. 15, §§ 223—228. Klüber, *Droit des Gens Moderne de l'Europe*, § 267.

(*n*) H. C. (1907), iv. 1 (that is, the

Hague Conference of 1907, Fourth Convention, Article 1).

(*o*) H. C. (1907), iv. 2.

(*p*) H. C. (1907), iv. 3.

Conferences. But in the Franco-German war the Germans paid little heed to them. They required every captured combatant to prove he was a French soldier by showing that he belonged to an organized corps, and that he was called out by an order from the proper authority addressed to him personally; otherwise he was liable to be treated as a "war criminal," and not as a prisoner of war. Moreover, every combatant was required to wear an irremovable distinctive uniform or badge, clearly distinguishable at rifle distance—an exorbitant demand in days of long-distance firing. The Germans, too, refused for some time to recognise the belligerent status of the French National Guard, and an authorized class of francs-tireurs, though they were duly commissioned by their Government. Sherman's practice in the American Civil War was more in accordance with recognised principles. He considered as lawful belligerents all voluntary, irregular, or detached bodies of troops, provided they were of sufficient strength and were commanded by a leader appointed by the military authorities.

Countries possessing large regular armies, *e.g.*, Germany, have discountenanced levies *en masse*. The Article arrived at thus constitutes a compromise between the greater and the smaller continental Powers. Levies *en masse* are as old as war itself. Notable instances of spontaneous risings, on the approach of the enemy, occurred in Russia (1700) against Charles XII., in Prussia (1807) during the Napoleonic wars, in Spain (1808-12), in Russia (1812), in Prussia (1813). Examples occurred also in the Boer War, and at Niou-tsia-toun in the Russo-Japanese war.

It is to be noted that, despite established custom and the express sanction of the Hague Regulations, the German official manual of the laws of war on land (*Kriegsbrauch im Landkriege*)—issued conformably to the requirement of the Hague Conference—demands not only that arms should be carried openly and the laws and usages of war respected, but also that such levies should possess the further qualifications usual for the organized military forces. Further, at the beginning of the Great War, 1914, the Germans in their hostilities against Belgium refused to recognise the belligerent capacity of the Civic Guard and other combatants who satisfied the requirements of international law. Many of these were unjustifiably shot on the ground that they had committed acts of "war treason" (*Kriegsverrath*) (*q*).

The Germans in Belgium alleged that the civil population participated in the hostilities, and as a result great numbers of

(*q*) Cf. Phillipson, *Int. Law and the Great War*, pp. 122 *seq.*



civilians were put to death. The Belgian Government, however, denied the truth of these allegations, and pointed out that circulars had been issued to the 2,700 communes in Belgium, emphasizing the duties of the civil population, in accordance with the provisions of the Hague Regulations (*r*).

**Guerilla war.**

There is no rule of international law prohibiting guerilla warfare. Guerilla fighters must be regarded by the enemy as legitimate combatants if they fulfil the four conditions laid down in the first Article of the Convention quoted above.

**Use of semi-barbarous troops.**

Whether semi-barbarous or coloured troops may be used in war against white or civilized races depends also on their fulfilment of the same conditions. The employment of savage troops is illegitimate, if it is certain or highly probable that they will not remain subject to military discipline, and that they will get out-of-hand and act contrary to the established laws and customs of war. The melancholy effects of using bands of marauders and undisciplined troops were seen, for example, in the Russo-Turkish war, on which an indelible stain was fixed by the atrocities committed by Cossacks and Bulgarians in the service of Russia, and by Circassians and Bashi-Bazouks in that of Turkey. The employment of the Turcos by France in 1859 and 1870, of the negroes in the American Civil War and in the Spanish-American war, 1898, of the Kaffirs in the Anglo-Boer war, was by no means unlawful, whatever may be said against it on grounds of policy. In the Russo-Japanese war, Japan used the Manchurian bands of Chun-chuses, whom the Russians described as "barbarians, criminals, and pillagers"; but the Japanese authorities claimed that their use was covered by the Hague Regulations. In the Great War of 1914 the Turcos and Indian troops were properly employed, notwithstanding the remonstrances of the Germans. However, whatever may be said about "savage" and "barbarian" troops, the war of 1914 showed that the worst excesses of cannibals and scalp-hunting savages seem less atrocious than the many unspeakable horrors perpetrated by German soldiers (*s*).

**PRISONERS OF WAR.**

According to the law of war, as still practised by savage nations, prisoners taken in war are put to death. Among the more polished nations of antiquity, this practice gradually gave way to that of making slaves of them. For this, again, was substituted that of

(*r*) See Phillipson, *Int. Law and the Great War*, pp. 122 *seq.*

(*s*) See Phillipson, *Int. Law and the Great War*, *passim*. As to the

employment of semi-civilized troops, cf. Spaight, *War Rights on Land*, pp. 65 *seq.*

ransoming, which continued through the feudal wars of the middle ages, when the practice proved a source of enrichment to doughty warriors. Those who were not ransomed were frequently subjected to dreadful treatment. Whatever mitigations were introduced were due to the influence of chivalry, the Church, and jurists. Arrangements came to be made between the belligerent States themselves for the ransom of their respective prisoners of war. In the seventeenth century we find numerous treaties of this kind, which usually fixed a scale. The latest instance is that of 1780 between England and France, when an English admiral or a French marshal was valued at sixty men, lower ranks were assessed proportionately, and a man was estimated at a pound sterling (*t*). The present usage of exchanging prisoners was not firmly established in Europe until some time in the course of the seventeenth century. Even in modern times, this usage was not obligatory among nations who chose to insist upon a ransom for the prisoners taken by them, or to leave their own countrymen in the enemy's hands until the termination of the war. Cartels for the mutual exchange of prisoners of war are regulated by special convention between the belligerent States, according to their respective interests and views of policy. Sometimes prisoners of war are permitted, by capitulation, to return to their own country, upon condition not to serve again during the war, or until duly exchanged; and officers are frequently released upon their parole subject to the same condition. Good faith and humanity ought to preside over the execution of these compacts, which are designed to mitigate the evils of war, without defeating its legitimate purposes. By the modern usage of nations, commissaries are permitted to reside in the respective belligerent countries, to negotiate and carry into effect the arrangements necessary for this object. Breach of good faith in these transactions can be punished only by withholding from the party guilty of such violation the advantages stipulated by the cartel; or, in cases which may be supposed to warrant such a resort, by reprisals or vindictive retaliation (*u*).

The treatment of prisoners of war was regulated by the provisions of the Brussels Declaration of 1874, which were adopted, The Hague Rules.

(*t*) Cf. Manning, *Law of Nations*, bk. iv. chap. viii.

(*u*) Grotius, *de Jur. Bel. ac Pac.* lib. iii. cap. 7, §§ 8, 9; cap. 11, §§ 9—13. Vattel, *Droit des Gens*, liv. iii. ch. 8, § 153. C. Robinson's *Adm. Rep.* vol. iii. Note, Appendix A. Cor-

respondence between M. Otto, French Commissary of Prisoners in England, and the British Transport Board, 1801, *Annual Register*, vol. xlv. p. 265. (*State Papers.*) Wheaton, *Hist. Law of Nations*, pp. 162—164.

with additions and modifications, by the Hague Conference of 1899. The rules of the latter, again, were, with certain emendations, adopted by the Hague Conference of 1907; so that the regulations of the second Conference now constitute the law governing the subject.

Treatment of  
prisoners of  
war.

“Prisoners of war are in the power of the hostile Government, but not in that of the individuals or corps who captured them. They must be humanely treated. All their personal belongings, except arms, horses, and military papers, remain their property” (x).

In earlier times prisoners of war were in the power of the individual captors, as has already been seen in the observations on the former practice of ransom. In some quarters it is claimed that a commander is entitled to put prisoners to death in case of imperative necessity, *e.g.*, when their presence is dangerous to the existence of the captors and there is no means of keeping them (y). But the better and weightier opinion of to-day is contrary to this view. To violate the dictates of humanity (as Hall remarks) (z) is a greater evil than to increase the strength of the enemy. That is, if prisoners cannot be kept, they ought to be liberated. The Boers did so in the South African war; and the British did the same in the Crimean war.

Further, measures of reprisal ought not to be taken against prisoners of war because of illegitimate acts committed by the enemy, unless, perhaps, the acts in question are directed against the prisoners taken from the other belligerent. This amounts to retaliation in kind, which should not be resorted to if other means avail to cause the enemy to discontinue his reprehensible conduct.

If men are taken prisoners in the act of committing, or who had committed, violations of international law, they are not properly entitled to the privileges and treatment accorded to honourable prisoners of war. The fact that they acted under orders cannot furnish a valid excuse; for if such shifting of responsibility be admitted, then we arrive at the conclusion that millions of men, including responsible officers of the higher command, are to be held free from blame no matter what atrocious deeds they have perpetrated; and that only one person is answerable, namely, the

(x) H. C. (1907), iv. 4.

(y) See Bluntschli, *Das Moderne Völkerrecht*, § 580; and the German Official Manual (*Kriegsbrauch im*

*Landkriege*), p. 16.

(z) *International Law* (1909), p. 397.



monarch or president of the belligerent State, as the case may be. This is a conclusion which neither reason nor humanity can accept. During the Great War, a number of German officers and men were on one occasion rescued from a destroyed submarine, which had attacked and sunk without warning British merchantmen, and had fired torpedoes at ships carrying non-combatants, neutrals, and women. Such conduct is illegitimate, and is clearly a breach of existing law. Accordingly, the Board of Admiralty announced (March 8, 1915)—and justifiably so—that these prisoners would be debarred from certain privileges and courtesies that are extended to honourable combatants. Again, a German prisoner captured by the French was conclusively proved to have committed outrages on French wounded and robbed fallen men, and was therefore shot as a criminal. Similarly, German airmen having fallen into the hands of the Russians after throwing bombs on the open town of Libau were informed that they were liable to be treated as common outlaws (a). We may add that by way of retaliation for the British treatment—which was far from harshness—of the submarine prisoners, the German authorities selected an equal number of British prisoners (for the most part officers of distinguished families) and subjected them to a rigorous kind of incarceration. This was rather an exhibition of vindictiveness than a justifiable retort.

“Prisoners of war may be interned in a town, fortress, camp, or any other locality, and bound not to go beyond certain fixed limits; but they can only be confined as an indispensable measure of safety, and only while the circumstances which necessitate the measure continue to exist” (b). Internment.

“The State may utilize the labour of prisoners of war, other than officers, according to their rank and aptitude. Their tasks shall not be excessive, and shall have nothing to do with the military operations. Prisoners may be authorized to work for the public service, for private persons, or on their own account. 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; or, if there are no such tariffs in force, at rates proportional to the work executed. When the work is for other branches of the public service or for private persons, the conditions shall be settled in agreement with the military authorities. The wages of the prisoners shall go towards improving their position, and the Labour of prisoners.

(a) See Phillipson, *Int. Law and the Great War*, pp. 259 *seq.*

(b) H. C. (1907), iv. 5. As to

conditions of internment in England and Germany during the Great War, see Phillipson, p. 256.

balance shall be paid them at the time of their release, after deducting the cost of their maintenance" (c).

The exemption of officers from forced labour was an amendment adopted by the Hague Conference of 1907. The Japanese had already adopted the practice in regard to Russian officers in 1904 (d).

May prisoners be employed in the construction of fortifications? Prof. Holland holds that such work may be carried out, if at a distance from the scene of hostilities (e). The late Prof. Westlake thought otherwise (f), and this appears to be the better opinion. Such services as are of a neutral character, e.g., those connected with military hospitals and ambulances, may properly be imposed. The most suitable kinds of labour are those resorted to by Russia in the case of her prisoners taken in the Great War. Thus, it was announced that they were employed in different kinds of out-of-door labour, e.g., working on railways, making roads, building houses, planting trees, felling timber, ploughing and harvesting, constructing drainage works, &c.

Maintenance  
of prisoners.

"The Government into whose hands prisoners of war have fallen is bound to maintain them. Failing a special agreement between the belligerents, prisoners of war shall be treated as regards food, quarters, and clothing, on the same footing as the troops of the Government which has captured them" (g).

Discipline.

"Prisoners of war shall be subject to the laws, regulations, and orders in force in 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.

Escape.

Escaped prisoners, recaptured before they have succeeded in re-joining their army, or before quitting the territory occupied by the army that captured them, are liable to disciplinary punishment. Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment for the previous flight" (h).

The disciplinary punishment here referred to cannot be said to include the extreme penalty of death, though it might well be inflicted where the offence committed involved a serious plot, or riot, or rebellion. Such force as is found necessary may be employed to prevent the escape of a prisoner; and for this purpose violence resulting in the fugitive prisoner's death may be applied,

(c) H. C. (1907), iv. 6.

(d) Cf. Ariga, *La guerre russo-japonaise au point de vue de droit international* (Paris, 1907), p. 114.

(e) *The Laws of War on Land* (1908), § 27.

(f) *Int. Law*, vol. ii. p. 64.

(g) H. C. (1907), iv. 7.

(h) *Ibid.* 8.

if less severe measures prove inadequate. In the case of prisoners who have expressly undertaken not to escape, the German Manual allows the death penalty for a breach of parole.

“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 the prisoners of war of his class” (*i*). Declaration of rank and name.

Obviously, prisoners are not bound to furnish information on matters other than their rank and identity. It would be unlawful to inflict punishment or hardships on those prisoners who refuse to give such information.

“Prisoners of war may be set at liberty on parole if the laws of their country authorize it, and, in such a case, they are bound, on their personal honour, scrupulously to fulfil, both as regards their own Government and the Government by which they were made prisoners, the engagements they have contracted. In such cases, their own Government is bound neither to require of nor accept from them any service incompatible with the parole given” (*k*). Release on parole.

The conditions of the parole are a matter of arrangement between the captor and the prisoner. “The usual terms are,” as Westlake says, “that the prisoner, unless exchanged, will not serve during the existing war against the captor or his allies engaged in the same war; and this is understood to refer only to active service in the field, and not to debar the paroled prisoner from performing military or administrative duties of any kind at places not within the seat of actual hostilities” (*l*). Thus the French Official Manual allows prisoners released on such a parole to be employed in their country in instructing recruits in depôts, in working on fortified places that are not besieged, in maintaining public order, in fighting against other enemies, in fulfilling civil functions or diplomatic missions.

“A prisoner of war cannot be forced to accept his liberty on parole; similarly the hostile Government is not obliged to assent to the prisoner’s request to be set at liberty on parole” (*m*).

“Any prisoner of war, who is liberated on parole and recaptured bearing arms against the Government to whom he had pledged his honour, or against the allies of that Government, forfeits his right to be treated as a prisoner of war, and may be brought before the Courts” (*n*). Breach of parole.

(*i*) *Ibid.* 9.

(*k*) *Ibid.* 10.

(*l*) *Op. cit.* p. 65.

(*m*) *Ibid.* 11.

(*n*) *Ibid.* 12.



The Courts mentioned here refer to the military Courts (o).

Exchange of  
Prisoners.

It was stated above that in modern times the practice of ransom was replaced by that of exchange. Prisoners were exchanged in the American Civil War, in the Franco-German war; and, to a very small extent, in the Spanish-American war, Anglo-Boer war, Russo-Japanese war, and in the Great War, 1914, as between Great Britain and Germany (where a few wounded soldiers were involved, who were manifestly incapacitated from taking any further part in hostilities). It cannot be said, therefore, that the practice of exchange now exists, save in a very limited and sporadic form.

Army  
followers.

“Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers, contractors, who fall into the enemy’s hands, and whom the latter thinks fit to detain, have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying” (p).

This Article raises the question as to what persons may be made prisoners of war. Certain persons, belonging to the class of non-combatants, are indicated. Others we have mentioned above in connection with Article 3. It is held by some writers that persons whose services are requisitioned by an army temporarily—*e.g.*, guides, messengers—ought not to be made prisoners of war at all; for it would be difficult if not impossible to provide them with permits on account of the chance and temporary character of their employment, to which they are for the time being compelled. Leading members of the enemy Government, wherever found, whether armed or unarmed, may no doubt be taken prisoners, on the ground that their capture would tend to reduce the enemy’s resistance. The German Manual goes further, and allows the seizure of all persons whose liberty may be a source of danger to the opposing belligerent, *e.g.*, influential journalists, political personages, priests who might rouse the population. This practice, which was adopted by the Germans in Belgium and France during the Great War, is unjustifiable; not only did they arrest the persons indicated, they also seized large numbers of leading citizens and transported them to Germany. Press correspondents, though they are not expressly protected like the members of the medical and Red Cross service, ought not to be treated as strictly as ordinary prisoners of war. The captor ought to adopt no

(o) For practices in recent wars with regard to parole, see Spaight,

War Rights on Land, pp. 290 *seq.*  
(p) H. C. (1907), iv. 13.

other measures against them but those necessary for preventing their escape. In recent wars they have not infrequently been allowed to return by a circuitous route (*q*).

“A Bureau for information relative to prisoners of war is instituted, on 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 the prisoners, to receive from the various services concerned full information respecting internments and transfers, releases on parole, exchanges, escapes, admissions into hospital, deaths, as well as all other information necessary to enable it to make out and keep up to date an individual return for each prisoner of war. The Bureau must state in this return the regimental number, name and surname, age, place of origin, rank, unit, wounds, date and place of capture, internment, wounding, and death, as well as any observations of a special character. The individual return shall be sent to the Government of the other belligerent after the conclusion of peace. It is also the duty of the Information Bureau to receive and collect all objects of personal use, valuables, letters, &c., found on the battlefields or left by prisoners who have been released on parole, or exchanged, or who have escaped, or died in hospital or ambulance, and to transmit them to those interested” (*r*).

Bureau of information.

“Relief societies for prisoners of war, which are regularly constituted in accordance with the law of the country with the object of serving as the intermediary 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 these societies may be admitted to the 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, and on giving an engagement in writing to comply with all their regulations for order and police” (*s*).

Relief societies.

“The Information Bureau shall have the privilege of free postage. Letters, money orders, and valuables, as well as postal parcels destined for the prisoners of war, or despatched by them, shall be free of all postal charges, both in the countries of origin and destination, as well as in those they pass through. Gifts and

Free postage.

(*q*) For the practice of Japan in chap. v.  
the Russo-Japanese war, cf. Takahashi, (*r*) H. C. (1907), iv. 14.  
Int. Law applied to the R.-J. War, (*s*) *Ibid.* 15.

relief in kind for prisoners of war shall be admitted free of all import and other duties, as well as of payments for carriage by the Government railways" (*t*).

The Article makes no provision for the censorship of correspondence; but, obviously, prisoners' letters are subject to censorship. The practice was in force in previous wars; and in the Great War of 1914 it assumed elaborate proportions.

Payment of officers.

"Officers taken prisoners shall receive the same rate of pay as officers of corresponding rank in the country where they are detained, the amount to be repaid by their Government" (*u*).

Such repayment is clearly subject to the stipulations arrived at in the treaty of peace. Thus in the Treaty of Portsmouth it was provided (Article 13) that Russia should repay Japan the difference between the actual amount so expended by Japan and the actual amount similarly expended by Russia.

Freedom of worship.

"Prisoners of war shall enjoy every latitude in the exercise of their religion, including attendance at their own church services, provided, only they comply with the regulations for order and police issued by the military authorities" (*x*).

Wills.

Death certificates.

"The wills of prisoners of war are received or drawn up on the same conditions as for soldiers of the national army. The same rules shall be observed regarding death certificates, as well as for the burial of prisoners of war, due regard being paid to their grade and rank" (*y*).

Repatriation.

"After the conclusion of peace the repatriation of prisoners of war shall take place as speedily as possible" (*z*).

THE SICK AND WOUNDED.

It has long been an established usage of war that sick or wounded combatants should not be illtreated by the enemy. Various measures of alleviation were from time to time introduced; and religious bodies came to undertake regularly the task of tending those who were disabled by wounds or by disease. Treaties were also frequently concluded between States to ensure aid and protection to soldiers disabled in war between the signatory parties. The eighteenth century witnessed a progressive step, inasmuch as belligerents began to tend the adversary's wounded, irrespectively of treaty obligations.

About the middle of the nineteenth century began a movement in several countries in Europe with the object of setting up an international medical and sanitary organization. In 1863 a semi-

(*t*) H. C. (1907), iv. 16.

(*u*) *Ibid.* 17.

(*x*) *Ibid.* 18.

(*y*) *Ibid.* 19.

(*z*) *Ibid.* 20.



official Conference was held at Geneva, where it was proposed that every country should establish aid societies, and that medical services should be marked by a distinctive emblem and neutralized. At the invitation of the Swiss Government, representatives of sixteen States met at Geneva (1864) and produced the Geneva Convention, to which other States afterwards acceded. Belligerents were thereby required to protect the sick and wounded regardless of their nationality, and to send them back to their own country when they recovered and were unfit for further service. As a compliment to Switzerland, the distinctive device adopted was a red cross on a white ground, which was formed by reversing the Swiss colours; and the use of this emblem rendered inviolable hospitals, ambulances, their material and staff. In 1868 a further Convention was arrived at, applying these rules to naval warfare. In course of time, improvements were found necessary, and in 1899 the subject was considered at the Hague Conference.

Geneva  
Conventions.

In 1906, the delegates of thirty-five Powers assembled in Switzerland, and established a considerably amended Convention, which is now binding on all the States that have signed and ratified it; though the Convention of 1864 remains obligatory on those Powers that have not acceded to that of 1906, provided, of course, they are signatories of the earlier Convention. It may be confidently assumed, however, that the provisions laid down will, by reason of their world-wide recognition, possess binding force even in the case of such States as have not yet signified their formal adherence thereto. The principles of this Convention were applied to naval warfare by the second Hague Conference, 1907. The latter will be dealt with later; for the present we may consider the provisions for land warfare contained in the Geneva Convention, 1906. Article 21 of the Fourth Convention of the Hague Conference, 1907, says: "The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention" [that is, that of 1864 or 1906 as the case may be].

"Officers and soldiers, and other persons officially attached to armies, shall be respected and cared for by the belligerent in whose power they are, without distinction of nationality.

Treatment of  
the sick and  
wounded.

Nevertheless, a belligerent who is compelled to abandon sick and wounded to the enemy shall, as far as military exigencies permit, leave with them a portion of his medical personnel and material to aid in caring for them." (Article 1.)

The important point in this Article is to determine the meaning of "sick and wounded," in order to know when protection is demanded. It is clear that the expression applies only to those

who, through sickness or wounds, are no longer able to continue fighting. Those who continue despite wounds are considered as active combatants, and are liable to be attacked as such.

“Subject to the treatment provided for them in pursuance of the preceding Article, the sick and wounded of an army who fall into the hands of the other belligerent are prisoners of war, and the general rules of international law concerning prisoners are applicable to them.

Belligerents are, however, free to arrange with one another such exceptions and mitigations with regard to the treatment of the sick and wounded prisoners as they may deem expedient. In particular, they will be at liberty to agree:—

- (1) to restore to one another the wounded left on the field after a battle;
- (2) to repatriate the sick and wounded whom they do not wish to retain as prisoners after rendering them fit for removal or after their recovery;
- (3) to hand over to a neutral State, with the latter's consent, the enemy's sick and wounded to be interned by the neutral State until the end of hostilities.” (Article 2.)

The three suggestions made in this Article are, obviously, not intended to be exhaustive. Subject to the fundamental principles of the Convention the opposing commanders are free to come to whatever arrangements they deem fit, in order to advance the interests of the sick and wounded. As the sick and wounded are prisoners of war, and, therefore, as such, liable to rather severe treatment, the commanders may, then, well agree to mitigate mutually some of the attendant rigours.

“After each engagement the commander in possession of the field shall take measures to search for the wounded, and to ensure protection against pillage and maltreatment, both for the wounded and the dead.

He shall see to it that a careful examination of the bodies is made before the dead are buried or cremated.” (Article 3.)

The dead.

“Every modern war . . . has seen wounded men left untended after battle, in agony from wounds, pain, and thirst, perishing of exhaustion, of starvation, of the violence of marauders, of the chill of frost or the heat of accidentally kindled fires. No international agreement will ever make such things as these utterly impossible” (a). In certain circumstances it may not be possible to take up the casualties after a conflict, *e.g.*, when a belligerent

(a) Spaight, War Rights on Land, p. 427.

holds a strategic position and whose defence works he guards so jealously that he will not permit the enemy's search-parties to approach his line, for fear that they might at the same time gain valuable information. Many instances of this kind occurred in the South African war and in the Russo-Japanese war. As to the collection and disposal of the dead, the regulations issued by the Japanese authorities in the latter war marked a humane and enlightened departure (*b*). So far as possible, the mode of burial should be that in force in the country of the deceased. Thus the Japanese buried the Russian dead and performed appropriate obsequies, although cremation is the regular practice in their own country.

“ Each belligerent shall, as soon as possible, send to the authorities of the country or army to which they belong the military identification marks or tokens found on the dead, and a list of the names of the sick or wounded collected by him. Exchange of information.”

The belligerents shall keep each other mutually informed of any internments and transfers, as well as of admissions into hospital and deaths among the sick and wounded in their hands. They shall collect all the articles of personal use, valuables, letters, &c., found on the field of battle or left by the sick or wounded who have died in the medical establishments or units, in order that such articles may be transmitted to the persons interested by the authorities of their own country.” (Article 4.)

The obligation laid down in this Article refers, clearly, to the sick, wounded, and fallen belonging to the enemy, for the duties of a belligerent towards his own sick, wounded, and fallen are prescribed by his own municipal law and military regulations.

There are few wars in which combatants have not sheltered themselves behind wounded enemy soldiers; though there is no express injunction on the point in any convention, the practice is a violation of recognised usage and a cowardly breach of the dictates of humanity.

Again, to simulate sickness or wounds for a hostile purpose is not a legitimate ruse of war, and is punishable as a war crime.

“ The competent military authority may make an appeal to the charitable zeal of the inhabitants to collect and take care of, under his direction, the sick and wounded of armies, granting to those who respond to the appeal special protection and certain immunities.” (Article 5.)

(*b*) Cf. Hershey, *Russo-Japanese War*, pp. 291 *seq.*; Ariga, *La guerre russo-japonaise*, pp. 154 *seq.*



This Article is also a suggestion which commanders may, in their discretion, carry out. Supervision is necessary to prevent pillage and espionage.

Medical units  
inviolable.

“Mobile medical units (that is to say, those which are intended to accompany armies in the field) and the fixed establishments of the medical service shall be respected and protected by the belligerents.” (Article 6.)

The expressions used in this Article replaced the terms ‘ambulances’ and ‘military hospitals’ respectively, which were adopted by the Geneva Convention of 1864. Despite the distinction made in Article 6, it is difficult to draw a sharp line of demarcation between mobile medical units and fixed establishments. Prof. Holland, who was one of the British representatives at Geneva, says that mobile medical units include “all organizations which follow the troops on the field of battle (described in the British army as ‘bearer companies’ or ‘field hospitals’); while ‘fixed establishments,’ which might perhaps have been better described as ‘fixed units,’ would cover ‘stationary’ or ‘general’ hospitals (whether actually movable or not), placed on a line of communications, or at a base” (c).

When pro-  
tection ceases.

“The protection to which medical units and establishments are entitled ceases if they are used to commit acts injurious to the enemy.” (Article 7.)

“The following facts are not considered to be of such a nature as to deprive a medical unit or establishment of the protection guaranteed by Article 7:—

(1) That the personnel of the unit or of the establishment is armed, and that it uses its arms for its own defence or for that of the sick and wounded under its charge.

(2) That in default of armed orderlies the unit or establishment is guarded by a picket or by sentinels duly authorized.

(3) That arms or cartridges taken from the wounded and not yet handed over to the proper authority are found in the unit or establishment.” (Article 8.)

From the above it is clear that a medical unit, though it is not entitled to adopt measures of offence, is permitted to defend itself, if attacked, without thereby being deprived of the right of respect and protection. Thus, in the Russo-Japanese war, a Japanese sanitary corps having been attacked by a band of retreating Russians, charged the assailants and even made them prisoners (d).

(c) Laws of War on Land (1908), p. 30. Cf. Spaight, *op. cit.* p. 437.

(d) Cf. Ariga, *La guerre russo-japonaise*, pp. 207 *seq.*

The meaning of the second proviso in the Article is that if the sentinels cannot produce a due authority they are liable to be taken as prisoners of war (conformably to the following Article); if they can, then they are to be released.

“The personnel engaged exclusively in the collection, transport, Personnel. and treatment of the sick and wounded, as well as in the administration of medical units and establishments, and the chaplains attached to armies, shall be respected and protected under all circumstances. If they fall into the hands of the enemy, they shall not be treated as prisoners of war.

These provisions apply to the personnel of the guard of medical units and establishments under the circumstances indicated in Article 8 (2).” (Article 9.)

The use in this Article of the word ‘exclusively’ indicates that protection will not be extended to soldiers who are detailed temporarily to assist as sick orderlies. Those who give only occasional help are liable, if captured, to be treated as prisoners of war. The immunity conferred on the regular and permanent personnel is conditional on their not participating in operations hostile to the enemy’s interests, including such acts as the transmission of letters or messages.

The personnel of voluntary aid societies, duly recognised and Aid societies. authorized by their Government, who are employed in the medical units and establishments of armies, is placed on the same footing as the personnel referred to in the preceding Article, provided always that the said personnel shall be subject to military law and regulations.

“Each State shall notify to the other, either in time of peace or at the commencement of or during the course of hostilities, but in any case before actually employing them, the names of the societies which it has authorized, under its responsibility, to render assistance to the regular medical service of its armies.” (Article 10.)

“This Article makes it quite clear that Red Cross, or aid, societies, unless affiliated to the regular medical organization of one or the other belligerent, and subject to its military law, enjoy none of the benefits conferred by the Convention. . . . It makes no difference whether or not they are recognised by the Government of the State to which they belong, as available when needed for service with its own armies” (e).

“A recognised society of a neutral country can only afford the assistance of its medical personnel and units to a belligerent with

(e) Holland, *op. cit.* § 51.

the previous consent of its own Government and the authorization of the belligerent concerned.

A belligerent who accepts such assistance is bound to notify the fact to the adversary before making any use of it." (Article 11.)

Obviously this Article imposes no obligation on the other belligerent to allow passage to neutral aid societies intending to join the enemy. Thus in the Anglo-Boer war Great Britain refused to accede to the application of several foreign ambulances for permission to join her enemy, because an ambulance that had before then obtained leave was found to be the bearer of messages to Boer combatants. Similarly in 1896 Italy refused to allow a Russian Red Cross Society to proceed to Abyssinia. Neutral aid societies are bound to assist the belligerents impartially. But the nature and the extent of the assistance depend obviously on the needs of the particular belligerent. In recent wars there have been several instances where a neutral Red Cross Society was debarred from sending aid to a belligerent whom it intended to serve, because it was unable to render similar assistance to the other (*f*).

"The persons designated in Articles 9, 10, and 11, shall continue, after they have fallen into the hands of the enemy, to carry on their duties under his direction.

Rights of the  
personnel.

When their assistance is no longer indispensable, they shall be sent back to their army or to their country at such time and by such route as may be compatible with military exigencies.

They shall then take with them such effects, instruments, arms, and horses as are their private property." (Article 12.)

Under the old Convention, the personnel could, in the circumstances indicated in this Article, withdraw at once, though special engagements were sometimes concluded to secure a continuation of their services; but under the present Convention the persons designated who fall into the enemy's hands may be compelled by him to continue their duties, so long as their services are indispensable. Whilst the material of voluntary aid societies is liable to be requisitioned (in accordance with Article 16), that of the personnel is inviolable.

"The enemy shall secure to the persons mentioned in Article 9, while in his hands, the same allowances and the same pay as are granted to the persons holding the same rank in his own army." (Article 13.)

This Article does not apply to persons associated to voluntary aid societies.



“If mobile medical units fall into the hands of the enemy they shall retain their material, including their teams, irrespectively of the means of transport and the drivers employed. Material.

Nevertheless, the competent military authority shall have the right to use the material for the treatment of the sick and wounded. It shall be restored under the conditions laid down for the medical personnel, and so far as possible at the same time.” (Article 14.)

The units mentioned in this Article “are to retain their material, &c., irrespectively of its character, *i.e.*, although portions of it have been borrowed from military units or obtained by requisition from the inhabitants of the country” (*g*). A captor is not necessarily debarred, under this provision, from using in case of necessity some of the material of a medical unit for the benefit of his own wounded.

“The buildings and material of fixed establishments remain subject to the laws of war, but may not be diverted from their purpose so long as they are necessary for the sick and wounded.

Nevertheless, the commanders of troops in the field may dispose of them, in case of urgent military necessity, provided they make previous arrangements for the welfare of the sick and wounded who are found there.” (Article 15.) Liability of  
Red Cross  
material.

It is clear here that when a belligerent militarily occupies territory of the enemy, fixed establishments pass with it to the invader. They are liable to confiscation; but not to diversion from their purpose, if they contain sick and wounded, unless military exigencies demand, and then only if other provision is made. Civil hospitals, even if belonging to the State, would, unlike these military establishments, be free from confiscation.

“The material of voluntary aid societies which are admitted to the privileges of the Convention under the conditions herein prescribed, is considered private property, and, as such, is to be respected under all circumstances, saving only the right of requisition as recognised for belligerents in accordance with the laws and usages of war.” (Article 16.)

“Medical stores, drugs, &c., except those held by a mobile medical unit or a convoy of evacuation, are not protected by the Convention, and are subject to seizure just like any other army property” (*h*).

“Convoys of evacuation shall be treated like mobile medical units, subject to the following special provisions:— Convoys of  
evacuation.

(1) A belligerent intercepting a convoy may break it up if

(*g*) Holland, *op. cit.* § 55.

(*h*) Spaight, *op. cit.* p. 449. See *ibid.* for practices in recent wars.

military exigencies demand, provided he takes charge of the sick and wounded who are in it.

(2) In this case, the obligation to send back the medical personnel, provided for in Article 12, shall be extended to the entire military personnel detailed for the transport or the protection of the convoy and furnished with an authority in due form to that effect.

The obligation to restore the medical material provided for in Article 14 shall apply to railway trains and boats used in internal navigation, which are specially arranged for evacuation, as well as to the material belonging to the medical service for fitting up ordinary vehicles, trains, and boats.

Military vehicles, other than those of the medical service, may be captured with their teams.

The civilian personnel and the various means of transport obtained by requisition, including railway material and boats used for convoys, shall be subject to the general rules of international law." (Article 17.)

In the sense contemplated by this Article convoys of evacuation are convoys of sick and wounded in course of conveyance, by rail, road, or river. Under the earlier Convention they enjoyed an "absolute neutrality." To make the requisitioned personnel and material subject to international law implies that they may be requisitioned by the belligerent into whose hands they fall. A 'mixed' train, *i.e.*, one consisting not only of sick and wounded, but also of military persons and material, is not considered a convoy of evacuation, and therefore cannot claim protection. Thus in 1904 the Japanese at Port Arthur fired on a train flying the Red Cross flag, on the ground that it contained military persons, besides sick and wounded (*i*). A belligerent may stop a suspected hospital train, and may fire a warning shot to compel it to stop (*k*).

The emblem  
of the Red  
Cross.

"As a compliment to Switzerland, the heraldic emblem of the Red Cross on a white ground, formed by reversing the Federal colours, is retained as the emblem and distinctive sign of the medical service of armies." (Article 18.)

It is clear from the expressions used in this Article that the Red Cross emblem has no religious significance. It was thereby intended to conciliate the susceptibilities and allay the suspicions of Mohammedan countries. Turkey uses for the protection of her ambulances the device of the Red Crescent; and Persia uses the Lion and Sun.

(*i*) See Ariga, *op. cit.* § 48; Hershey, Russo-Japanese War, p. 302.

(*k*) Cf. the suggestions of Ariga, *loc. cit.*

“With the permission of the competent military authority this emblem shall be shown on the flags and armllets (*brassards*), as well as on all the material belonging to the medical service.” (Article 19.)

“The personnel protected in pursuance of Articles 9 (par. 1), 10, and 11, shall wear, fixed to the left arm, an armllet (brassard) with a Red Cross on a white ground, delivered and stamped by the competent military authority and accompanied by a certificate of identity in the case of persons who are attached to the medical service of armies, but who have not a military uniform.” (Article 20.)

It will be noted that there are no regulations respecting the size of the flag, the brassard, and the Red Cross. In any case the Red Cross should be visible. The armllet is not always indispensable to confer immunity, seeing that it need not be worn by those employed only temporarily in the medical service, *e.g.*, pickets, guards, litter-bearers.

“The distinctive flag of the Convention shall be hoisted only over those medical units and establishments which are entitled to be respected under the Convention and with the consent of the military authority. It should be accompanied by the national flag of the belligerent to whom the unit or establishment belongs.” The Red  
Cross flag.

Nevertheless, medical units which have fallen into the hands of the enemy, so long as they are in that situation, shall not fly any other flag than that of the Red Cross.” (Article 21.)

It is evident from this provision that the Red Cross flag must not be allowed to fly over civil hospitals or any buildings and ambulances except those that are here specified. But in recent wars, civil hospitals, particularly those in bombarded towns, have usually hoisted the Geneva flag. No provision has been made for the use of a visible sign at night.

It would seem that persons wearing the armllet, who approach a position or works that the enemy is anxious to conceal, may be ordered to halt either by shouting to them or firing a warning shot, and, if they do not halt in spite of the perceptible signals, may be shot at, or, in the alternative, captured and detained (*l*).

“The medical units belonging to neutral countries which may be authorized to afford their services under the conditions laid down in Article 11 shall fly, along with the flag of the Convention, the national flag of the belligerent to whose army they are attached.

(*l*) Cf. Ariga, *La guerre russo-japonaise*, pp. 189 *seq.*



The provisions of the second paragraph of the preceding Article are applicable to them.” (Article 22.)

“The emblem of the Red Cross on a white ground and the words ‘Red Cross’ or ‘Geneva Cross’ shall not be used, either in time of peace or in time of war, except to protect or to indicate the medical units and establishments and the personnel and material protected by the Convention.” (Article 23.)

(This Article was not accepted by Great Britain.)

Application  
and carrying  
out of the  
Convention.

“The provisions of the present Convention are binding only upon the contracting Powers in the case of war between two or more of them. These provisions shall cease to be binding from the moment when one of the belligerent Powers is not a party to the Convention.” (Article 24.)

“The commanders-in-chief of belligerent armies shall arrange the details for carrying out the preceding Articles, as well as for cases not provided for, in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention.” (Article 25.)

“The signatory Governments will take the necessary measures to instruct their troops, especially the personnel protected, in the provisions of the present Convention, and to bring them to the notice of the civil population.” (Article 26.)

Prevention of  
abuses and  
infractions.

“The signatory Governments, in countries the legislation of which is not at present adequate for the purpose, undertake to adopt or to propose to their legislative bodies such measures as may be necessary to prevent at all times the employment of the emblem or the name of Red Cross or Geneva Cross by private individuals or by societies other than those entitled to do so under the present Convention, and in particular for commercial purposes as a trade mark or trading mark.

The prohibition of the employment of the emblem or the names in question shall come into operation from the date fixed by each legislature, and at the latest five years after the present Convention comes into force. From that date it shall no longer be lawful to adopt a trade mark or trading mark contrary to this prohibition.” (Article 27.)

(This Article was not accepted by Great Britain.)

“The signatory Governments also undertake to adopt, or to propose to their legislative bodies, should their military law be insufficient for the purpose, the measures necessary for the repression in time of war of individual acts of pillage and maltreatment of the sick and wounded of armies, as well as for the punishment, as an unlawful employment of military insignia, of the improper

use of the Red Cross flag and armlet (brassard) by officers and soldiers or private individuals not protected by the present Convention.

They shall communicate to one another, through the Swiss Federal Council, the provisions relative to these measures of repression at the latest within five years from the ratification of the present Convention." (Article 28.)

(This Article was not accepted by Great Britain. Whilst the British delegates expressed their sympathy with the provisions of Articles 23, 27 and 28, they did not accept them, because they were unable to guarantee that the legislature would enact them.)

The remaining Articles (29—33) relate to the ratification of the Convention, to its denunciation, and to the subsequent adhesion of Powers not originally parties thereto. Article 31 lays down, as has already been pointed out, that the Convention of 1864 applies to such of its signatories as do not ratify the present Convention (*m*).

In former times nearly all methods conceivable were considered legitimate by a belligerent in his efforts to overcome or destroy his enemy. Gradually relaxations were introduced, through the influence of religion, the writings of jurists and others, the growing sense of humanity among the peoples of the world, and the humaner practices of generous and chivalrous commanders. Thus limitations were gradually imposed on the means of injuring the enemy, and so definite customs and usages became generally recognised and established. Now we have a considerable body of conventional law on the subject; though the customary law is to be taken as supplementing it where necessary. The Hague Regulations and Declarations as well as the St. Petersburg Declaration apply here.

MEANS OF  
INJURING THE  
ENEMY ON  
LAND.

"The right of belligerents to adopt means of injuring the enemy is not unlimited" (*n*). Means limited.

"Considering that the progress of civilization should have the effect of alleviating as much as possible the calamities of war; that the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; that for this purpose it is sufficient to disable the greatest possible number of men; that this object would be exceeded by the employ-

(*m*) As to various infractions of the Geneva Convention during the Great War, see Phillipson, *Int. Law and the Great War*, pp. 245 *seq.*  
(*n*) Hague Regulations (1907), iv. 22.

ment of arms which needlessly aggravate the sufferings of disabled men, or render their death inevitable; that the employment of such arms would therefore be contrary to the laws of humanity; the contracting parties engage mutually to renounce in case of war among themselves the employment by their military or naval troops of any projectile of a weight less than 400 grammes (about  $13\frac{1}{2}$  ounces), which is either explosive or charged with fulminating or inflammable substances" (*o*).

The three following Hague Declarations deal with aircraft projectiles, asphyxiating gases, and expanding bullets:—

"The contracting Powers agree to prohibit, for a period extending to the close of the Third Peace Conference, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature" (*p*).

"The contracting Powers agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases" (*q*).

"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" (*r*).

Special prohibitions.

Besides the prohibitions contained in the Declaration of St. Petersburg, the Hague Declarations, and any others that may have been or may be laid down, the Hague Regulations (1907) particularly forbid combatants to have recourse to the following proceedings:—

- "(a) To employ poison or poisoned weapons;
- (b) To kill or wound treacherously individuals belonging to the hostile nation or army;
- (c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;
- (d) To declare that no quarter will be given;
- (e) To employ arms, projectiles, or material of a nature to cause superfluous injury;
- (f) To make improper use of a flag of truce, of the national flag, or of military insignia and uniform of the enemy, as also the distinctive signs of the Geneva Convention;
- (g) To destroy or seize the enemy's property, unless such

(*o*) Declaration of St. Petersburg, 1868.

(*p*) Hague Declar. (1907) (1).  
 (*q*) Hague Declar. (1899) (2).  
 (*r*) Hague Declar. (1899) (3).



destruction or seizure be imperatively demanded by the necessities of war;

- (h) To declare extinguished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.

A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war" (s).

"Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered lawful" (t). Ruses of war.

It is clear from the foregoing that the instruments and methods of warfare that a belligerent may adopt are restricted. International law proclaims that the only object of war as such is to overcome the armed forces of the enemy. The infliction of death and agony as an end in itself, the illtreatment of combatants who have already been disarmed, are, therefore, illegitimate. Similarly, the use of projectiles and arms which not only effectively disable the enemy, but also entail unnecessary suffering, is contrary to war law. The fundamental principle throughout warfare is that no greater force, no greater severity should be applied than is absolutely necessary to gain ascendancy over the adversary. The plea of 'military necessity' cannot prevail over specific prohibitions imposed by law, written or customary. Methods of warfare restricted.

The Hague Rules sometimes speak of military necessity by way of exception; but the German Official Manual sets it up as the predominating factor in warlike procedure, to which all the established mitigations of warfare, all considerations of humanity and fairness are subservient. The instructions contained in the *Kriegsbrauch* are inconsistent with the rules we have set forth, when they state that the German armies must, in order to be efficient, do their utmost to annihilate the enemy—to demolish his material possessions, to crush his physical power, to destroy his intellectual and moral resources—in a word, to bring about his entire demoralization. Officers are warned against the humanitarian tendencies of the time. The Manual declares that it is the combatants' own interest that dictates the imposition of restric- Military necessity.

(s) Hague Regul. (1907), iv. 23, (t) *Ibid.* Art. 24.

a—h.

tions on the use of violence, terror, and cunning. German writers frequently distinguish between 'Kriegsmanier,' the custom or usage of war which imports relaxations, and 'Kriegsraison,' the necessity of war which disregards restrictions when their observance would interfere with military operations. Thus their maxim is 'Kriegsraison geht vor Kriegsmanier' (Necessity of war takes precedence of usage of war); that is, when a case of 'necessity' is thought to have arisen, the laws of war lose their binding force. These doctrines are clearly unjustifiable; their application in the Great War of 1914 aroused the indignation of the civilized world (*u*).

Explosive  
bullets.

In 1863 the Russian military authorities invented a bullet that exploded when fired on a hard surface, and later it was modified so as to explode when impinging on a soft substance. However, the Russian Government undertook to abstain from the use of such projectiles, if the other European Powers engaged to do the same. A Conference comprising representatives from the European States and from Brazil met at St. Petersburg in 1868, and produced the Declaration referred to above. There have been many wars since that date, but explosive bullets have regularly been avoided by belligerents. Though the United States and Spain were not parties to the Declaration, explosive bullets were not used by them in their war of 1898. However, it was reserved for German troops in 1914—according to evidence advanced by the Belgian authorities—to have recourse to the prohibited bullet (*x*).

Expanding  
bullets.

Similarly, the use of expanding bullets is illegal. The notorious dum-dum bullet—so called from the name of the works near Calcutta where it was manufactured—was intended to be used by Great Britain only against certain tribes of fanatical savages whose wild onslaughts could not be effectively arrested by the ordinary kind of bullets. Great Britain was not a party to the Declaration of 1899 forbidding their use (though she acceded in 1907); nevertheless she did not use them in the South African war. In the war of 1914, again, the Belgian authorities accused the German army of employing expanding bullets; whilst the British Government, in reply to German charges, publicly denied that they had been used by British or French troops, and maintained, on the contrary, that both in France and in Togoland German soldiers

(*u*) Cf. Phillipson, *Int. Law and the Great War*, pp. 133 *seq.* On 'Kriegsraison,' &c., see Westlake, *Collected Papers* (1914), pp. 243, 244; and for a full examination of the extravagant views set forth in the

Kriegsbrauch im Landkriege, see an Article by A. Mérignhac, in *Revue générale de droit int. public*, vol. xiv. (1907), pp. 197 *seq.*

(*x*) Cf. Phillipson, *op. cit.* pp. 200, 201.

had been supplied with soft-core bullets having thin envelopes which did not entirely cover the core (*y*).

The Hague Declaration, No. 1, prohibiting the use of aircraft projectiles, was first made in 1899 at the Hague Conference for a term of five years, and was ratified by nearly all the States represented, notable exceptions being Great Britain and the United States. This Declaration having expired by the efflux of time, a similar prohibition was declared at the second Hague Conference in 1907, when it was signed and ratified by both Great Britain and the United States. More than a third of the Powers represented, however, did not sign it, among which are France, Russia, Japan, Germany, Italy, Spain, Sweden. Accordingly, the Declaration of 1907, prohibiting the discharge of projectiles from balloons, &c., cannot be considered a binding rule of international law, except as between the signatory parties themselves. None the less, there are several restrictions imposed by general rules, written and customary, on the employment of such projectiles. These will be presently considered, when we deal with the question of bombardment (*z*).

The Declaration against the use of shells for the "sole object" of diffusing noxious gases was accepted by nearly all the Powers represented at the Hague Conference of 1899. Great Britain and the United States were again exceptions, though the former signified her adhesion in 1907. There can be no doubt that this rule now possesses binding force generally. The expression "sole object" is to be noted. Bursting shells, the fumes of which are only incidentally injurious, are not, of course, prohibited. The prohibition applies when it is the *sole* purpose—and we may reasonably add, the *main* purpose—of the enemy to diffuse asphyxiating gases. It appears that during the Crimean war, the American Civil War, and the Franco-German war, suggestions were made by individuals as to the use of such gases, but were not entertained. The use of this barbarous instrument of warfare was reserved for the year 1915, when the German armies employed it systematically, and thereby inflicted death and agony on many men.

The employment of poisoned weapons has at all times been held to be an illegitimate and outrageous practice. Apart from this, the use of poison is condemned by modern conventional law; nor

(*y*) *Ibid.* pp. 201 *seq.* The use complained of was, no doubt, exceptional; as was also the case in the South African war, when complaints were made against the Boers; see F. Des-

pagnet, *La guerre sud-africaine*, pp. 111, 112; and in the Russo-Japanese war, see Ariga, *op. cit.* p. 246.

(*z*) See *infra*, p. 622.



was it tolerated by the older customary law. In the Anglo-Boer war and in the Russo-Japanese war there were reports, which were not definitely verified, that streams and wells were poisoned by belligerent forces. In April and May, 1915, reports came from South-West Africa that in the war there between the German colonial troops and the Union forces under General Botha, the former resorted to the deliberate poisoning of wells. To cut off the enemy's water supply is not an illegitimate proceeding, but to poison it savours of treachery and is unlawful. From the prohibition of Article 23a and the condemnation of deleterious gases, we may reasonably infer that the wilful spreading of contagious diseases is similarly illegal.

Treacherous  
conduct.

The treachery spoken of in Article 23b "includes not only assassination of individuals, but also by implication any offer for an individual 'dead or alive'" (a). In the Chinese-Japanese war, the Chinese authorities offered a reward for the heads of three Japanese generals. This is the only instance in modern warfare that was countenanced by the authorities of a belligerent. The test of treacherous conduct in general is the assumption of a false character whereby the person assuming it deceives his enemy and so is able to commit a hostile act which he could not have done had he avoided the false pretences. "Modern international law distinguishes between dashes made at a ruler or commander by an individual or a little band of individuals who come as open enemies, and similar attempts made by those who disguise their enemy character. A man who steals secretly into the opposing camp in the dark, and makes alone or with others a sudden attack in uniform upon the tent of king or general, is a brave and devoted soldier. A man who obtains admission to the same tent disguised as a pedlar, and stabs its occupant when lured into a false security, is a vile assassin, and the attempt to procure such a murder is as criminal as the murder itself" (b). To pretend to surrender and then attack the enemy is an act of treachery, as is also to approach under a flag of truce and then commit a hostile act. War law condemns this "stab-in-the-back" style of fighting. But, as was pointed out in a British Army Order during the Boer war, 1900, treacherous conduct is not to be confounded with military surprises, ambushes, or stratagems, which are permissible.

Ruses of war.

Ruses of war generally, and stratagems adopted for intelligence work in particular, are permitted by Article 24. But this must be taken subject to the prohibition of treachery, and subject to

(a) Holland, *op. cit.* § 76.

(b) T. J. Lawrence, *Principles of*

*International Law* (London, 1913),  
pp. 553, 554.

Article 23f, which condemns the improper use of a flag of truce, of the national flag, of the military uniform and insignia of the enemy, and the distinctive signs of the Geneva Convention. All stratagems and devices adopted by a belligerent for the purpose of obtaining an advantage over the enemy by misleading him and putting off his guard are allowable, if they are merely exhibitions of astuteness and strategic and tactical ingenuity and are not tainted by a treacherous element or breach of good faith, and do not involve the violation of any rule either express or tacit. In every war, various kinds of tricks are carried out that fall within this provision, *e.g.*, making a sudden surprise, laying a trap, pretending that an attack or retirement is being prepared, raising clouds of dust or lighting many fires in order to make a small force seem larger than it really is, setting up dummy guns or laying dummy mines, building bridges and other works not intended to be used, sending bogus messages, despatches, and newspapers with the object that they may be intercepted by the enemy and so deceive him, using the enemy's signals, imitating the bugle-calls and words of command, calling upon men to surrender with a threat that if they refuse they will be annihilated by approaching forces which in fact are not there, threatening to bombard a defended town when the guns have not really arrived, and so on. Belligerents are ever ready to put into practice the ancient maxim, "Where lion-skin runs short, patch up with fox-skin." But where there is an obligation to speak the truth and keep faith, any ruse involving a breach of such obligation is improper, *e.g.*, declaring that a truce had been established when such was not the case, violating a safe conduct, demanding an armistice and breaking it by surprise, &c. (*c*). Good faith is indispensable in warfare. Its entire disregard would render possible the perpetration of greater and greater horrors and villainy.

As to Article 23f, forbidding the improper use of the enemy's flag or uniform, &c., the main difficulty is to determine when such use is proper and when improper. (The improper use of the flag of truce, which is also mentioned in this Article, will be considered presently (*d*).) The old rule was that it was justifiable to use the distinctive emblems of an enemy for the purpose of effecting an evasion or for luring his forces into action, but before attacking it was obligatory to reveal the true colours (*e*). The prevailing

Use of enemy  
flag or  
uniform.

(*c*) Cf. the British official manual of war law, entitled *Land Warfare* (ed. by Col. Edmonds and Prof. Oppenheim).

(*d*) See *infra*, p. 517.

(*e*) As to the assumption of enemy colours in maritime warfare, see *infra*, p. 579.



view at the present time condemns the use of the hostile flag or uniform during a combat, and for purposes of approach. Article 23f by no means settles the question; so that each case must necessarily be judged on its merits, and determined conformably to the basic principles of war law, special regard being paid to the element of *bona fides*. If troops can get no other clothing, in the course of a conflict, but the uniforms of their enemy, they may legitimately put on the latter, provided that such modifications are made, *e.g.*, by removing any distinctive badges, that the enemy will not confuse the present wearers with members of their own side (*f*). Again, it would be an abuse of the Red Cross flag to attach it to wagons or transports that carry anything other than medical or sanitary stores, for combatants to assume the badge when they do not belong to the Red Cross service, or for buildings to fly the flag when they are used as military depôts, observatories, or places of refuge for combatants (*g*).

Quarter.

Generally speaking, a belligerent is obliged to grant quarter to those who offer themselves as prisoners of war. We have already pointed out that claims of "military necessity"—factitious and ubiquitous as they are—cannot justify the destruction of men who have been taken prisoners. But in the case of those who lay down their arms and appeal to the adversary for mercy, quarter must be given where it is practicable. "The admitted case in which it is not practicable is that which occurs during the continuance of fighting, when the achievement of victory would be hindered and even endangered by stopping to give quarter instead of cutting down the enemy and rushing on, not to mention that during fighting it is often impracticable so to secure prisoners as to prevent their return to the combat. Hence it is especially difficult to avoid ruthless slaughter in the storm of a place or position, but the rule formerly dictated by military pride that those are not entitled to quarter who insult a superior force by defending a place after a breach has been made and the counterscarp thrown in, or who defend an ill-fortified place at all against a superior force, is entirely obsolete and condemned" (*h*). There is no uniform method of indicating surrender. The most usual way is by hoisting the white flag, especially when a detachment or group is concerned; sometimes white handkerchiefs are raised, arms thrown down, hands held up, the butt end of the gun raised, &c.

(*f*) For practices in recent wars, see Spaight, pp. 106 *seq.*; Ariga, §§ 67, 68.

Cross during the Great War, see Phillipson, *op. cit.* p. 209.

(*h*) Westlake, *Int. Law* (1913), vol. ii. p. 83.



We have already referred to illegal bullets, asphyxiating gases, and to the general pronouncement in the Declaration of St. Petersburg. The latter is reinforced by Article 23e, which forbids the use of arms, projectiles, or material of a nature to cause superfluous injury. These prohibited instruments of warfare no doubt include such things as glass, nails, irregularly shaped bits of iron; and some writers hold that red-hot shot is also included. Explosive hand grenades are not prohibited; they were used in the Crimean war, the American Civil War, and in the Russo-Japanese war; and they were constantly employed in the Great War of 1914.

Prohibited arms, &c.

With regard to Article 23h, which forbids a belligerent to declare extinguished, suspended, or inadmissible in a court of law the rights and actions of enemy subjects, we have already shown above (i) that it refers to a commander in the field or in military occupation of the enemy territory. It cannot, therefore, impose an international obligation possessing general applicability. This being so, the clause as it stands is defective in wording.

Enemy's legal rights and actions.

Further, a belligerent may not compel enemy subjects to take part in operations directed against their own country. The operations referred to are clearly of a more comprehensive character than 'military operations.' They would include services in all kinds of works that are immediately or that will be subsequently useful to the belligerent in the carrying on of his war. Obviously, therefore, it is unlawful to force enemy subjects to build fortifications, to dig trenches, to manufacture munitions or other war material, to repair arms, to give information as to the enemy's forces, to act as guides. Where the services, however, are for the benefit of the occupied territory and the community in general, they may be demanded; *e.g.*, carrying provisions, repairing roads and bridges (unless these are of exclusively or even predominantly military application), tending the wounded, burying the dead, &c. It is held in some quarters that the construction of fortifications at a distance from the scene of hostilities would not fall within the prohibition. But such fortifications might soon become the centre of hostilities. It would seem, therefore, that they are likewise covered by the Article. It is only compulsory service that is forbidden; voluntary service may lawfully be accepted.

Services of enemy subjects.

In connection with the services of enemy subjects, it may be added that, notwithstanding the absence of a written provision, it is a rule of the customary law of nations that to incite the enemy's

Inciting enemy soldiers to desert, &c.

(i) See *supra*, pp. 462, 466.

troops to treason, desertion, or other disloyalty, is illegitimate; but to stir up rebellion in the enemy's country is not generally considered unlawful, though many jurists condemn the practice.

Enemy's  
property.

Next we came to Article 23g, which involves the difficult questions as to the destruction and seizure of enemy's property. It proclaims, in general terms, that enemy's property, whether public or private, is to be respected, unless military exigencies demand otherwise. This provision must be read in conjunction with Article 43 (*k*), which says that private property must not be confiscated. The latter Article, however, refers to the proceedings of an army in military occupation of the enemy territory, whilst the former relates to the conduct of hostilities proper.

Devastation  
and destruc-  
tion.

In early times a belligerent claimed the right to devastate, without any restriction, his enemy's territory and destroy his property, either as an end in itself or as a means to the attainment of his own end, viz., that for which he made war. Grotius condemned this practice of unrestricted destruction, and held that devastation may be resorted to only when it is calculated to reduce the enemy to sue for peace, that is when a definite military advantage is derived thereby (*l*). At the end of the seventeenth century Belgium and Piedmont were devastated. Louis XIV., however, sought to justify his destruction on the ground that it was a defensive measure necessary for the protection of his frontiers; but all Europe, as Vattel says, resounded with invectives and reproaches. Later, the practice of devastation came to be associated with the efforts to achieve certain strategical objects. Vattel, writing in the middle of the eighteenth century, describes the sacking of towns and villages, when committed without necessity, as savage and monstrous excesses. He says, such necessity may arise in three cases: to chastise an unjust and barbarous nation for the purpose of checking its brutality and protecting ourselves from its depredations; to make a barrier for covering a frontier against an enemy who cannot be stopped in any other way; in the prosecution of field operations or carrying out siege works (*m*). Gradually practice tended to follow the mitigations expounded by theory. Thus, in 1799, when the Duke of York proposed to destroy the dykes in Holland and flood the country, his proposal was protested against on the ground that the act would be contrary to the laws of war if it were not advantageous to his military forces or detrimental to those of the enemy. The necessity of military

(*k*) See *infra*, p. 531.

(*m*) Droit des Gens, iii. 8, 142;

(*l*) De Jur. Bel. ac Pac. iii. 12, 1. iii. 9, 166—172.



operations was more and more recognised as the determining factor of the propriety of devastation (*n*). Accordingly, the destruction, in 1813, of Newark and York by the American troops, and that of public buildings in Washington in 1814 by the British, being unnecessary from the military point of view, were illegitimate.

The British measures against the United States were attempted to be justified as acts of retaliation for similar excesses on the part of the American forces on the frontiers of Canada. The answer of the United States Government emphasized that the system of devastation, which had been practised by the British forces, was manifestly contrary to the usages of civilized warfare; it referred to the wanton desolation that had been committed by the British naval forces in 1813, at Havre-de-Grace and Georgetown and other places in the Chesapeake Bay; and stigmatized the destruction of the public buildings in Washington as an act unexampled in the wars of modern Europe. Moreover, it was stated that the destruction of Newark was justified by the officers who ordered it, on the ground that it became necessary in the military operations there, but that it was disavowed by the American Government, which sought to punish the persons responsible for it, and was prepared to make reparation. Finally, it was declared that such practice of desolation was contrary to the views and practices of the United States, revolting to humanity, and repugnant to the sentiments and usages of the civilized world (*o*). In the debate in the House of Commons, April 11, 1815, Sir James Mackintosh described the British naval proceedings as disgraceful. He observed that it was a violation of all decent courtesy to direct an expedition deliberately against palaces of government, halls of legislation, tribunals of justice, repositories of the muniments of property and of the records of history—objects exempted among civilized nations from the ravages of war, and secured, as far as possible, even from its accidental operation, because they contribute nothing to the means of hostility, but are consecrated to purposes of peace, and minister to the common and perpetual interest of all human society. It seemed to him an aggravation of this atrocious measure, that ministers had endeavoured to justify the destruction of a distinguished capital, as a retaliation for some acts of violence of inferior American officers, unauthorized and disavowed by their Government, against some insignifi-

(*n*) Cf. De Martens, Précis, § 280; Klüber, Pt. II. tit. 2, sect. 2, ch. 1, §§ 262—265.

(*o*) Admiral Cochrane to Mr. Secretary Monroe, Aug. 18, 1814, and the reply, Sept. 6, 1814, in American State Papers, vol. iii. pp. 693, 694.



cant village in Upper Canada. To make such retaliation just, there must always be clear proof of the outrage; in general, also sufficient evidence that the adverse Government had refused to make due reparation for it; and lastly, some proportion of the punishment to the offence. But here the excessive destruction committed, falsely called retaliation, was a monstrous iniquity (*p*).

Ravaging the  
enemy's  
territory  
when lawful.

The fundamental principle of war law, then, authorizes us to use against an enemy such a degree of violence, and such only, as may be necessary to secure the object of hostilities. The same general rule, which determines how far it is lawful to destroy the persons of enemies, will serve as a guide in judging how far it is lawful to ravage or lay waste their country. If this be necessary, in order to accomplish the just ends of war, it may be lawfully done, but not otherwise. Thus, if the progress of an enemy cannot be stopped, nor our own frontier secured, or if the approaches to a town intended to be attacked cannot be made without laying waste the intermediate territory, the extreme case may justify a resort to measures not warranted by the ordinary purposes of war. When the exigencies of offence or defence demand that certain enemy property be destroyed or damaged, such destruction or damage is considered necessary by the law of war and therefore legitimate. The German Manual expresses the rule in a positive and in a negative form: No damage must be done, not even the most trivial, which is not necessitated by military reasons. Every damage, even the very greatest, is justifiable, if war demands it or if it is a consequence of the proper prosecution of war (*q*). Thus military necessity would apparently justify the devastation of entire districts and large areas. But to destroy for the mere purpose of inflicting pecuniary loss is unlawful; gratuitous ravage is not warranted by military necessity. Necessity must be rationally construed. It must not be potential or prospective; it must, in order to operate as a justification, be direct and immediate. If modern usage has sanctioned any other exceptional grounds for severity, they will be found in the right of reprisals, or vindictive retaliation. The whole international code is founded upon reciprocity. The rules it prescribes are observed by one nation, in confidence that they will be so by others. Where, then, the established usages of war are violated by an enemy, and there are no other means of restraining his excesses, retaliation may justly be resorted to by the suffering nation, in

(*p*) Hansard, vol. xxx. pp. 526, 527.

(*q*) *Kriegsbrauch im Landkriege*,  
p. 54.

order to compel the enemy to return to the observance of the law which he has violated.

The devastation of his own territory has sometimes been resorted to by a belligerent, for the purpose of impeding the advance of the enemy, and this is perfectly justifiable. Thus, Peter the Great contributed to his victory over Charles XII. at Pultawa by laying waste eighty square leagues of Russian territory that lay in the path of the Swedish army. In 1812, the Russians caused the destruction of Napoleon's army by burning down Moscow (*r*). The ravaging of Georgia and Carolina by General Sherman during the American Civil War, like that of the Shenandoah Valley by General Sheridan, was perhaps a necessary military operation on the part of the Federal troops, and it certainly tended to bring the war to a more rapid conclusion (*s*). A similar policy of devastation was carried out by the British in the former Boer Republics. Whole regions were laid waste to prevent their being used as a base by the enemy, the non-combatant families having first been removed from them and sent to concentration camps. However, this doctrine of military necessity is obviously liable to terrible abuse. No doubt the German armies operating in Belgium during the Great War, 1914, would appeal to this 'military necessity' to justify their conduct. But no one can admit that military necessity justified the conversion of Belgium into a shambles and a desert.

Ravaging  
territory.

Apart from the necessary devastation of territory and destruction of property, there remains the question of seizing or confiscating property, movable and immovable. This is dealt with later, in reference to military occupation (*t*).

It has already been pointed out that war is primarily, if not exclusively, hostilities directed against the armed forces of a belligerent State; and that, therefore, non-combatants are not to be deliberately or carelessly subjected to attack. This principle underlies the Hague Regulations concerning sieges and bombardments.

SIEGES AND  
BOMBARD-  
MENTS.

"The attack or bombardment, by any means whatever, of towns, villages, dwellings, or buildings which are undefended is prohibited" (*u*).

Undefended  
places.

(*r*) Calvo, ii. § 893.

(*s*) North American Review, April, 1872, p. 405. Cf. Spaight, War Rights, pp. 133 *seq.*; P. Bordwell,

The Law of War between Belligerents (Chicago, 1908), pp. 77 *seq.*

(*t*) See *infra*, p. 531.

(*u*) Art. 25.

At the Brussels Conference of 1874 the representatives of the States who were present agreed that only 'fortified' places should be liable to siege; but in 1899, at the first Hague Conference, this expression was replaced, at the instance of the German delegate, by the more ambiguous one 'defended,' on the ground that the requirement implied in the former would unduly restrict the action of armies in the field. A place that is merely occupied by troops, though not actually defended, would fall within the terms of this Article. The German Official Manual lays down that military necessity justifies bombardment of an occupied locality not only when its occupation has been devised for defensive purposes, but also when it is intended to guard a passage, to defend approaches, to protect a retreat, to prepare or cover a tactical movement, or to procure provisions (*v*). Several open towns, both French and German, were subjected to bombardment in the Franco-German war because they defended themselves. To offer a defence is not being open for the enemy to enter if he wishes or if he is able otherwise. An undefended town that shares in the defence of a fortified town would probably be regarded as liable to attack. Further, it may be that military necessity would be held to justify the bombardment of an open town which is near a fortress, and which is of military use to the defenders of the latter. Article 25, it is to be noted, applies also to the use of aircraft bombs. The words 'by any means whatever' were specially added in 1907 to the corresponding Article of 1899, with that intention.

Previous  
warning.

"The commander of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities" (*x*).

The warning is, of course, required in order that non-combatants and their property may be removed to a place of safety. The word 'assault' refers to a surprise attack. A usage may now be said to be growing up in favour of the free exit of 'useless mouths.' When a belligerent proposes to reduce a town by bombardment, and not by famine, his refusal to permit the civilian population to leave it would be tantamount to inflicting suffering on persons who are by the fundamental principles of war law immune from hostilities. Thus, in the Franco-German war, the Germans allowed the departure of non-combatants from Strassburg, as they resolved to carry the town by assault; they refused it in the case of Paris which they proposed to reduce by famine. There is no fixed

(*v*) *Kriegsbrauch im Landkriege*, p. 21.

(*x*) Art. 26.



interval between the notification and the commencement of the bombardment; the amount allowed will naturally depend on the circumstances of each case. If, after due warning, the women, children, and other non-combatants do not depart, the investing commander cannot then be held responsible for any injury they may suffer (*y*).

“In sieges and bombardments all necessary steps should be taken to spare, as far as possible, buildings devoted to religion, art, science, and charity, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes. It is the duty of the besieged to indicate these buildings or places by some special visible signs, which shall previously be notified to the assailants” (*z*).

Protected  
buildings.

The character of the special sign required by this Article is not determined for land warfare, as it has been determined for naval bombardment. Hence, in the former case, an arrangement between the belligerents would be necessary. Military hospitals, as we have seen, are specifically protected by the Geneva Convention; so that the hospitals referred to in this Article are civil hospitals. If hospitals are deliberately set up in parts of the town which it is of vital importance for the assailants to shell, the responsibility for damage to them and injury to the inmates must fall on the defenders. In the Franco-German war, cathedrals, churches, hospitals, historic and artistic buildings, libraries—including the great library of Strassburg—suffered dreadfully. In several other wars before that and since, these protected monuments and buildings were spared; but in the Great War, 1914, merciless destruction appears to have been the rule followed regularly by the German forces in Belgium and France. The cathedrals of Malines and Termonde were deliberately attacked, the famous Cloth Hall of Ypres was intentionally demolished; the wilful destruction of Reims Cathedral and the university and library of Louvain aroused the indignation of the entire world. Hospitals, museums, and other protected buildings were not spared (*a*).

“The giving up to pillage of a town or place, even when taken by assault, is forbidden” (*b*).

We shall later on deal more fully with this subject in connection with Article 47, which prohibits pillage generally (*c*).

(*y*) For the terrible and lawless bombardment by the Germans of Belgian and French towns and villages, see Phillipson, *Int. Law and the Great War*, pp. 162 *seq.*

(*z*) Art. 27.

(*a*) See Phillipson, *loc. cit.*

(*b*) Art. 28.

(*c*) See *infra*, p. 533.

SPIES AND  
ESPIONAGE.

International law does not prohibit a belligerent from obtaining any information he deems to be necessary about the enemy, the enemy's country, his preparations, measures of offence and defence, military resources, strategic plans, &c. But to carry out this purpose no method may be adopted that involves a violation of any of the Hague Rules or any rule of customary law. So far as the field of operations is concerned, such information may be procured not only by the usual means of reconnoitring, but by intercepting messages, questioning prisoners of war, bribing enemy soldiers and civilians (a practice that is allowed by military usage, though reprobated by many writers), using secret agents and spies.

Definition of  
espionage.

Espionage is defined by the Hague Regulations (*d*) as the act of a soldier or civilian who, proceeding clandestinely or on false pretences, obtains or seeks to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party. In order that a charge of espionage (in the sense contemplated by international law) may be maintained, three points must be established: firstly, the stealthy character of the act or false pretences; secondly, that it was committed within the zone of belligerent operations; thirdly, an intention to communicate it to the adverse party. If the act is committed or attempted without secrecy or false pretences or outside the zone of operations, it may none the less be regarded as a serious offence (a 'war crime') by the belligerent into whose hands the offender falls. It follows from the definition that soldiers not in disguise who have penetrated into the zone of operations of the hostile army to obtain information cannot be regarded as spies. Similarly, the following are not considered spies: soldiers or civilians carrying out their mission openly, charged with the delivery of despatches destined either for their own army or for that of the enemy; persons sent in balloons to deliver despatches, and generally to maintain communication between the various parts of an army or a territory; and others similarly engaged. It is obvious that a soldier would not be carrying out his mission openly if he divested himself of his uniform and put on civilian dress.

## Balloonists.

A question arose during the Franco-German war as to what treatment persons should receive who ascended in balloons in order to reconnoitre the enemy's forces. Those who were captured by the Germans were imprisoned in fortresses, and brought to trial by a council of war. But the German practice was condemned at

the time; many jurists and publicists held that such balloonists if captured should be treated as prisoners of war; and the new provision of the Hague is in accordance with this view. The declaration made by a Russian admiral, soon after the commencement of the Russo-Japanese war, that newspaper correspondents sending wireless messages from neutral steamers were liable to be treated as spies was clearly untenable.

A well-known case relating to this subject is that of Major André. John André, born in London (1751), of French-Swiss descent, joined the British army in Canada and became aide-de-camp to General Sir Henry Clinton. Benedict Arnold, an American commandant, having undertaken to surrender a certain fortress to the British forces, André was sent by Clinton to make the necessary arrangements for carrying out this engagement. André met Arnold near the Hudson on the night of September 20, 1780; then André put on civilian clothes, and by means of a passport given to him by Arnold in the name of John Anderson he was to pass through the American lines. Approaching the British lines, he was captured and handed over to the American military authorities. A court-martial summoned by Washington convicted him of espionage, and declared that "agreeably to the laws and usages of nations he ought to suffer death." He was hanged October 2, 1780; but in this country he was considered a martyr. According to the provision indicated above, his offence could not now have been regarded as espionage, as he was not seeking information; it might, however, have been considered a 'war crime' or 'war treason.'

Case of  
Major André.

We may conveniently refer here to the Lody case. Lody, a German subject, was charged (October 30, 1914) before a General Court Martial in London with attempting to give information to the German authorities with regard to the defences and war preparations of Great Britain. As the offence was committed in Edinburgh and Dublin—places beyond the 'zone of operations of a belligerent'—it was described as a 'war crime' or 'war treason.' The accused was found guilty, condemned to death, and shot.

The Lody  
case.

A person found guilty of espionage may be hanged or shot; but smaller punishments are sometimes imposed. Where a death sentence is pronounced, it is generally carried out by shooting. In earlier times a spy caught in the act was liable to be shot on the spot without any trial. Now the Hague Regulations (e) require a previous trial.

Penalty.



“A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is to be treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage” (f).

NON-HOSTILE  
INTERCOURSE  
BETWEEN  
BELLIGERENTS.

Grotius has devoted a whole chapter of his great work to prove, by the consenting testimony of all ages and nations, that good faith ought to be observed towards an enemy. And even Bynkershoek, who holds that every other sort of fraud may be practised towards him, prohibits perfidy, upon the ground that his character of enemy ceases by the compact with him, so far as the terms of that compact extend. “I allow of any kind of deceit,” says he, “perfidy alone excepted, not because anything is unlawful against an enemy, but because when our faith has been pledged to him, so far as the promise extends, he ceases to be an enemy.” Indeed, without this mitigation, the horrors of war would be indefinite in extent and interminable in duration. The usage of civilized nations has therefore introduced certain *commercia belli*, by which the violence of war may be allayed, so far as is consistent with its objects and purposes, and something of a pacific intercourse may be kept up, which may lead, in time, to an adjustment of differences, and ultimately to peace (g).

*Commercia  
belli.*

Truce or  
armistice.

There are various modes in which the extreme rigour of the rights of war may be relaxed at the pleasure of the respective belligerent parties. Among these is that of a suspension of hostilities, by means of a truce or armistice. This may be either general or special. If it be general in its application to all hostilities in every place, and is to endure for a very long or indefinite period, it amounts in effect to a temporary peace, except that it leaves undecided the controversy in which the war originated. Such were the truces formerly concluded between the Christian Powers and the Turks. Such, too, was the armistice concluded, in 1609, between Spain and her revolted provinces in the Netherlands. A partial truce is limited to certain places, such as the suspension of hostilities, which may take place between two contending armies, or between a besieged fortress and the army by which it is invested (h).

(f) Art. 31. As to spying which does not amount to espionage in the international law sense, see *infra*, p. 528.

(g) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 1. *The Daifje* (1800), 3 C. Rob. 139.

(h) Vattel, Droit des Gens, liv. iii. ch. 16, §§ 235, 236.

The power to conclude a universal armistice or suspension of hostilities is not necessarily implied in the ordinary official authority of the general or admiral commanding in chief the military or naval forces of the State. The conclusion of such a general truce requires either the previous special authority of the supreme power of the State, or a subsequent ratification by such power (*i*).

Power to conclude an armistice.

A partial truce or limited suspension of hostilities may be concluded between the military and naval officers of the respective belligerent States, without any special authority for that purpose, where, from the nature and extent of their commands, such an authority is necessarily implied as essential to the fulfilment of their official duties (*k*).

A suspension of hostilities binds the contracting parties, and all acting immediately under their direction, from the time it is concluded; but it must be duly promulgated in order to have a force of legal obligation with regard to the other subjects of the belligerent States; so that if, before such notification, they have committed any act of hostility, they are not personally responsible, unless their ignorance be imputable to their own fault or negligence. But as the supreme power of the State is bound to fulfil its own engagements, or those made by its authority, express or implied, the Government of the captor is bound, in the case of a suspension of hostilities by sea, to restore all prizes made in contravention of the armistice. To prevent the disputes and difficulties arising from such questions, it is usual to stipulate in the convention of armistice, as in treaties of peace, a prospective period within which hostilities are to cease, with a due regard to the situation and distance of places (*l*).

Period of its operation.

Besides the general maxims applicable to the interpretation of all international compacts, there are some rules peculiarly applicable to conventions for the suspension of hostilities. The first of these rules, as laid down by Vattel, is that each party may do within his own territory, or within the limits prescribed by the armistice, whatever he could do in time of peace. Thus either of the belligerent parties may levy and march troops, collect provisions and other munitions of war, receive reinforcements from his allies, or repair the fortifications of a place not actually besieged. The second rule is, that neither party can take advantage of the

Rules for interpreting conventions of truce.

(*i*) Grotius, *De Jur. Bel. ac Pac.* lib. iii. cap. 22, § 8; see Barbeyrac's note thereon. Vattel, *Droit des Gens*, liv. iii. ch. 16, §§ 233—238.

(*k*) *Vide ante*, Pt. III. ch. 2, pp. 357 *seq.*

(*l*) Grotius, *De Jur. Bel. ac Pac.* lib. iii. cap. 21, § 5. Vattel, *Droit des Gens*, liv. iii. ch. 16, § 239.

truce to execute, without peril to himself, what the continuance of hostilities might have disabled him from doing. Such an act would be a fraudulent violation of the armistice. For example, in the case of a truce between the commander of a fortified town and the army besieging it, neither party is at liberty to continue works, constructed either for attack or defence, or to erect new fortifications for such purposes. Nor can the garrison avail itself of the truce to introduce provisions or succours into the town, through the passages or in any other manner which the besieging army would have been competent to obstruct and prevent, had hostilities not been interrupted by the armistice. The third rule stated by Vattel is rather a corollary from the preceding rules than a distinct principle capable of any separate application. As the truce merely suspends hostilities without terminating the war, all things are to remain in their antecedent state in the places, the possession of which was specially contested at the time of the conclusion of the armistice (*m*).

It is obvious that the contracting parties may, by express compact, derogate in any and every respect from these general conditions.

Recommencement of hostilities on the expiration of truce.

At the expiration of the period stipulated in the truce, hostilities recommence as a matter of course, without any new declaration of war. But if the truce has been concluded for an indefinite, or for a very long period, good faith and humanity concur in requiring previous notice to be given to the enemy of an intention to terminate what he may justly regard as equivalent to a treaty of peace. Such was the duty inculcated by the Fœcial college upon the Romans, at the expiration of a long truce which they had made with the people of Veii. That people had recommenced hostilities before the expiration of the time limited in the truce. Still it was held necessary for the Romans to send heralds and demand satisfaction before renewing the war (*n*).

Capitulations for the surrender of troops and fortresses.

Capitulations for the surrender of troops, fortresses, and particular districts of country, fall naturally within the scope of the general powers entrusted to military and naval commanders. Stipulations between the governor of a besieged place, and the general or admiral commanding the forces by which it is invested, if necessarily connected with the surrender, do not require the

(*m*) Vattel, *Droit des Gens*, liv. iii. ch. 16, §§ 245—251.

(*n*) Liv. *Hist. lib. iv. cap. 30*. As to the laws of war observed by the

Romans, see Wheaton, *Hist. Law of Nations*, pp. 20—25; Phillipson, *Int. Law and Custom of Ancient Greece and Rome*, vol. ii. pp. 223 *seq.*



subsequent sanction of their respective sovereigns. Such are the usual stipulations for the security of the religion and privileges of the inhabitants, that the garrison shall not bear arms against the conquerors for a limited period, and other like clauses properly incident to the particular nature of the transaction. But if the commander of the fortified town undertakes to stipulate for the perpetual cession of that place, or enters into other engagements not fairly within the scope of his implied authority, his promise amounts to a mere 'sponson' (o).

The celebrated convention made by the Roman consuls with the Samnites, at the Caudine Forks, was of this nature. The conduct of the Roman senate in disavowing this ignominious compact, is approved by Grotius and Vattel, who hold that the Samnites were not entitled to be placed *in statu quo*, because they must have known that the Roman consuls were wholly unauthorized to make such a convention. This consideration seems sufficient to justify the Romans in acting on this occasion according to their uniform uncompromising policy, by delivering up to the Samnites the authors of the treaty, and persevering in the war until this formidable enemy was finally subjugated (p).

Convention of the Caudine Forks.

The convention concluded at Closter-Seven, during the Seven Years' War, between the Duke of Cumberland, commander of the British forces in Hanover, and Marshal Richelieu, commanding the French army, for a suspension of arms in the north of Germany, is one of the most remarkable treaties of this kind recorded in modern history. It does not appear, from the discussions which took place between the two Governments on this occasion, that there was any disagreement between them as to the true principles of international law applicable to such transactions. The conduct, if not the language of both parties, implies a mutual admission that the convention was of a nature to require ratification, as exceeding the ordinary powers of mere military commanders in respect to mere military capitulations. The same remark may be applied to the convention signed at El Arish, in 1800, for the evacuation of Egypt by the French army; although the position of the two Governments, as to the convention of Closter-Seven, was reversed in that of El Arish, the British Government refusing in the first instance to permit the execution of the latter treaty on the ground of the defect in Sir Sidney Smith's powers. Instructions had been despatched to his superior officer (as well as to

Convention of Closter-Seven.

Convention of El Arish.

(o) *Vide ante*, Pt. III. ch. 2, p. 358. Cf. Phillipson, *op. cit.* vol. ii. pp. 293

(p) See the account given by Livy *seq.* of this remarkable transaction, lib. ix.

himself) forbidding him to enter into any arrangement of the kind. These instructions were notified to General Kleber, who was therefore aware that the agreement was null *ab initio*. Sir Sidney Smith, however, promised that he would endeavour to secure its acceptance by his Government; but General Kleber at once resumed hostilities. The British Government afterwards directed that the convention should be carried out, as the French general had signed it believing that Sir Sidney Smith was competent to conclude it. This was not done, owing to the determination of the new French commander, General Menou, to continue hostilities.

In these compacts, time is material: indeed it may be said to be of the very essence of the contract. If anything occurs to render its immediate execution impracticable, it becomes of no effect, or at least is subject to be varied by fresh negotiation (*q*).

Capitulation  
of Manila.

The city of Manila and all the Philippine Islands surrendered to the English in 1762. By Article 1 of the Capitulation it was stipulated, "That all the effects and possessions of the inhabitants of Manila and its dependencies shall be secured to them, under the protection of His Britannic Majesty, with the same liberty they have heretofore enjoyed." Article 4 empowered the inhabitants to carry on all sorts of commerce as British subjects. A Spanish man-of-war, the *Santissima Trinidad*, sailed from Manila, 1st August, 1762, before the date of the capitulation, but being damaged by storm put back to Manila to refit, and was captured by H.M. ships *Argo* and *Panther* near the island of Capult, one of the Philippines, 30th October, 1762. The *Santissima Trinidad* and her cargo were subsequently condemned in the Admiralty Court as lawful prize to the *Argo* and *Panther*. On an appeal interposed in the name of an inhabitant of Manila, the Lords declared that the capitulation ought to be construed liberally in favour of the claimant, but that there was no room for doubt. The agreement to preserve the city of Manila from the plunderer and the inhabitants in their effects and possessions, for a price to be paid, is manifestly ransoming what fell under the power of the conqueror in consequence of the place having been taken by storm, but can have no relation to any effects or possessions in other parts of the world, not under the power of the conqueror, nor subject to the fate of the place. Further, even if the ship had not begun her voyage before the surrender, sailing a Spanish man-of-war

(*q*) Flassan, *Histoire de la Diplomatie Française*, tom. vi. pp. 97—107. *Annual Register*, vol. i. pp. 209—213, 228—234; vol. xlii. p. 219, pp. 223—233. *State Papers*, vol. xliii. pp. 28

—34. *Parl. Hist.* vol. xxv. pp. 587 *seq.* Cf. De Garden, *Hist. de traités de paix*, vi. 210—214, 288; De Martens, *Recueil*, vii. 1; Hall, *International Law* (1909), pp. 548, 549.

was not carrying on commerce as British subjects. And the appeal was dismissed (*r*).

With regard to flags of truce, capitulations, and armistices, the Hague Regulations contain the following provisions:—

“A person is considered as bearing a flag of truce who is authorized by one of the belligerents to enter into communication with the other, and who carries a white flag. He has a right to inviolability, as have also the trumpeter, bugler, or drummer, the flag-bearer, and interpreter, who may accompany him” (*s*). Flags of truce.

“The commander to whom a flag of truce is sent is not obliged to receive it in all circumstances. He can take all steps necessary to prevent the envoy taking advantage of his mission to obtain information. In case of abuse he has the right to detain the envoy temporarily” (*t*).

“The envoy loses his rights of inviolability if it is proved beyond doubt that he has taken advantage of his privileged position to provoke or commit an act of treachery” (*u*).

“Capitulations agreed on between the contracting parties must be in accordance with the rules of military honour. When once settled they must be scrupulously observed by both parties” (*x*). Capitulations.

“An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not fixed, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice” (*y*). Armistices.

“An armistice may be general or local. The first suspends all military operations of the belligerent States everywhere; the second only those between certain fractions of the belligerent armies, and within a fixed radius” (*z*).

“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 on a fixed date” (*a*).

“It is for the contracting parties to settle in the terms of the armistice what communications may be held, in the theatre of war, with and between the populations” (*b*).

The communications mentioned here refer to intercourse, on the one hand between the inhabitants of the occupied part of a country and those in the unoccupied part, and on the other between

(*r*) *The Santissima Trinidad*, alias *El Poderoso* (1762), Marsden, Adm. Cases, 162.

(*s*) Hague Regulations (1907), Art. 32.

(*t*) *Ibid.* Art. 33.

(*u*) *Ibid.* Art. 34.

(*x*) *Ibid.* Art. 35.

(*y*) *Ibid.* Art. 36.

(*z*) *Ibid.* Art. 37.

(*a*) *Ibid.* Art. 38.

(*b*) *Ibid.* Art. 39.



the forces of each belligerent and the inhabitants of the part held by the other. "This prohibition is rendered necessary, by the principle that an armistice suspends fighting but does not affect the state of war. . . . In the absence of a special provision, the invading belligerent's war rights as against the population continue unchanged. He can raise requisitions, billet his soldiers, demand services in kind and even levy contributions, and his general martial law regulations remain in full force. And war conditions still hold good as regards the mutual relations of the inhabitants of the districts held by the two belligerents. In the absence of special conditions in the protocol, the conclusion of the armistice does not free the inhabitants of the occupied territory from the obligation of holding no intercourse with the people in the other belligerent's zone of authority. They may be treated as spies or war-traitors if they offend, just as if hostilities continued" (c).

"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" (d).

On account of the indefiniteness of the expressions 'serious violation' and 'urgency' (the latter being on all-fours with the indefinite 'military necessity') the retaliatory proceedings indicated in this Article are practically left to the discretion of the party aggrieved.

"A violation of the terms of the armistice by individuals acting on their own initiative only entitles the injured party to demand the punishment of the offenders, and, if necessary, indemnity for the losses sustained" (e).

Passports,  
safe-con-  
ducts, and  
licenses.

Passports, safe-conducts, and licenses, are documents granted in war to protect persons and property from the general operation of hostilities. The competency of the authority to issue them depends on the general principles already noticed. This sovereign authority may be vested in military and naval commanders, or in certain civil officers, either expressly, or by inevitable implication from the nature and extent of their general trust. Such documents are to be interpreted by the same rules of liberality and good faith with other acts of the sovereign Power (f).

Licenses to  
trade with  
the enemy.

Thus a license granted by the belligerent State to its own subjects, or to the subjects of its enemy, to carry on a trade interdicted

(c) Spaight, *op. cit.* pp. 245, 246.

(d) Hague Regulations (1907), lib. iii. cap. 21, § 14. Vattel, *Droit des Gens*, liv. iii. ch. 17, §§ 265—277.

(e) *Ibid.* Art. 41.

(f) Grotius, *De Jur. Bel. ac Pac.* lib. iii. cap. 21, § 14. Vattel, *Droit des Gens*, liv. iii. ch. 17, §§ 265—277.

by war, operates as a dispensation with the laws of war, so far as its terms can be fairly construed to extend. Similarly, the contract made for the ransom of enemy's property, taken at sea, is generally carried into effect by means of a safe-conduct granted by the captors, permitting the captured vessel and cargo to proceed to a designated port, within a limited time (*g*).

In early warfare the invasion of an army into enemy territory was frequently followed by pillage and destruction, or by appropriation of anything that could be seized. "The troops lived on the country which they ate up like locusts" (*h*). Grotius refers to the general practice of his day, when such seizure, plunder, and confiscation on the part of an invader were considered permissible; but he points out, in reference to the mitigations of belligerent practice advocated by him and other jurists, that the conduct of the invading army should not be unrestricted, but that no more should be done or taken than was absolutely necessary for its security. In the wars of the eighteenth century certain disciplinary measures were sometimes adopted by commanders to restrain the licence of their troops; and not infrequently lawless looting was replaced by the practice of demanding requisitions. Military proceedings varied considerably, however; the older methods of 'self-help' and indiscriminate devastation were not forgotten. Occupation of territory was claimed to confer sovereignty over it and its population. In the middle of the eighteenth century, Vattel, a reformer in so many institutions of the law of nations, declined to admit this exaggerated doctrine, and insisted that sovereignty could not arise until the invading belligerent had completely ousted the enemy and had definitely acquired the territory by conquest or by a treaty of cession (*i*). This principle, together with its necessary implications, gradually gained ground. Commanders like Wellington did much to prevent plunder and licence. The development of standing armies and the consequent elaboration of military law and discipline helped on the progressive movement, which was facilitated, too, by the noteworthy work of Heffter (1844) (*k*). From about the middle of the nineteenth century, States began to issue instructions to their armies in the field. Then international conferences—official conferences of States like the Brussels Con-

MILITARY  
OCCUPATION.

(*g*) On licenses to trade with the enemy, see *supra*, p. 435; and on ransom contracts, see *infra*, p. 587.

(*h*) Lawrence, *op. cit.* p. 431.

(*i*) Droit des Gens, liv. iii. §§ 197, 198.

(*k*) A. W. Heffter, Das Europäische Völkerrecht der Gegenwart.

ference (1874), and unofficial assemblies of leading jurists like the Institute of International Law (1880)—took up the question. Their productions paved the way for the Hague Conferences of 1899 and 1907, whose provisions constitute now the written law on the subject.

When  
territory is  
considered  
occupied.

“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 has been established and can be exercised” (*l*).

It is clear from the above Article that a particular locality cannot be deemed to be militarily occupied if the assumed authority is not supported by a force capable of maintaining it. A merely temporary existence of such force is, therefore, inadequate; for as soon as it ceases to be effective in a given place, there military occupation ceases with it. An invading commander’s proclamation will not in itself suffice; it may amount to no more than a ‘paper’ occupation, just as the notification of a naval blockade that cannot effectively be realized results in nothing more than a ‘paper blockade.’ Similarly, presumptions of a ‘constructive’ occupation, as distinguished from an actual, are insufficient. Occupation is not necessarily consequent on invasion; for the invaders may soon afterwards be repulsed and driven out of the country. They cannot be said to have gained a permanent footing there, until they have ousted the national forces from the invaded territory.

Occupation  
and conquest.

Further, just as invasion must be accompanied by certain essential conditions in order that it may be transformed into occupation, so must military occupation be accompanied by certain necessary conditions in order that it may ripen into conquest. Formerly, as we have pointed out above, the invader assumed the larger rights of an occupant, and the occupant assumed the still larger rights of a conqueror. But now there is a line of demarcation between these stages. Conquest or complete subjugation implies the permanent subjection of the occupied country to the sovereign of the occupying forces, with the intention that this territory shall be annexed to the dominions of the new sovereign and shall henceforth be considered as a constituent portion thereof; that is, conquest depends on ‘firm possession’ together with the intention and the capacity to hold the territory so acquired.

Occupation  
and  
sovereignty.

The rights of occupancy, then, cannot be co-extensive with those of sovereignty. They are due to the military exigencies of the



invader, and consequently are only provisional. The local inhabitants do not owe the occupant even temporary allegiance; and the national character of the locality is not legally changed.

This view has long been adopted by British Courts. Thus, in *The Gerasimo* (1857) (*m*), the Privy Council pointed out that in order to convert a friendly or neutral territory into enemy territory, it was not sufficient that the territory in question should be under hostile occupation and subjected to the control of a hostile Power; some additional proceeding was necessary, *e.g.*, cession or conquest, whereby the territory was incorporated with and made part of the dominions of the invader (*n*). This principle was adopted not only in the British Prize Courts, but also in the Courts of common law (*o*). Lord Stowell emphasized the distinction between a hostile occupation and possession clothed with a legal right by cession or conquest, or confirmed by lapse of time (*p*). It was held, too, in the French Courts (*q*) that a crime committed by a Frenchman in Spanish territory which was at the time occupied by the French forces was a crime committed in foreign territory.

Some decisions of the American Courts adopted a different point of view. Thus the Supreme Court held that when a portion of the American Union is occupied by a public enemy, that portion is to be deemed a foreign country in respect of revenue laws, and that goods imported into it are not imported into the Union (*r*). On the other hand, when the forces of the Union occupy a foreign territory, such territory comes under the sovereignty of the Union, but does not become part of the United States, although foreign nations are bound to regard it as such. It is to be governed by military law, as regulated by public law. This is due to the fact that the President has power to make war, and subject the enemy's country, but only in a military sense. But he has no power to enlarge the boundaries of the Union—which can be done only by Congress, the treaty-making power (*s*). In another case the Supreme Court decided that the island of Santa Cruz, which was Danish territory then occupied by Great Britain, was to be considered British, and therefore as possessing enemy character for all the purposes of the war then existing between Great Britain

(*m*) 11 Moo. P. C. 88.

(*n*) Cf. *The Fama* (1804), 5 C. Rob. 115; *The Manilla*, 1 Edw. 1; *The Santa Anna*, 1 Edw. 180.

(*o*) *Donaldson v. Thompson* (1808), 1 Camp. 429; *Hagedorn v. Bell*, 1 M. & S. 450.

(*p*) *The Bolletta*, 1 Edw. 171.

(*q*) *Villasseque's Case* (1818), Ortolan, i. 324.

(*r*) *U. S. v. Rice* (1819), 4 Wheaton, 246.

(*s*) *Fleming v. Page* (1850), 9 Howard, 615; *Neeley v. Henkel* (1900), 180 U. S. Rep. 109. But see *The Circassian* (1864), 2 Wall. 135.

and the United States (t). Whatever advantages this American view may possess in regard to the question of commercial intercourse in war, it is incompatible with the fundamental distinction—which implies an indispensable conception—between military occupation and conquest, that is between temporary possession and permanent acquisition.

Authority of  
the military  
occupant.

Martial law.

Article 43 of the Hague Regulations defines in very general terms the authority of the military occupant: the authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all measures in his power to re-establish and assure as far as possible public order and safety, while respecting, unless absolutely prevented, the laws in force in the country (u).

The words 'public order and safety' do not represent exactly the meaning of the original 'l'ordre et la vie publics,' which refer also to the entire social and commercial life of the community. As the population does not owe the occupying commander allegiance, and as his authority is based merely on military necessity and so is provisional, it follows that, unless military exigencies imperatively demand otherwise, he must administer the existing territorial law, and must not interfere with the existing rights and obligations of the inhabitants, and in particular must not infringe the provision laid down in Article 23h. If, owing to the state of occupation and the special circumstances arising therefrom, he finds certain judicial and administrative modifications indispensable, he must see to it that they are not incompatible with the rules of international law and the dictates of honour and justice. The totality of these modifications constitutes the superimposed martial law. Martial law applied by the commander to the belligerent forces and others found within the line of military operations, as well as to inhabitants of invaded or occupied territory, may be distinguished from the martial law proclaimed by a sovereign in a country threatened with invasion, and also from military law.

Military law.

Military law consists of the rules and regulations made by the legislative authority of the State for the government of its naval or military forces, and it exists both in time of peace and in time of war. Though a man is a soldier, he remains a citizen, and so is subject to the ordinary civil jurisprudence. But as a

(t) *Bentzon v. Boyle (The Thirty Hogsheads of Sugar)*, 9 Cranch, 191.

(u) H. R. Art. 43.

soldier he has further responsibilities; for he is also subject, always and everywhere, to this special military code. In England military law consists of the Army Act, the King's Regulations and Orders for the Army, and Army Orders. This body of law is sanctioned and brought into existence from year to year by the annual Army Act. Military courts-martial are of three kinds, which possess different powers: (1) regimental, consisting of at least three members; (2) district, also three at least; and (3) general, which must contain at least nine members in the United Kingdom, India, Malta, and Gibraltar, but elsewhere not less than five. But these military courts are to be distinguished from the courts convened by a commander in the field or in occupied territory (x).

According to English law, when the country is in a state of actual war, or a state of riot, insurrection or rebellion, the Crown and its ministers are entitled to make whatever arrangements and take whatever precautions are considered necessary in addition to the existing law or in substitution for it. The governing principle is found in the maxim, which has universal applicability—the safety of the commonwealth is the supreme law. Accordingly, the Crown is empowered, apart from the provisions of the written law, to adopt these exceptional measures and employ the necessary force in order to restore peace and order. The exercise of this right and the application of this unusual force are covered by the term martial law. In time of peace the Crown is not entitled to issue commissions to try civilians by courts-martial. At other times, even after the proclamation of martial law, the ordinary tribunals remain and continue their work. The proclamation simply gives power to the military authorities to take exceptional measures for dealing expeditiously with those resisting the authority of the Government or aiding or abetting rebels or the enemy. The acts of the military authorities may not be questioned by the ordinary courts of justice, whilst martial law is in force (y). But on the conclusion of the state of war or rebellion, martial law ceases to operate, and then any seemingly illegitimate proceeding of the military authorities may be inquired into by the ordinary Courts. In order to meet this contingency, however, and obviate any difficulties that may thus arise, Acts of Indemnity are passed by the legislature, for the purpose of protecting the authorities who have acted in good faith, and possibly for providing compensation to

Martial law  
at common  
law.

(x) Cf. *Tilonko v. The Att.-Gen. of Natal*, (1907) A. C. 93, 461.

(y) Cf. *Van Reenen's Case*, (1904) 8 A. C. 114.



innocent persons who may have suffered through the military action.

Martial law is only justified by necessity.

Martial law in this sense is merely a greater or less cessation, from necessity, of municipal law; and what necessity requires it justifies (*z*). Under it, a man in actual armed resistance may be put to death on the spot by anyone acting under the orders of competent authority; or, if arrested, may be tried in any manner which such authority shall direct. But if there be an abuse of the power so given, and acts are done under it, not *bonâ fide* to suppress rebellion and in self-defence, but to gratify malice or in the caprice of tyranny, then for such acts the party doing them is responsible (*a*). "The only principle," says Sir James Mackintosh, "on which the law of England tolerates what is called 'martial law' is necessity. Its introduction can be justified only by necessity; its continuance requires precisely the same justification of necessity; and if it survives the necessity, in which alone it rests, for a single minute, it becomes instantly a mere exercise of lawless violence. When foreign invasion or civil war renders it impossible for courts of law to sit, or to enforce the execution of their judgments, it becomes necessary to find some rude substitute for them, and to employ for that purpose the military, which is the only remaining force in the community. While the laws are silenced by the noise of arms, the rulers of the armed force must punish as equitably as they can those crimes which threaten their own safety and that of society, but no longer; every moment beyond is usurpation. As soon as the laws can act, every other mode of punishing supposed crimes is itself an enormous crime. If argument be not enough on this subject—if, indeed, the mere statement be not the evidence of its own truth—I appeal to the highest and most venerable authority known to our law." He then quotes Sir Matthew Hale (*b*), and cites the case of the Duke of Lancaster, who was executed when taken prisoner at the battle of Boroughbridge, 1322, and proceeds: "No other doctrine has ever been maintained in this country since the solemn parliamentary condemnation of the usurpation of Charles I., which he was himself compelled to sanction in the Petition of Right" (*c*).

If in foreign invasion or civil war the courts of law are actually closed, and it is then impossible to administer criminal justice according to law, then, on the theatre of actual military operations,

(*z*) Forsyth, *Cases and Opinions on Constitutional Law*, p. 201.

(*a*) *Ibid.* p. 214. Finlason, *Martial Law* (London, 1867).

(*b*) Hale, *Pleas of the Crown*, pp. 499, 500.

(*c*) Sir J. Mackintosh, *Miscellaneous Works*, p. 734 (London, 1851).

where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course, and where actual war is raging, acts done by the military authorities are not justiciable by the ordinary tribunals (*d*). As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule ought to never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It should also be confined to the locality of actual war or insurrection; but the fact that for some purposes some tribunals have been permitted to pursue their ordinary course in a district in which martial law has been proclaimed is not conclusive that war is not raging (*e*).

When the actual seat of war is at a distance from the country, it is generally considered that a proclamation of martial law in the country is not necessary. The rules and orders issued under statutory sanction or by virtue of the King's prerogative are regarded as sufficient to meet the needs of the existing conditions.

Proclamation of martial law.

It may well be, however, that when England is at war outside her domains, English territory (or certain vital parts of it) may be regarded as being assimilated to the zone of operations, so as to justify a proclamation of martial law. The modern methods of rapid communication and transport, the essential multiplicity of preparations, the unceasing relationships between the home Government and the military and naval forces, the presence of large numbers of alien enemies afford support to such a view. Moreover, it was held in *Marais' case* (*f*) that, in consequence of such state of war, martial law may be applied in places that are beyond the range of active hostilities. And conformably to this view, the *Lody case* (involving the offence of spying) was taken before a court-martial (October 30, 1914).

Whilst the British and American practice is to introduce this exceptional system of martial law by a formal proclamation, in continental practice it usually comes into being by a declaration of a 'state of siege,' or 'state of war.' Thus, before the outbreak of the Great War of 1914, and when hostilities were deemed in Germany to be imminent, the Kaiser decreed a state of war in

Declaration of 'state of siege.'

(*d*) *Ex parte Marais*, (1902) A. C. 109.

(*e*) *Ex parte Milligan* (1867), 4 Wallace, 127. See also *Smith v. Shaw*, 12 Johnson, 257; *McConnell v. Hamp-*

*den*, 12 Johnson, 234; *Luther v. Borden* (1849), 7 Howard, 42; *Ex parte Marais*, (1902) A. C. 109.

(*f*) (1902) A. C. 109.

conformity with Article 68 of the German Constitution. The Article says: "The Emperor may, if the public safety in the federal territory is threatened, declare every part thereof in a state of war. Until the issue of an Imperial law regulating the prescriptions, the form of notice, and the effects of such declaration, the provisions of the Prussian law, June 4, 1851, hold good." Following such declaration, the military authorities at once adopted various measures for protecting the frontiers, for safeguarding communications and transports, &c.

Martial law during the American civil war. *Milligan's case.*

In October, 1864, during the Civil War, Lambdin P. Milligan, a citizen of the United States, and an inhabitant of Indiana, was arrested, while at home, by order of the Federal general commanding the military district of Indiana. Though not a military person, he was sent to Indianapolis, and brought before a military commission sitting there, tried on certain charges of conspiring against the Government, found guilty, and sentenced to be hanged. The question, which was brought before the Supreme Court, was whether the military commission had jurisdiction legally to try and sentence him. In Indiana the Federal authority was not opposed by force, and its courts were always open to hear criminal accusations and redress grievances. But a powerful secret association, which plotted insurrection and armed co-operation with the rebels, existed in the State. On the question as to whether, under such circumstances, Congress had power to appoint a military commission to try and condemn citizens, not being military persons—that is, whether martial law could be proclaimed—the judges of the Supreme Court differed. But they were unanimous in holding that, as this power had not been distinctly exercised, Milligan, being a citizen not connected with the military service, could not be tried, convicted, and sentenced otherwise than by the ordinary courts of law (*g*).

Martial law in France. *Geoffroy's case.*

A somewhat similar case was decided in France in 1832. A royal order, dated the 6th of June, 1832, had put Paris in a state of siege, and under it military commissions were appointed, which tried and convicted several persons. One Geoffroy was declared guilty of an attack with intent to subvert the Government, and was condemned to death. He appealed to the Court of Cassation. This Court held that Geoffroy not being a military person, or subject to military authority, the military commission had no jurisdiction over him, and its sentence was accordingly annulled (*h*).

(*g*) *Ex parte Milligan* (1867), 4 Wallace, 5—142.

(*h*) Forsyth, Cases and Opinions, p. 483. See on this subject Mr. Field's



So far as this country is concerned, martial law has on several occasions been proclaimed in Ireland and in some of the British colonies for the suppression of rebellions or other serious disturbances. A recent instance is its proclamation in South Africa, where a rebellion amongst certain Boer forces broke out, during the Great War, against the British Government.

Martial law in the field or in occupied territory has been defined to be, the will of the commanding officer of an armed force, or of a geographical military department, expressed in time of war within the limits of his military jurisdiction, as necessity demands and prudence dictates, restrained or enlarged by the orders of his military chief or supreme executive ruler (*i*). As was said in an American case: "Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is under his supreme control" (*k*). The Duke of Wellington described it in the House of Lords as being "neither more nor less than the will of the general who commands the army." But he pointed out that the general must lay down the regulations and limits in accordance with which his will is to be carried out (*l*). The laws of war (when that expression is not used as a generic term) are the laws which govern the conduct of belligerents towards each other and other nations, *flagrante bello* (*m*). Military government is the government imposed by a successful belligerent, either over a foreign province or over a district retaken from insurgents, treated as belligerents. This supersedes, as far as may be deemed expedient, the local law, and continues until the war or rebellion is terminated, and a regular civil authority is instituted (*n*).

Martial law  
in the field.

Though the martial law of a commander is not really law at all in the ordinary sense of the term, it does not on that account justify military oppression. Its stringency will, of course, depend on the particular circumstances of each case; for example, on the amount of danger to which the military forces under the commander are exposed, and, in occupied territory, on the conduct of the local inhabitants; but in every case it should be administered

argument in *McCardale's case*, *Ibid.* p. 491. And his argument in *Milligan's case*, published separately, with an appendix (New York, 1866); also in 4 Wallace, 4. *Phillipps v. Eyre*, L. R. 6 Q. B. 1. Law Magazine, Nov. 1871, p. 170.

(*i*) *Ex parte Milligan*, 4 Wallace, 14 (argument). Opinions of Attys.-Gen. (U. S.), vol. viii. p. 367. And see *Bedreechund v. Elphinstone*, as re-

ported in 2 State Trials, New Series, p. 395, note, and also note to p. 976 of the same volume.

(*k*) *U. S. v. Diekelman* (1875), 92 U. S. 520.

(*l*) Hansard, 3rd series, vol. cxv. p. 880.

(*m*) Argument in *Ex parte Milligan* (1867), 4 Wallace, 14.

(*n*) Argument in *Ex parte Milligan* (1867), 4 Wallace, pp. 141, 142.

in accordance with the universally recognised fundamental principles of humanity and honour, fairness and justice (*o*).

War crimes.

Infringements of this martial law are regarded as 'war crimes.' As a rule no penalty should be inflicted on offenders without previous inquiry and condemnation by a court-martial consisting of a number of officers convened for the purpose. German authorities speak also of a special kind of war crime, which they call 'war treason' ('Kriegsverrath'). The German Manual defines it as the act of injuring or endangering the belligerent's interests by deceit, or by sending messages to the opposing army with regard to the position, movements, plans, &c. of the belligerent, whether in the field or in occupation (*p*). The use of the expression 'war treason' as applied to the nationals of the enemy is, in certain respects, unjustifiable; but whatever terminology be adopted, the consequences of the offence are the same. Thus certain acts committed openly by members of the enemy's armed forces are legitimate, but are regarded as acts of 'war treason' if attempted or done in occupied territory or within the belligerent's lines, either by enemy civilians or by enemy soldiers in disguise. Examples of such acts are the destruction of bridges, lines of communication, telegraphs, or telephones, wrecking military trains, cutting off water supply, setting free captured colleagues, bribing the belligerent's forces to surrender or desert, circulating proclamations or making promises calculated to imperil or damage the belligerent, &c. An instance may be referred to that occurred in the Russo-Japanese war, 1904. Two Japanese officers, having disguised themselves as Chinamen, attempted to blow up a railway bridge in Manchuria, in the rear of the Russian forces. They were captured in the attempt, and their identity was discovered. Accordingly, a Russian court-martial condemned them to death, and they were shot. Had they, undisguised, made the same attempt, they would have been treated, if captured, as prisoners of war.

As to 'war crimes' (apart from 'war treason') their number is naturally indefinite, depending as they do on the number of acts ordered to be done or forbidden to be done in the martial law proclamation or regulations of the invading or occupying commander. Thus, in the Anglo-Boer war, the British military authorities proclaimed the following to be offences against their martial law:—Being in possession of arms, ammunition, &c.,

(*o*) Cf. Bluntschli, *Völkerrecht*, §§ 542, 543, 546, 548. (*p*) *Kriegsbrauch im Landkriege*, p. 50.

travelling without a permit, sending prohibited goods, holding meetings other than those allowed, using seditious language, spreading alarmist reports, overcharging for goods, wearing uniforms without due authority, going out-of-doors between certain hours, injuring military animals or stores, being in possession, without a permit, of horses, vehicles, cycles, &c., hindering those in execution of military orders, trespassing on defence works (*q*). Such offences, together with several others, were specified in the Japanese regulations made in the Russo-Japanese war (*r*). Similarly, lists of offences were drawn up by German commanders occupying French and Belgian territory during the Great War, 1914. Not only were delinquencies like the above punished with very severe penalties (usually death), but certain injunctions were also laid down which exceeded in their rigour and extravagance the martial law regulations of previous belligerents, and were incompatible with the provisions and the spirit of the Hague Code. An order, for example, compelling inhabitants to keep their houses open all night was dreadfully abused by the occupying forces; an order compelling inhabitants to salute German soldiers, and permitting the latter, in case of default, to exact respect by any method, is outrageously arbitrary and arrogant, for it cannot be justified by any considerations of military necessity (*s*).

In recent wars the occupying commander has usually retained the services of the local judges and functionaries (other than political officials) for the general judicial and administrative work of the locality. But he is not obliged to do so. The practice facilitates the maintenance of the laws prevailing there, especially the civil and criminal jurisprudence. These laws ought not to be interfered with, unless they are contrary to the martial law enforced, which, of course, will be considered by the occupant to be predominant. In the Franco-German war, 1870-1871, the French municipal officials were retained, but the Government officials refused to remain in office under the invaders. Similarly the Germans retained to some extent the local authorities in Belgium, 1914-1915, but recalcitrant officials and those complaining of high-handed conduct were treated with the utmost severity, and in some cases were carried off, and incarcerated in German fortresses.

In general, the acts of the occupant possess legal validity, and cannot be abrogated by the subsequent Government. But this rule does not necessarily apply to acts that exceed the occupant's

Occupation  
and the  
local law.

(*q*) Cf. Papers relative to Martial Law in South Africa (Cd. 981).

(*r*) See Ariga, *op. cit.* pp. 379 *seq.*

(*s*) See Phillipson, *Int. Law and the Great War*, pp. 225 *seq.*



powers (*e.g.*, alienation of the domains of the State or the sovereign), to sentences for 'war treason' and 'war crimes,' to acts of a political character, and to those that operate beyond the period of occupation. When occupation ceases, no reparation is legally due for what has already been carried out. Thus, on the conclusion of the Franco-German war, certain persons claimed that they ought to be permitted to complete contracts (for felling timber in the State forests) made with the German authorities then in occupation of the localities concerned; but the restored French Government rejected the claim on the ground that the termination of the occupation annulled the continuing rights derived from or through the occupant (*t*).

Unlawful  
information.

"A belligerent is forbidden to compel the population of occupied territory to give information about the army of the other belligerent or about his means of defence" (*u*).

We have already seen that Article 23h prohibited the compulsion of enemy subjects to take part in the 'operations of war' against their own country; and we have pointed out that the expression 'operations of war' has a wider significance than such an expression as 'military operations.' Article 44, then, constitutes an extension, or rather a particular application of Article 23h. Whether these two Articles taken together exclude the employment of 'forced guides' has been doubted in some quarters (*x*). But there can be no rational ground for doubt when we consider the purport of the Articles, which forbid the forced employment of enemy nationals not only as combatants, but also as co-operators in any proceedings which are intended to contribute to the defeat of their own country. To this end the accurate information of a guide may be quite as important as the accurate firing of a battery. However, should the services of an enemy guide be obtained, whether voluntarily or under compulsion, he will be liable to the supreme penalty, in accordance with established custom, if he deliberately misleads the belligerent's forces.

It may be mentioned that reservations against Article 44 were made by several leading Powers, viz., Germany, Russia, Austria-Hungary, and Japan. But Article 23h is binding on them; and its terms are sufficiently wide to cover the case of compelled guides.

Oath of  
allegiance.

"It is forbidden to compel the inhabitants of occupied territory to take an oath of allegiance to the hostile Power" (*y*).

(*t*) Cf. Hall, *Int. Law* (1909), pp. 483, 484.

(*u*) H. R. (1907), Art. 44.

(*x*) Cf. Holland, *Laws of War on Land* (1908), p. 53.

(*y*) H. R. (1907), Art. 45.

Some writers hold that officials who are retained in their offices by the occupying commander may be required to take an oath of fidelity. There is, perhaps, nothing illegitimate in this requirement, provided the operation of the oath is confined strictly to the period of lawful occupation and to such services as the officials may rightfully be called upon to render. The same considerations might conceivably apply to the inhabitants in general in the occupied territory, but there is a greater danger in their case that the two provisoes mentioned may not be fully complied with by the occupant. On the other hand, an oath of neutrality is not necessarily forbidden by this Article; to require it would not be to superimpose further obligations, for the inhabitants are bound, in any case, to observe the duties of neutrality. In the Anglo-Boer war such an oath was administered by both belligerents (z). Certain reasons, however, may also be urged against the administration of this oath, too; for the occupant may come to regard a system of imposing oaths on the inhabitants as tantamount to a system of effective occupation. If occupation ceases to be effective *de facto*, exacted oaths and promises cannot make good the deficiency.

“Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.” Family honour.

Private property may not be confiscated” (a). Private property.

In earlier days it was a generally recognised rule that from the moment one State was at war with another it had a right to seize on all the enemy's property of whatever kind and wherever found and to appropriate it to its own use or to that of the captors. By the ancient law of nations, even things that were classed as *res sacrae* were not exempt from capture and confiscation; thus Cicero, in his fourth oration against Verres, says that victory made all the *sacred* things of the Syracusans *profane*, and so subject to appropriation or destruction, as the case may be. But in modern times, as has already been pointed out, the principle grew up that no use of force against an enemy is legitimate unless it is absolutely necessary to accomplish the purposes of war. Accordingly, by the modern usage of nations, which acquired the force of law, temples of religion, public edifices devoted to civil purposes only, monuments of art, repositories of science, and similar institutions

(z) Cf. Proclamations of F. M. Lord Roberts (Cd. 426), p. 23; Spaight, *op. cit.*, p. 372.  
(a) H. R. (1907), Art. 46.

were exempted from the general operations of war. Private property also came to be regarded as immune from confiscation, with the exception of such as might become booty in special cases, when taken from enemies in the field or in besieged towns, and of military contributions levied upon the inhabitants of the hostile territory. This exemption was taken to extend even to the case of an absolute and unqualified conquest of the enemy's country. In ancient times, both the movable and the immovable property of the vanquished passed to the conqueror. Such was the Roman law of war, often asserted with unrelenting severity; and such was the fate of the Roman provinces subdued by the northern barbarians, on the decline and fall of the western empire. A large portion, from one-third to two-thirds, of the lands belonging to the vanquished provincials was confiscated and partitioned among their conquerors. The last example in Europe of such a conquest was that of England, by William of Normandy. Since that period, among the civilized nations of Christendom, conquest, even when confirmed by a treaty peace, has not been followed by a general or partial transmutation of landed property. The property belonging to the Government of the vanquished nation passes to the victorious State, which also takes the place of the former sovereign in regard to the eminent domain. In other respects, private rights were long considered to be unaffected by conquest (*b*).

Article 46 of the Hague Regulations demands respect on the part of a belligerent for the personal and proprietary rights of the inhabitants of occupied territory. But this general provision is subject to various exceptions; for "by the prohibition of confiscation it is only meant that private property cannot by any regulation of the invader be taken from its owner for no other reason than that he is an enemy" (*c*). These exceptions are due to considerations of 'military necessity,' and the chief are:—Requisitions and contributions for the support of the invading armies or as an indemnity for the expenses of maintaining order in, and continuing the administration of, the occupied territory; destruction of property demanded imperatively by the exigencies of offence or defence; private property consisting of war material and means of transport; use and adaptation of property for the army's needs which cannot otherwise be satisfied; reprisals; confiscations.

(*b*) Vattel, *Droit des Gens*, liv. iii. ch. 9, § 13. Klüber, *Droit des Gens Moderne de l'Europe*, Pt. II. tit. 2, sect. 2, ch. 1, §§ 250—253. Martens,

*Précis*, liv. viii. ch. iv. §§ 279—282.  
(*c*) Westlake, *Int. Law*, vol. ii. (1913), p. 103.



seizures, and fines by way of penalty for offences against the occupying commander's martial law regulations. Private property will not be regarded as being exempt from the operations of war if its owners do not obey the laws of war. An invader protects non-combatants and their property so long as they take no part in the struggle. As soon as they relinquish this character, the reasons which restrained the invader cease, and he may then punish such individuals by seizing their property, or, if this cannot be discovered and secured, their offence may be visited upon the community to which they belong if the community as a whole can reasonably be held responsible for the delinquency.

Formerly, another exception was made to the immunity of private property. If it was such that it ministered directly to the strength of the enemy, and its possession alone enabled him to supply himself with the munitions of war, and to continue the struggle, it was considered to be subject to confiscation. Thus during the American Civil War cotton was the mainstay of the Confederates; without it they could not have continued the rebellion. The Supreme Court therefore decided that it could lawfully be captured by the Federal troops, notwithstanding that it was strictly private property (*d*). "The whole doctrine of confiscation," said the Supreme Court in a recent case, "is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without, impairs his ability to resist the confiscating Government, while at the same time it furnishes to that Government means for carrying on the war. Hence any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation" (*e*).

"Pillage is formally forbidden" (*f*).

Pillage.

We have already seen that Article 28 prohibits the pillage of a town or locality, even when taken by assault; for in former times a successful assault was regarded as bestowing on the assailants a right to loot. The pillage spoken of in Article 47 refers to booty that is not permitted. Such permissible booty or spoil of war taken on the field of battle comprises horses, batteries, carts, arms, equipment, munitions, army stores and supplies, the war chest, State papers in the possession of captured officers, &c. But private

(*d*) *Mrs. Alexander's Cotton* (1864),  
2 Wallace, 429; *U. S. v. Padelford*,  
9 Wallace, 540; *Haycraft v. U. S.*, 22

Wallace, 93.

(*e*) *Miller v. U. S.*, 11 Wallace, 306.

(*f*) H. R. (1907), Art. 47.

property may not be thus taken as booty (*g*), unless it be arms, munitions, pieces of equipment, &c. (*h*). It is for municipal law to determine in whom the ownership of permissible booty is vested: so far as Great Britain is concerned, it goes to the Crown.

Unfortunately, the practice of pillage has obtained more or less in all wars; it has reappeared in 1914, when German troops had constant recourse to it in a most shameful and heartless manner (*i*). Its extent depends on the policy of commanders—manifested by tacit consent or connivance—and on the character of military discipline.

Occupant  
collecting  
taxes.

“If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as possible, in accordance with the rules of assessment and incidence in force, and he shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound” (*k*).

This Article does not necessarily give the occupying commander a right to collect the taxes, nor does it forbid him to do so. It simply imposes certain limitations on him, if he decides to have recourse to such collection. The qualifying expression ‘imposed for the benefit of the State’ excludes the rates and charges incidental to local government. These may not be collected by the occupant himself; he may, however, superintend their expenditure in order to prevent their being utilized for hostile purposes. The national revenue collected by him must be on the scale in force at the time of invasion, and must be devoted primarily to defray the expenses of his public administration; if any surplus remains it may be used for his own necessary purposes. He is not entitled to raise new taxes, or to raise existing taxes before they are due; in case of necessity, a permissible substitute is contributions and requisitions. He is not bound to observe the prevailing mode of collecting the State taxes, if the officials of the old Government have fled or refuse to serve.

Contribu-  
tions.

“If, in addition to the taxes mentioned in the preceding Article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of such territory” (*l*).

(*g*) Cf. *supra*, H. R. Arts. 4, 14, and Geneva Convention, Art. 4, which relate to the private property of prisoners, of the sick and wounded, and to medical material.

(*h*) See also *infra*, Art. 53.

(*i*) Cf. Phillipson, *Int. Law and the Great War*, pp. 162 *seq.*, 220, 229 *seq.*

(*k*) H. R. Art. 48.

(*l*) H. R. (1907), Art. 49.

It is clear from this Article that contributions may be raised only for two purposes, which are necessarily inseparable from the legitimate activities and objects of the occupant. He may not raise them, therefore, with a view to self-enrichment, or with a view to crippling the financial resources of his enemy and so compelling him to submit, or by way of exacting a war indemnity. He may not raise more than the needs of the army warrant—such needs arising when its own supplies fail, or when unforeseen operations have to be executed. "It may sometimes be justifiable to levy a money contribution on one place, in order to spend it on the purchase of requisitions in another place. The burden of the war may thus be more equitably distributed, falling on the inhabitants generally, rather than upon individual owners of property which may be required" (m).

"No contribution shall be collected except under a written order, and on the responsibility of a commander-in-chief.

This collection shall only be effected, as far as possible, in accordance with the rules of assessment and incidence of the taxes in force.

For every contribution a receipt shall be given to the contributors" (n).

"The receipt mentioned in this Article is intended as evidence that money, goods, or services have been exacted, but implies, in itself, no promise to pay on the part of the occupant. He does not even thereby bind his Government, if victorious, to stipulate in the Treaty of Peace that the receipts shall be honoured by the Government of the territory which has been under occupation. A Swiss proposal, making it obligatory to honour the receipts mentioned in this and the following Article, was indeed deliberately rejected at the first Hague Conference. An occupant may, of course, incur a greater liability by the form which he chooses to give to his receipts, or under the terms of a general proclamation which he has issued" (o).

"Neither requisitions in kind nor services shall be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country. Requisitions.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

(m) Holland, *The Laws of War on Land*, § 109.

(n) H. R. Art. 51.

(o) Holland, *op. cit.* § 111.



Supplies in kind shall, as far as possible, be paid for in cash; if not, a receipt shall be given, and the payment of the amount due shall be made as soon as possible" (*p*).

This Article imposes a limit—though it is not clearly defined—on the requisitioning licence of belligerents. In the first place, the amount and kind of requisitions depend on the actual needs of the army in occupation; secondly, no more must be demanded than the resources of the particular locality can meet—the inhabitants must not be deprived of their means of subsistence. Requisitions are generally collected through the medium of the local municipal authorities, as a safeguard against plundering. The 'requisitions in kind' include not only provisions, but other necessities of the army, such as means of transport, clothing, &c. Demands for large quantities of articles of luxury, such as wines, liqueurs, cigars, &c., are unjustifiable. The 'services' refer to the work of artisans and labourers (*e.g.*, smiths, farriers, drivers, carpenters), and to that of occupiers of houses where troops are quartered; but in no case must the occupant demand services of a military character, or such as are closely related to his belligerent operations. One of the weakest points of this Article is the indefiniteness with regard to the payment for supplies and services (*q*).

Treatment of  
property.  
Cash, &c.

"An army of occupation may only take possession of cash, funds, and realizable securities which are strictly the property of the State, depôts of arms, means of transport, stores, and supplies, and, generally, all such movable property of the State as may be used for military operations.

Military  
material.

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things (apart from cases governed by maritime law), depôts of arms, and, generally, all kinds of war material, may be seized even though they belong to private persons, but they must be restored and compensation fixed when peace is made" (*r*).

We have already referred to the devastation of territory and destruction of property, public or private, when necessity demands, in the general operations of a belligerent in the field. The same considerations apply to the case of occupation. The first paragraph of this Article refers to confiscation, the second merely to sequestration. The expression 'realizable securities'—the gene-

(*p*) H. R. Art. 52.

(*q*) For examples of exorbitant contributions and requisitions demanded

by the Germans in the Great War, see Phillipson, *op. cit.* pp. 235 *seq.*

(*r*) H. R. Art. 53.

rally accepted translation of the original 'valeurs exigibles'—has given rise to some difference of opinion. (In German it has been officially rendered 'eintreibbare Forderungen,' suable claims.) It is, however, generally agreed that the occupant may appropriate and realize securities 'payable to bearer.' As to debts, the occupant is entitled to forbid payments to the former Government, but he may not compel the payment to him of debts that have not become due—for to do so would involve an unjustifiable interference with private rights. In the case of debts that are due or become due to the original sovereign during the occupation, nearly all jurists hold that the occupant cannot take the debt itself, viz., the capital; some maintain, too, that he may not even appropriate the interest due on such debts, whilst others contend that he may lawfully do so. Occupation is not conquest, and sovereignty is not thereby acquired. The power to recover debts due to a State is incidental to the exercise of legitimate sovereignty alone.

The appliances mentioned in the second paragraph of Article 53 as being subject to sequestration (notwithstanding that they are private property) include railway plant, telegraphs, telephones, steamers, horses, carts, and other means of communication. All these appliances, together with private property that can serve as war material (such as arms, ammunition, leather, cloth, saddles, &c.) may be seized and used; but as they are to be eventually restored and compensation is to be paid, it would seem that an obligation to give receipts for them is implied. It will be for the treaty of peace to settle which party is to pay this compensation. In 1870-1 the Germans destroyed arms proper belonging to private persons; but ornamental and hunting weapons they sequestered, and gave receipts for them. Private property, other than means of transport and war material, may not be seized at all. The funds of saving banks over which the State has partial control are not liable to seizure if they belong in reality to private depositors. Similarly, State insurance or pension funds, of which the State is simply the trustee, are entitled to immunity. In 1870 the Germans refrained from seizing the funds of the Banque Nationale de France on the ground that it was a private institution<sup>(s)</sup>; but in 1914 they did not observe this rule in Belgium, where they confiscated the funds of certain branches of the Belgian National Bank, whose private character was apparent, as well as the funds of the Caisse d'Epargne et de Retraite, an institution conducted

Things liable  
to seizure.

<sup>(s)</sup> Cf. P. Schiemann, *Rechtslage der Öffentlichen Banken in Kriegsfall* (Greifswald, 1902), p. 76.

by the Post Office authorities, but containing the savings of working people (*t*).

Submarine  
cables.

“Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in case of absolute necessity. They must likewise be restored and compensation arranged for at the conclusion of peace” (*u*).

This is a new Article added in 1907. In connection with this subject the rules arrived at by the Institute of International Law may be referred to: (1) A submarine cable connecting two neutral territories is inviolable. (2) A cable connecting the territories of two belligerents or of two parts of the territory of one of the belligerents may be cut anywhere, except in the territorial waters or the neutralized waters of a neutral State. (3) A cable connecting a neutral territory with the territory of one of the belligerents may not under any circumstances be cut in the territorial or neutralized waters of a neutral State. In the high sea, this kind of cable may be cut only if an effective blockade exists and within the limits of the line of the blockade, and the cable must be restored with the least possible delay; it may always be cut on the territory or in the territorial waters of an enemy, up to a distance of three marine miles from low-water mark (*x*). As to rules (1) and (2) there has been general agreement; the more difficult case of rule (3) is now provided for by Article 54, which allows the cutting of a cable joining the occupied territory to a neutral country, if military exigencies demand. Destruction merely with the object of inflicting pecuniary loss on the enemy, and not warranted by strategic or tactical operations, is illegitimate. When destruction is legitimate and it is resorted to, indemnity must be paid after the peace. For some time there has been difference of opinion as to whether a belligerent might cut in the open sea a cable joining a neutral country with enemy territory—the right to cut the shore end of such a cable not having been disputed. There is, however, nothing in Article 54 prohibiting it, subject to the demands of military necessity and to subsequent compensation. In 1899, in the Spanish-American war, the United States naval forces cut, within Spanish territorial waters, the Hong-Kong—Manila cable belonging to a British company, but refused to admit a legal obligation to pay indemnity. In 1882, in the Chile-

(*t*) See Phillipson, *op. cit.* pp. 228, 229.

(*u*) H. R. (1907), Art. 54.

(*x*) *Annuaire de l'Institut de Droit*

International, vol. xix. p. 331. On submarine cables generally, see Phillipson, *Studies in International Law* (1908), pp. 55 *seq.*



Peru war, Chile similarly cut the cable of a British company, and afterwards paid compensation.

“The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural undertakings belonging to the hostile State and situated in the occupied country. It must protect the capital of these properties, and administer them in accordance with the rules of usufruct” (y).

Immovable  
State  
property.

A usufructuary is a person who has a special interest in property, which he must use in such a manner as not to impair its *corpus*. According to the above provision, then, an occupant may not appropriate or alienate public immovable property, as he is not entitled to exercise the rights of sovereignty until the occupied territory has been duly annexed; he may appropriate only the produce. The ‘rules of usufruct’ mentioned in the Article may differ more or less in different States, though the fundamental conception be the same. If there is a difference between those of the occupying commander’s State and those of the occupied territory, which are to be applied by the occupant? The Article does not answer this question. Some jurists are in favour of the occupant’s law (z), others hold that the local law is to be applied. The latter contention appears to be the more reasonable, inasmuch as Article 43, defining the general authority of the occupant, calls upon him to respect the prevailing laws of the country, unless he is absolutely prevented from doing so. One cannot conceive any insuperable hindrance to the application of the laws of usufruct obtaining in the occupied country. Article 55, then, gives the occupant the right, for example, to collect the rents and dues in respect of State immovables maturing during the occupation; so that the old Government, when restored, will not be entitled to disregard the payment of such rents and dues and demand them a second time. The occupant, too, may fell timber ripe for cutting; but purchasers are obliged to remove it before the occupation comes to an end, as the restored Government may legitimately forbid it, despite previous contracts with the occupant. If timber not fit for cutting be sold, the purchaser’s title will not be recognised by the former Government.

Occupant as  
usufructuary.

In the case of movable property taken on land, it was usually held that if it could be identified its immediate recapture, or within a period of twenty-four hours, restored it to its former owner.

*Jus post-  
liminii.*

(y) H. R. Art. 55.

(z) Cf. Bluntschli, § 646.

Now such property is immune from seizure unless it belongs to the State, or it is of a military character, or is needed for military operations. A different rule is applied to real property, or immovables. The original owner of this species of property is entitled to what is called the benefit of postliminy, and the title acquired in war must be confirmed by a treaty of peace before it can be considered as completely valid. This rule cannot be frequently applied to the case of mere private property, which by the general usage of modern nations is exempt from confiscation. It only becomes practically important in questions arising out of alienations of real property, belonging to the Government, made by the opposite belligerent, while in the military occupation of the country. Such a title must be expressly confirmed by the treaty of peace, or by the general operation of the cession of territory made by the enemy in such treaty. Until such confirmation, it continues liable to be divested by the *jus postliminii*. The purchaser of any portion of the national domain takes it at the peril of being evicted by the original sovereign owner when he is restored to the possession of his dominions (a).

Churches,  
works of art,  
&c.

“The property of municipalities, that of institutions dedicated to religious worship, charity, and education, the arts and sciences, even when belonging to the State, shall be treated as private property.

All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science is forbidden, and should be made the subject of legal proceedings” (b).

This Article does not prohibit an occupant from using State or municipal buildings for purposes required by military necessity; so that, in the absence of other accommodation, he is permitted, for example, to turn schools into barracks, churches into hospitals, &c. He must not wilfully damage these buildings and their contents, unless it be imperatively demanded by military operations; but in no case is he entitled to appropriate or carry off such contents.

The case of  
the works of  
art acquired

In connection with this subject, a very interesting case is furnished by the proceedings of the allies in 1815 with regard to the foreign works of art that had been accumulated in

(a) Grotius, De Jur. Bel. ac Pac. lib. iii. cap. 6, § 4; cap. 9, § 13. Vattel, Droit des Gens, liv. iii. ch. 13, §§ 197—200, 210, 212. Klüber, Droit des Gens Moderne de l'Europe, §§ 256—258. Martens, Précis, liv. viii. ch. 4, § 282, a.

Where the case of conquest is com-

plicated with that of civil revolution, and a change of internal government recognised by the nation itself and by foreign States, a modification of the rule may be required in its practical application. *Vide ante*, Pt. I. ch. 2, pp. 48 *et seq.*

(b) H. R. Art. 56.

the Louvre. But here the distinction between illegitimate appropriation during military occupation and legitimate appropriation by cession and treaty was not observed. The invasion of France by the allied Powers of Europe, in 1815, was followed by the forcible restitution of the pictures, statues, and other monuments of art, collected from different conquered countries during the wars of the French Revolution, and deposited in the museum of the Louvre. The grounds upon which this measure was adopted were fully explained in a note delivered by the British minister, Lord Castlereagh, to the ministers of the other allied Powers at Paris, on the 11th September, 1815. It was there stated that representations had been laid before the Congress, assembled in that capital, from the Pope, the Grand Duke of Tuscany, the King of the Netherlands, claiming, through the intervention of the allied Powers, the restoration of the statues, pictures, and other works of art, of which their respective States had been successively stripped by the late revolutionary Government of France, contrary to every principle of justice, and to the usages of modern warfare. The note went on to say that it was now the second time that the Powers of Europe had been compelled, in vindication of their own liberties and for the settlement of the world, to invade France, and twice their armies had possessed themselves of the capital of the State, in which these, the spoils of the greater part of Europe, were accumulated. The legitimate sovereign of France had as often, under the protection of those armies, been enabled to resume his throne, and to mediate for his people a peace with the allies, to the marked indulgence of which neither their conduct to their own monarch, nor towards other States, had given them just pretensions to aspire. That the purest sentiments of regard for Louis XVIII., deference for his ancient and illustrious house, and respect for his misfortunes, had invariably guided the allied councils, had been proved beyond a question, by their having, in 1814, framed the treaty of Paris on the basis of preserving to France its complete integrity; and still more, after their late disappointment, by the endeavours they were again making, ultimately to combine the substantial interests of France with such an adequate system of temporary precaution as might satisfy what they owed to the security of their own subjects. But it would be the height of weakness, as well as of injustice, and in its effects much more likely to mislead than to bring back the people of France to moral and peaceful habits, if the allied sovereigns, to whom the world was anxiously looking up for protection and repose, were to deny that principle of integrity

by France  
in the  
Napoleonic  
wars.

Lord Castle-  
reagh's Note.



in its just and liberal application to other nations, their allies (more especially to the feeble and the helpless), which they were about, for a second time, to concede to a nation against which they had had occasion so long to contend in war. Upon what principle could France, at the close of the war, expect to sit down with the same extent of possessions which she held before the revolution, and desire, at the same time, to retain the ornamental spoils of all other countries? Was there any possible doubt of the issue of the contest, or of the power of the allies to effectuate what justice and policy required? If not, upon what principle would they deprive France of her late territorial acquisitions, and preserve to her the spoiliations consisting of objects of art appertaining to those territories, which all modern conquerors had invariably respected, as inseparable from the country to which they belonged? These remarks were amplified by a variety of considerations of political expediency, not necessary to be recapitulated, and the note concluded by declaring that, in applying a remedy to this offensive evil, it did not appear that any middle line could be adopted which did not go to recognise a variety of spoiliations, under the cover of treaties, if possible, more flagrant in their character than the acts of undisguised rapine by which these remains were, in general, brought together. The principle of property regulated by the claims of the territories from whence these works were taken, is the surest and only guide to justice; and perhaps there was nothing which would more tend to settle the public mind of Europe at this day, than such a homage on the part of the King of France, to a principle of virtue, conciliation, and peace (c).

In the debate which took place in the House of Commons, on the 20th of February, 1816, on the Peace with France, Sir Samuel Romilly, speaking incidentally of this proceeding, stated that he was by no means satisfied of its justice. It was not true that the works of art deposited in the museum of the Louvre had all been carried away as the spoils of war; many, and the most valuable of them, had become the property of France by express treaty stipulations; and it was no answer to say, that those treaties had been made necessary by unjust aggressions and unprincipled wars; because there would be an end of all faith between nations, if treaties were to be held not to be binding, because the wars out of which they arose were unjust, especially as there could be no competent judge to decide upon the justice of the war, but the nation itself. By whom, too, was it that this supposed act of

justice and this "great moral lesson," as it was called, had been read? By the very Powers who had, at different times, abetted France in these her unjust wars. Among other articles carried from Paris, under the pretence of restoring them to their rightful owners, were the celebrated Corinthian horses which had been brought from Venice; but how strange an act of justice was this to give them back their statues, but not to restore to them those far more valuable possessions, their territory and their republic, which were, at the same time, wrested from the Venetians! But the reason of this was obvious: the city and the territory of Venice had been transferred to Austria by the treaty of Campo Formio, but the horses had remained the trophy of France; and Austria, whilst she was thus hypocritically reading this moral lesson to nations, not only quietly retained the rich and unjust spoils she had got, but restored these splendid works of art, not to the Venice which had been despoiled of them, the ancient, independent, republican Venice; but to Austrian Venice—to that country which, in defiance of all the principles she pretended to be acting on, she still retained as part of her own dominions (*d*).

"No general penalty, pecuniary or otherwise, may be inflicted on the population on account of the acts of individuals for which it cannot be considered as collectively responsible" (*e*). Collective or  
general  
penalties.

This Article impliedly sanctions the infliction of pecuniary penalties, or fines, and other penalties on a community for acts and omissions for which it is clearly answerable. These acts and omissions refer not only to breaches of war law, but also to infringements of the occupying commander's proclamations or martial law regulations, as well as to failure to supply legitimate contributions and requisitions. Moreover, where reprisals are permissible collective penalties may be imposed. Occupying commanders have usually held a town or village jointly responsible for damage done to railways, bridges, telegraphs, &c., in the neighbourhood. To saddle a community with responsibility of this kind is unjustifiable, if the damage was committed by unknown individuals without the cognizance of the community, and when the community was unable to prevent the commission of the act. It is the occupant's business to maintain the public order, and, above all, to secure the observance of his martial law

(*d*) Life of Romilly, edited by his sons, vol. ii. p. 404.

(*e*) H. R. Art. 50.

regulations. It is unlawful to hold innocent persons responsible for the misconduct of others beyond their control. To say that it is a frequent practice is simply to say that an elementary principle of reason and justice is honoured in the breach rather than in the observance.

Hostages.

This brings us to the question of hostages, on which there is by no means unanimous agreement. In earlier times hostages were given by one party or by both parties as a guarantee that a convention or a promise would be observed. The practice of seizing hostages has also been adopted by occupying commanders, as a guarantee that the fellow-citizens of the arrested persons would refrain from doing certain things prohibited and would carry out certain things ordered to be done. In 1870-1 the Germans habitually seized hostages, including mayors, councillors, priests, university professors, and other leading citizens, who were to be put to death in case of disobedience on the part of their townsmen. No doubt such measures of intimidation and repression contributed much to the ultimate victory of the invaders. These proceedings were repeated, in a peremptory and systematic manner, by the Germans whenever they entered into occupation of Belgian and French towns and villages during the war of 1914-1915. Many hostages were shot, many were held in oppressive and humiliating confinement, many were carried off to Germany (*f*). They were treated far worse than prisoners of war. The Hague Rules do not include innocent citizens among the persons liable to be captured as prisoners of war. The Hague Regulations, it is true, have no specific provision with regard to hostages; but their seizure and the presumption of vicarious responsibility as well as the principle of terrorism and application of psychological pressure are contrary to the fundamental conceptions of humanity, conscience, fairness, and justice that are frequently appealed to in the international conventions of the Hague. The practice is akin to that of brigandage and blackmail, and is repugnant to all honourable men. International law does not sanction the abnegation of honour even in the severest warfare. In the Franco-German war, and in the Anglo-Boer war, too (*g*), the Germans and the British seized hostages and placed them on military trains as a safeguard against wrecking or damage to bridges, &c. This practice is almost as indefensible as using inhabitants as a shield to the firing

(*f*) Cf. Phillipson, *Int. Law and the Great War*, pp. 238 *seq.*

(*g*) Cf. White Paper, *Proclamations issued by F. M. Lord Roberts in South Africa* (Cd. 426), 1900, p. 11.



line (*h*). Besides, it is to be remembered that trains may lawfully be wrecked and bridges damaged by qualified combatants—even if they proceed singly—who manage to cross the lines; so that in such a case the arrested hostages would be made to suffer for the legitimate acts of a belligerent.

(*h*) Several cases of this practice occurred in the Great War; see Phillipson, *op. cit.* pp. 195, 253, 254.

## CHAPTER III.

## RIGHTS OF WAR AS BETWEEN ENEMIES—MARITIME WARFARE.

LAWFUL  
BELLIGERENTS  
IN NAVAL  
WAR.

THE naval forces of maritime States consist of two classes of vessels: firstly, fighting vessels ('vaisseaux de combat'), including battleships, cruisers, torpedo boats, destroyers, and submarines; and secondly, auxiliary vessels ('vaisseaux auxiliaires'), including colliers, transports, repairing ships, supply ships, despatch boats, &c. At the Hague Conference, 1907, Lord Reay, one of the representatives of Great Britain, proposed such a classification for the acceptance of the other delegates, and suggested that the second class, viz., auxiliary vessels, should be accorded the same belligerent status as regular fighting ships. The obvious objection, however, was made that the proposal was incompatible with the principles of 'unneutral service.' Though this distinction has not received the recognition of written international law, it none the less exists as a fact.

Non-com-  
missioned  
captors.

It must probably be considered as a remnant of the barbarous practices of those ages when maritime war and piracy were synonymous, that captures made by private armed vessels without a commission, not merely in self-defence, but even by attacking the enemy, were considered lawful, not indeed for the purpose of vesting the enemy's property thus seized in the captors, but to prevent their conduct from being regarded as piratical, either by their own Government or by the other belligerent State (*a*). Property thus seized was condemned to the Government as prize of war, or, as these captures were technically called, 'droits of admiralty.' The same principle is now applied to the captures made by armed vessels commissioned against one Power, when war breaks out with another; the captures made from that other are condemned, not to the captors, but to the Government (*b*).

(*a*) See Sir L. Jenkins' Charge to the Grand Jury at the Admiralty Sessions in Southwark, 18th Feb. 1680. Marsden, Adm. Cases, p. 256.

(*b*) Brown, Civ. and Adm. Law, vol. ii. p. 526, Appendix. *The Abigail*

(1801), 4 C. Rob. 72; *The Georgiana*, 1 Dods. Ad. 397. Spark, Diplomatic Correspondence, vol. i. p. 443. Wheaton's Rep. vol. ii. Appendix, Note I. p. 7.

The practice of cruising with private armed vessels commissioned by the State by means of letters of marque, was formerly sanctioned by the laws of every maritime nation, as a legitimate means of destroying the commerce of an enemy. The practice, however, was justly arraigned as liable to gross abuses, as tending to encourage a spirit of lawless depredation, and as being in glaring contradiction to the more mitigated modes of warfare practised by land. Powerful efforts were made by humane and enlightened individuals to suppress it, as inconsistent with the liberal spirit of the age. The treaty negotiated by Franklin, between the United States and Prussia, in 1785, by which it was stipulated that, in case of war, neither Power should commission privateers to depredate upon the commerce of the other, furnished an example worthy of applause and imitation. But this stipulation was not revived on the renewal of the treaty, in 1799; and it was feared that, so long as maritime captures of private property were tolerated, this particular mode of injuring the enemy's commerce would continue to be practised, especially where it afforded the means of countervailing the superiority of the public marine of an enemy (*c*).

Abolition of privateering.

The practice of privateering was resorted to during the Napoleonic wars. But as the system was liable to gross abuses and licentious conduct, and involved serious disadvantages in the case of neutral commerce, public opinion gradually turned against it. In 1854, at the commencement of the Crimean war, the allies, Great Britain and France, decided to discontinue the issuing of letters of marque to private owners, and to use in their naval operations against the enemy only public armed vessels. On the conclusion of the war, the Declaration of Paris (signed by the plenipotentiaries of Great Britain, France, Austria, Prussia, Russia, Turkey, and Sardinia) laid down, *inter alia*, that "privateering is and remains abolished" (Article 1). Nearly all maritime States afterwards expressed their adhesion to the Declaration. The United States was a notable exception; she refused to sign it, unless the right to capture private property other than contraband were abrogated. Nor did Spain and Mexico accept the Article against privateering. During the American Civil War of 1861, Congress authorized the President to issue letters of marque, but he did not avail himself of this power. The Confederates offered their letters of marque to foreigners, but the restrictive legislation

(*c*) Vattel, liv. iii. ch. 15, § 229. 15. North American Review, vol. ii. Franklin, Works, vol. ii. pp. 447, 530. (N. S.) pp. 166—196. Wheaton, Hist. Edinburgh Review, vol. iii. pp. 13— Law of Nations, p. 308.



of the maritime Powers, and the threat of the United States to treat such vessels as pirates, prevented their being accepted. The Confederate vessels were commissioned as of their regular navy (*d*). In the Spanish-American war of 1898, the United States Government issued a proclamation stating its intention "to adhere to the rules of the Declaration of Paris." The Spanish Government, while accepting the three last Articles of the Declaration, maintained their right to issue letters of marque, but postponed the authorization of privateers, and contented itself with the organization of a service of auxiliary cruisers. The utter collapse of the Spanish naval power, and the consequent cessation of hostilities, prevented further developments (*e*). In 1886, Japan signed the Declaration of Paris. At the second Hague Conference, 1907, Spain notified her adhesion to it.

The Declaration of Paris is now a firmly established part of international law and is regarded as possessing universal applicability, although it has not obtained the formal adhesion of a few States. During the Great War of 1914 it was urged in some quarters in Great Britain that she should denounce the Declaration, on the ground that, among other reasons, Germany had had recourse to a species of privateering, inasmuch as she had converted merchantmen into warships on the high seas. But such conversion, as we shall see presently, is not equivalent to privateering. Moreover, in *The Marie Glaeser* (*f*), a case of maritime capture that came before the Prize Court soon after the outbreak of the war, the President declared, when a question was raised as to the Declaration of Paris, that the Court would regard it as possessing binding force and as an acknowledged part of international law.

Enlistment of  
a volunteer  
navy.

Privateering was definitely and formally abolished by the Declaration of Paris, 1856; but after that date States not infrequently resorted to the practice of enlisting for purposes of war vessels belonging to private persons. Thus, in July, 1870, at the commencement of the Franco-German war, Prussia, being weaker than France in naval resources, endeavoured to make good the deficiency by inviting private owners to place their merchantmen at the service of the Government, with the object of equipping them and utilizing them in belligerent operations against the adversary. These vessels were intended to constitute a volunteer navy. Their officers and crews were in the first instance to be

(*d*) Wheaton, by Dana, n. 173.

(*e*) See Hertslet, *Commercial Treaties*, xxi. pp. 836, 1075.

(*f*) *The Marie Glaeser* (1914), 31 T. L. R. 8.

provided by the owners, but were to be under naval discipline and naval command; and the vessels were to fly the naval flag. For the time being, then, the vessels were to be regarded as units of the naval forces, and the officers and crew as combatants. The German Government offered the owners certain sums for the hire of their ships, and an indemnity in case they were captured or destroyed, as well as premiums if they destroyed enemy vessels or took prizes. France denounced the scheme as being equivalent to privateering and thus contrary to the Declaration of Paris, and made an appeal to Great Britain. The British Government submitted the question to its law officers, who held that there was a "substantial difference" between the German proposal and the practice abolished by the first Article of the said Declaration, so that no opposition could properly be offered to the Prussian decree (*f*). The matter was taken up by some of the leading publicists and jurists of the day, but no agreement was arrived at. However, the German project came practically to nothing, for none of the invited vessels assumed hostilities.

But the movement to raise auxiliary fleets in time of war by incorporating suitable merchantmen temporarily in the navy was by no means dead. In 1877 when war appeared imminent between Great Britain and Russia, the Russian Government accepted the offer of a patriotic association to establish a Volunteer Fleet. The vessels were to be purchased by private subscription, and placed under the command of the imperial navy during the threatened war. The difference between the two Powers was settled by the Treaty of Berlin; but the Russian Volunteer Fleet remained, and is still in existence. It receives a subsidy from the Government on certain conditions as to strength and efficiency; its ships may in time of peace carry the mercantile flag and may engage in commerce, but they are in the main employed in the public service, *e.g.*, in carrying convicts, soldiers, officials, and stores between Petrograd or Odessa and the Russian possessions in the Far East. The commander and one other officer of each vessel are appointed by the State, and their crews (who may also be supplied by the Government) are subject to naval training and discipline. In time of war the naval flag is assumed.

Later, some of the leading maritime Powers adopted another method for recruiting their navies. Thus, in 1887, Great Britain entered into arrangements with the great shipping companies, which, in return for annual subsidies, were to place at the disposal

(*g*) British Parl. Papers, Franco-German War, No. 1 (1871), p. 22.

of the Admiralty fast vessels, at a fixed price and on short notice, for service as cruisers or transports in time of war. The Government undertook to provide from the Royal Naval Reserve half the number of the seamen, and also to place the necessary equipment on board (*h*). In 1891 the United States (*i*) made similar arrangements with American shipowners, and made good use of such auxiliary cruisers in the war with Spain, 1898. The same system, with modifications in details, was adopted by other naval Powers; for example, France, Germany, Italy, Japan. The British arrangements mentioned above have since been discontinued, with the exception of the agreement with the Cunard Company; and another plan was adopted by which subsidies were granted to the Company on condition that the vessels it built were previously approved by the Government.

Are vessels of this character entitled to be regarded as legitimate belligerents? Like the militia and volunteer corps of land warfare, they are lawful belligerents if they are taken over and commissioned by the State, if they operate under its responsibility and observe (like the regular warships) the laws and customs of war.

In July, 1904, during the Russo-Japanese war, the *Peterburg* and the *Smolensk*, two vessels of the Russian Volunteer Fleet, in the guise of merchantmen flying the mercantile flag passed from the Black Sea through the Bosphorus and the Dardanelles into the Mediterranean, and proceeded *viâ* the Suez Canal to the Red Sea. After leaving Suez they mounted guns, hoisted the naval flag, and began to intercept neutral commerce. Several vessels were stopped, amongst which was the German steamship *Prinz Heinrich*; several of her mail bags were taken from her (though they were afterwards placed on board the British vessel *Persia* and sent on to their destination). Matters came to a head when the British S.S. *Malacca* was seized by the *Peterburg* (July 13) on the ground that she was engaged in contraband trade; though, in fact, her cargo consisted of arms and ammunition belonging to the British Government and destined for Hong-Kong and Singapore. However, a prize crew was put on board the *Malacca*; she was taken to Port Said, where her passengers and crew were disembarked, and then sent to Libau for adjudication. When reports of these proceedings reached this country, the British Government sent a protest to Russia, and demanded the release of the *Malacca* on the

(*h*) British Parl. Papers, Subvention of Merchant Steamers for State Purposes, 1887.

(*i*) Cf. Moore, Digest, vol. vii. p. 542. See also *The Rita* (1899), 39 Fed. Rep. 763.



grounds that she did not carry contraband, and that the *Peterburg* and the *Smolensk* could not lawfully exercise the right of capture, inasmuch as they were not ships of war; but if they were, then Russia had violated several international agreements, whereby the Bosphorus and the Dardanelles were closed to men-of-war. Russia receded from her position, liberated the *Malacca* after a perfunctory examination of her cargo, and agreed to forbid her Volunteer Fleet to exercise belligerent rights in the future, on the ground that the belligerent status of such vessels was not yet recognised by international law (*j*). As a result of this incident the second Hague Conference, 1907, considered the question of the conversion of merchantmen, and arrived at a number of rules thereon:—

“(1) No merchant ship converted into a warship shall have the rights and duties appertaining to vessels possessing that status unless it is placed under the direct authority, immediate control, and responsibility of the Power whose flag it flies.

The Hague Convention relative to the conversion of merchant ships into warships.

(2) Merchant ships converted into warships must bear the external marks which distinguish the warships of their nationality.

(3) The commander must be in the service of the State and duly commissioned by the proper authorities. His name must appear on the list of the officers of the fighting fleet.

(4) The crew must be subject to military discipline.

(5) Every merchant ship converted into a warship is bound to observe, in its operations, the laws and customs of war.

(6) A belligerent who converts a merchant ship into a warship must, as soon as possible, announce such conversion in the list of its warships” (*k*).

This Convention was signed by practically all the Powers represented at the Hague. A notable exception was the United States, which refused to be a signatory thereto for the same reason that she declined previously to accept in a formal manner the Declaration of Paris—for the United States Government has throughout been anxious to abolish, along with the practice of privateering, the right to capture private enemy property of a non-contraband character. Though her signature was withheld from the Convention, the United States will undoubtedly observe in practice the definite and authoritative regulations laid down.

A striking deficiency of the seventh Convention is the absence of a rule as to the place where merchantmen may be converted.

Place of conversion.

(*j*) On the *Malacca case*, see T. J. Lawrence, *War and Neutrality in the Far East* (1904), pp. 202 *seq.*; F. E. Smith and N. W. Sibley, *International Law as interpreted during the Russo-*

*Japanese War* (1905), pp. 40 *seq.*; *Parliamentary Debates* (1904), 4th series, vol. cxxxviii. pp. 1433, 1479.

(*k*) Hague Convention, No. VII. (1907), Arts. 1—6.

There was a difference of opinion both at the Hague Conference (1907) and at the London Naval Conference (1909) among the States including the Great Powers. Great Britain, the United States, Japan, and other Powers contended that the conversion of merchantmen into warships should be effected only in the ports of the country to which the merchantmen belonged or in ports occupied by that country's armed forces. On the other hand, a number of Powers, including France, Germany, and Russia, claimed the right to convert also on the high seas. Moreover, some even advocated permission to convert in neutral ports or neutral territorial waters. The latter course is clearly inadmissible, as being contrary to the well-established fundamental principles of neutrality. On general principles, however, it is obviously legitimate for a belligerent to effect conversion in its own waters or in those of the enemy, or of an ally. As to the high seas, the conclusion cannot be inferred so readily. If the practice be there permitted without restriction, neutral interests will thereby be jeopardised; for neutral States are entitled to know beforehand their position with regard to belligerent interference with their trade, and by what vessels such interference will be exercised. Further, if conversion on the high seas be allowed, the right of reconversion would presumably be also claimed; so that a vessel might be subjected to a series of arbitrary transformations—according to her object and position—which would be inconsistent with the fundamental requirement as to definite belligerent status. War law forbids intermittent belligerency on sea as well as on land. The question of converting merchantmen on the high seas remains, then, unsettled. If an agreement thereon be arrived at in the future, it is very probable that the suggestions of the delegates of three Powers will be embodied. Thus, at the London Naval Conference (1908-1909) Great Britain proposed that the right of conversion on the high seas should be restricted "to the case of vessels which had been specifically and publicly designated by the respective Governments as suitable for the purpose," and which appeared on their navy lists; and that such vessels, while in neutral ports, should be subjected to the same treatment as belligerent men-of-war (*l*). Italy suggested at the Hague Conference (1907) that conversion should be limited to merchantmen that left the territorial waters of their own country before the outbreak of war. Finally, Austria proposed at the same time that if conversion be allowed, reconversion should be prohibited in the same war.

(*l*) British Parl. Papers, Miscell. No. 4 (1909), p. 31.



The practice of conversion on the high seas was reported to have taken place during the Great War. Thus, soon after the commencement of hostilities, a German liner, the *Vaterland*, after leaving the United States with a number of German reservists, was said to have converted herself, when outside the American territorial waters, into a cruiser for the purpose of capturing or destroying the enemy merchantmen. It was also reported that the United States Government despatched a warship to ascertain whether the alleged conversion had involved a breach of American neutrality.

Converted merchantmen are to be distinguished from a class of mercantile vessels which may be described as defensively armed merchantmen. Of these much was heard during the Great War. Unlike the former, they are not commissioned and continue to trade or carry passengers; but with a view purely and simply to adopting measures of self-defence in case of unjustifiable attack, they are provided with a number of guns. The legitimacy of this practice was denied in Germany.

Defensively  
armed mer-  
chantmen.

During the Napoleonic wars the British merchant service usually carried guns for defensive purposes. The vessels of the East India Company and the Hudson Bay Company were furnished with adequate armament (*m*). Even as late as the middle of the nineteenth century, merchantmen engaged in the opium trade took similar precautions for self-defence. After this the practice fell into disuse; but quite recently it was reintroduced. In 1913 the British Admiralty stated that some forty vessels had been armed with two 4·7-inch guns each, and provision would soon afterwards be made for thirty more. The Admiralty supplied the guns and ammunition, and provided for the training of the guns' crews. The guns were mounted only in the stern, so that pursuers alone might be fired at. These vessels, it was emphasized, did not possess belligerent status, and could not take part in offensive operations. They would offer resistance only to the enemy's armed merchantmen.

Exception was taken to these proceedings in some countries, especially in Germany, where it was contended that such measures of self-defence were illegitimate and exposed the crew to the treatment of 'criminals,' unless they were duly enrolled in the naval forces of their country. In 1913, however, the Institute of International Law considered the measures to be permissible. It would

(*m*) Cf. James, Naval History.



follow, then, that the crews of defensively armed merchantmen, if captured by the enemy after having offered resistance, are entitled to be treated as prisoners of war; so that they forfeit the right of release which is accorded to the crew of a captured merchantman by the eleventh Convention of the Hague Conference, 1907.

Soon after the commencement of the Great War, the German Government complained to the United States that British merchantmen were furnished with 6-inch guns, and so were placed in the position of warships. But the American Government eventually decided that the merchant vessels of belligerents would be admitted in its ports, on the ground that to carry armament and ammunition for purely defensive purposes did not constitute them warships, if the guns were not larger than 6-inch and were not mounted forward.

We may add that on May 7, 1915, the great liner *Lusitania* was torpedoed by a German submarine (which resulted in the loss of more than 1,100 innocent persons, including a large number of neutrals); the German Government held, *inter alia*, that the vessel was armed, and therefore was in the position of a warship. This allegation was denied by the British Admiralty, and was later disproved at a public inquiry.

THE SICK,  
WOUNDED AND  
SHIPWRECKED.

We have already set forth the rules of international law relating to the treatment of the sick and wounded in land warfare. In the case of maritime warfare further rules are necessary. In 1899 the first Hague Conference established a Convention for adapting the principles of the Geneva Convention (1864) to naval war; and in 1907 the second Hague Conference revised, improved, and enlarged it, on the basis of the new Geneva Convention of 1906, and embodied the results in its tenth Convention. The principal provisions are as follows:—

Military  
hospital  
ships.

“Military hospital ships, that is to say, ships constructed or adapted by States specially and solely with a view of aiding the sick, wounded, and shipwrecked, the names of which have been communicated to the belligerent Powers at the commencement or during the course of hostilities, and in any case before they are employed, shall be respected, and cannot be captured while hostilities last.

These ships, moreover, are not in the same position as warships with regard to their stay in a neutral port” (n).

(n) Hague Convention (1907), No. X. Art. 1.

This Article requires the communication of the names of hospital ships to belligerents; it says nothing of such communication to neutral States. But as the Article confers on these ships immunity from the restriction imposed on warships in neutral ports, viz., a maximum stay of twenty-four hours, it might prevent inconvenience and suspicion if the names were notified also to neutrals.

It must be recorded that during the Great War this fundamental provision of the Convention was, according to a report of the British Admiralty, violated by Germany, in that one of her submarines fired a torpedo (February 1, 1915) at—but missed—the British hospital ship *Asturias*, some fifteen miles off the Havre lightship. A similar attack was made on another hospital ship, the *St. Andrew*. It was emphasized that both hospital ships had carefully fulfilled the requirements of the Convention, and were clearly recognisable by night as well as by day.

“Hospital ships equipped wholly or in part at the expense of private persons or officially recognised relief societies shall be likewise respected and exempt from capture, if 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 any case before they are employed. Private hospital ships.

These ships must be provided with a document from the proper authorities declaring that the vessels have been under their control while fitting out and on final departure” (o).

It was thought that the exemption granted by this Article would induce private owners of yachts and other suitable craft to place them at the disposal of the medical service.

“Hospital ships equipped wholly or in part at the cost of private persons or officially recognised societies of neutral countries shall be respected and exempt from capture, on condition that they are placed under the control of one of the belligerents, with the previous consent of their own Government and with the authorization of the belligerent himself, and that the latter has notified their name to his adversary at the commencement of or during hostilities, and in any case before they are employed” (p). Neutral hospital ships.

“The ships mentioned in Articles 1, 2, and 3, shall afford relief and assistance to the sick, wounded, and shipwrecked of the belligerents without distinction of nationality. Their duties and liabilities.

The Governments undertake not to use these ships for any military purpose.

These vessels must in no wise hamper the movements of the combatants.

During and after an engagement they will act at their own risk and peril.

The belligerents shall have the right to control and search them; they may decline their assistance, order them off, impose upon them a certain course, and put a commissioner on board; they may, even detain them if serious circumstances require it.

As far as possible the belligerents shall enter in the log book of the hospital ships the orders which they give them" (*q*).

Distinctive  
signs.

"Military hospital ships shall be distinguished by being painted white outside with a horizontal band of green about a metre and a half (about five feet) in breadth.

The ships mentioned in Articles 2 and 3 shall be distinguished by being painted white outside with a horizontal band of red about a metre and a half in breadth.

The boats of the ships above mentioned, as also small craft which may be used for hospital work, shall be distinguished by similar painting.

All hospital ships shall make themselves known by hoisting, with their national flag, the white flag with a red cross provided by the Geneva Convention; and further, if they belong to a neutral State, by flying at the mainmast the national flag of the belligerent under whose control they are placed.

Hospital ships which under the terms of Article 4 are detained by the enemy must haul down the national flag of the belligerent to whom they belong.

The ships and boats above mentioned which wish to assure by night the freedom from interference to which they are entitled, must, subject to the assent of the belligerent they are accompanying, take the necessary measures to render their special painting sufficiently plain" (*r*).

It has already been pointed out above, in connection with the Geneva Convention as applied to land warfare, that Turkey reserved the right to use the Red Crescent and Persia the Lion and Sun, instead of the Red Cross.

"The distinguishing signs referred to in Article 5 can only be used, whether in time of peace or of war, for protecting or indicating the ships therein mentioned" (*s*).

The British delegates did not accept this Article, on the ground

(*q*) Art. 4.

(*r*) Art. 5.

(*s*) Art. 6.



that they could not undertake that their legislature would pass an Act conformably thereto. We have already seen that for the same reasons the British representatives did not accept Article 28 of the Geneva Convention of 1906.

“In the case of a fight on board a warship, the sick wards shall be respected and spared as far as possible.” Sick wards and material.

These sick wards and the material belonging to them remain subject to the laws of war; they cannot, however, be used for any purpose other than that for which they were originally intended, so long as they are required for the sick and wounded.

The commander into whose power they have fallen, may, however, in case of serious military necessity, apply them to other purposes, after first seeing that the sick and wounded on board are properly provided for” (*t*).

“The protection to which hospital ships and sick wards are entitled ceases if they are used to commit acts harmful to the enemy.” Innocent character.

The fact of the staff of the said ships and sick wards being armed for maintaining order and defending the sick and wounded, and the presence of wireless telegraphy apparatus on board, are not sufficient reasons for withdrawing protection” (*u*).

In order to illustrate the application of this Article, two interesting cases may be referred to, one that occurred in the Russo-Japanese war (1905), and the other in the Great War (1915). After the Russo-Japanese war broke out, the *Orel* (described in the Japanese official documents as the *Aryol*), a steamship belonging to the Russian Volunteer Fleet, was chartered by the Russian Red Cross Society for use as a hospital ship. In accordance with the existing requirements (Article 2 of the third Convention of the Hague (1899), now replaced by the tenth Convention, 1907), her name was notified to the Japanese Government, which accordingly recognised her exemption. During the battle of Tsushima she was captured by a Japanese cruiser, and sent in for adjudication on the ground of having assisted in the warlike operations of the enemy (Article 4 of the 1899 Convention provided that hospital ships were not to be used for a military purpose). It was proved before the Sasebo Prize Court that a few days before the battle the vessel had received on board prisoners—not being sick and wounded—from the British steamer *Oldhamia*, which had

(*t*) Art. 7. Cf. Geneva Convention (1906), Arts. 6, 15, *supra*.

(*u*) Art. 8. Cf. Geneva Convention (1906), Arts. 7, 8, *supra*.

been captured by a Russian cruiser; that she carried material for military use; and had performed reconnoitring services. Accordingly the Court condemned both the vessel and the cargo (x). The *Ophelia* (y), purporting to be a German hospital ship, was captured on October 18, 1914, owing to suspicions aroused by her conduct. Up to the time of the war she was a merchant vessel, and on August 3 (the day before the outbreak of hostilities) she was in the port of London, and on the following day she proceeded to Hamburg. On September 11 the German Government issued a certificate declaring her to be a hospital ship. On October 18 she was heard to have received code messages. Accordingly she was signalled to stop, and the commander of the *Meteor* boarded her, and received some ship's papers; but several documents had been thrown overboard before his arrival. In consequence of this, the *Ophelia* was ordered to haul down her flag, and was taken in for adjudication. The President, in the course of his judgment, said that the records of hospital ships should be clean; but, if they are not preserved, their destruction raises a presumption of guilty practices (z). Such vessels are liable to search, in accordance with the express terms of the tenth Convention of 1907; but if those in charge can with impunity destroy the documents and records immediately before a searching officer makes his visit, the right of search becomes to a great extent nugatory. The evidence having compelled the President to come to the conclusions that, firstly, the *Ophelia* was not constructed, adapted, or used for the special and sole purpose of affording aid and relief to the sick, wounded, and shipwrecked, and, secondly, that she was adapted and used as a signalling ship for military purposes, he therefore held that she forfeited the protection claimed under the Convention, and so condemned her as lawful prize.

Private vessels  
with sick and  
wounded on  
board.

“Belligerents may appeal to the charity of the commanders of neutral merchantmen, yachts, or boats to take on board and tend the sick and wounded.

Vessels responding to this appeal, as well as the vessels which have of their own accord rescued sick, wounded, or shipwrecked men, shall enjoy special protection and certain immunities. In no case can they be captured for having such persons on board; but, subject to any undertaking that may have been given to them,

(x) *The Orel* (or *The Aryol*) (1905), Takahashi, Int. Law applied to the R.-J. War (1908), pp. 620 *seq.*

(y) *The Ophelia* (May 21, 1915), T. L. R. 452; (1915) P. 129.

(z) The case of *The Johanna Emilie* (1854), Spinks, 14, at p. 20, was referred to with regard to the spoliation of documents.

they remain liable to capture for any violations of neutrality they may have committed" (a).

"The religious, medical, and hospital staff of any captured ship is inviolable, and its members may not be made prisoners of war. On leaving the ship they take with them the objects and surgical instruments which are their property. The medical staff of captured vessels.

This staff shall continue to discharge its duties while necessary, and may afterwards leave when the commander-in-chief considers it possible.

The belligerents must secure to the said staff that has fallen into their hands the same allowances and the same pay as are granted to the persons holding the same rank in their own navy," (b).

"Sailors and soldiers and other persons officially attached to fleets or armies who are taken board when sick or wounded, whatever be their nationality, shall be respected and tended by the captors" (c). Wounded sailors, &c. on captured vessels.

"Any warship belonging to a belligerent may demand the surrender of the sick, wounded, or shipwrecked who are on board military hospital ships, hospital ships belonging to relief societies or to private individuals, merchant ships, yachts, and boats, whatever the nationality of such vessels" (d). Surrender of wounded, &c.

Great Britain accepted this Article on condition that it was understood to apply "only to the case of combatants rescued during or after a naval engagement in which they have taken part" (e).

"If sick, wounded, or shipwrecked persons are taken on board a neutral warship every possible precaution must be taken that they do not again take part in the operations of war" (f). Wounded, &c. on neutral warships.

It would follow that such persons taken on board a neutral warship are not to be handed over to either of the contending belligerents, but that they should be interned or released on parole by the neutral Government.

"The sick, wounded, or shipwrecked of one of the belligerents who fall into the power of the other belligerent are prisoners of war. The captor must decide, according to circumstances, whether to keep them, send them to a port of his own country, to a neutral port, or even to an enemy port. In this last case, prisoners thus repatriated may not serve again while the war lasts" (g). Treatment of wounded, &c.

The last provision of this Article is, as it stands, open to criticism, on the ground that it empowers a belligerent to send back

(a) Hague Convention (1907), No. X. Art. 9. Cf. Geneva Convention (1906), Art. 5, *supra*.  
 (b) Art. 10. Cf. Geneva Convention (1906), Arts. 9, 12, 13, *supra*.  
 (c) Art. 11. Cf. Geneva Convention (1906), Art. 1, *supra*.  
 (d) Art. 12.  
 (e) Parl. Papers, Miscell. No. 6 (1908), p. 148.  
 (f) Art. 13.  
 (g) Art. 14.



the enemy wounded or shipwrecked to their own country under compulsory parole. It is to be noted that it is a neutral warship and not a neutral merchantman or other vessel that is placed in a position analogous to that of neutral territory which enjoys inviolability.

Those landed  
at a neutral  
port.

“The sick, wounded, or shipwrecked, who are landed at a neutral port with the consent of the local authorities, must, in default of an arrangement to the contrary between the neutral State and the belligerent States, be guarded by the neutral State so as to prevent them from again taking part in the operations of the war.

The expenses of tending them in hospital and interning them shall be borne by the State to which the sick, wounded, or shipwrecked persons belong” (*h*).

If, in the above Article, the word ‘landed’ (débarqués) be construed strictly, it may well be inferred that the provision laid down does not apply to men who swim to the neutral shore or escape from a wreck. Further, the Article does not say definitely by whom the landing of the wounded and shipwrecked is effected. It seems to imply that it will be done by a belligerent vessel; hence if the landing is carried out by a neutral vessel the Article is inapplicable. Thus, on one occasion during the Great War when British survivors of destroyed vessels were landed in Holland by neutral ships, the Dutch Government liberated them. Had these survivors been taken on board a neutral warship, the same course could not have been adopted; for Article 13 would operate to prevent their release.

Belligerents’  
duties after  
each engage-  
ment.

“After each engagement, the two belligerents shall, so far as military interests permit, take measures to search for the sick, wounded, and shipwrecked, and protect them, as well as the dead, and protect them from pillage and ill-treatment.

They shall see that the burial, whether by land or sea, or cremation of the dead, shall be preceded by a careful examination of the bodies” (*i*).

“Each belligerent shall send, as early as possible, to the authorities of their country, navy or army, the military marks or documents of identity found on the dead and a list of the names of the sick and wounded picked up by him.

The belligerents shall keep each other informed as to the admissions into hospitals and deaths which have occurred among the sick and wounded in their hands. They shall collect all the objects

(*h*) Art. 15.

(*i*) Art. 16. Cf. Geneva Convention (1906), Art. 3, *supra*.

of personal use, valuables, letters, &c., which are found in the captured ships, or which have been left by the sick and wounded who died in hospital, in order to have them forwarded to the persons concerned by the authorities of their own country" (*k*).

In December, 1904, a conference of maritime Powers was held at the Hague, and a Convention was established, whereby it was agreed that all hospital ships complying with the conditions of Articles 1, 2, and 3 of the third Convention of the Hague Conference, 1899 (but now the corresponding conditions of the tenth Convention of 1907) "shall be exempted, in time of war, in the ports of the contracting parties, from all dues and taxes levied on ships for the benefit of the State." This Convention has been accepted by twenty-five States; but Great Britain did not take part in the Conference of 1904, on the ground that special legislation would be needed to carry out its provisions, although the British Minister at the Hague stated that his Government was favourably disposed towards the proposal (*l*).

Hospital  
ships and  
port dues.

International law, conventional and customary, imposes certain restrictions on the maritime capture of belligerents. We have already dealt with some very important cases, viz., the position of enemy merchant vessels on the outbreak of war, the immunity conferred on enemy ships by means of licenses, and the position of hospital ships. Other exceptions to the ordinary right of capture relate to the following:—Mail boats and postal correspondence; coastal fishing boats and small boats employed in local trade; vessels charged with religious, scientific, or philanthropic missions; the crews of captured enemy merchantmen; cartel ships; non-contraband enemy private property found on board neutral vessels. In addition to these, there are one or two minor relaxations.

RESTRICTIONS  
ON MARITIME  
CAPTURE.

From time to time, States entered into engagements whereby they agreed to exempt from capture, in time of war, each other's mail boats. These agreements were rare, and involved but few States, *e.g.*, Great Britain, the United States, France, Holland, and Belgium. They were concluded with the proviso that each contracting party might terminate them by giving notice to the other. It was, however, generally felt that conventions of this kind would hardly prove strong enough in time of war to protect

Mail boats  
and postal  
correspon-  
dence.

(*k*) Art. 17. Cf. Geneva Convention (1906), Art. 4, *supra*.

(*l*) Cf. A. P. Higgins, *The Hague*

Peace Conferences and other International Conferences (1909), pp. 392—394.

vessels carrying overseas correspondence. Accordingly, the efforts of States to establish a relaxation with regard to this subject were directed to secure immunity rather for the correspondence itself than for the boats conveying it. Sometimes neutrals endeavoured to obtain for their mail boats exemptions from visit and search on the part of belligerents; but an unqualified immunity was never granted, though there were cases in which belligerents agreed to modify in certain particulars their right of interference. Thus, on the outbreak of the Spanish-American war, 1898, the President of the United States declared in his proclamation that neutral mail boats would not be interfered with "except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade." Similarly, on the occasion of the Anglo-Boer war, the British Government announced such concessions. A German mail steamer, the *Bundesrath*, was stopped (December, 1899) on her voyage to Lorenzo Marques, in Delagoa Bay, by a British cruiser and brought into Durban on suspicion of carrying contraband; but her mails were released and sent on by another vessel. In the controversy that followed, the German Government did not appeal to any established rule or custom of international law with regard to the exemption of mail steamers, but held merely that it was desirable that such vessels should not be arrested (*m*). In the Russo-Japanese war (1904), the *Smolensk*, a vessel belonging to the Russian Volunteer Fleet (to which we have already referred), stopped the German steamship *Prinz Heinrich* in the Red Sea and removed a number of her mail bags; those intended for Japan were confiscated, but the others were after much delay placed on board the British vessel, the *Persia*, and sent on to their destination (*n*). Other belligerent nations at times adopted the same course; the exemption, however, was never conceded *de jure*, but only by way of grace.

The Hague Conference of 1907 took up the question, and in its eleventh Convention laid down two Articles which substitute clearly defined compulsory provisions for rules that had been more or less optional and precarious:—

"The postal correspondence of neutrals or belligerents, whether official or private in character, found on board a neutral or enemy ship is inviolable. If the ship is detained the correspondence must be forwarded by the captor with the least possible delay.

The provisions of the preceding paragraph do not apply, in

(*m*) Parl. Papers (1900), Africa, No. 1.

(*n*) Cf. Lawrence, War and Neutrality in the Far East, pp. 109 *seq.*



case of violation of blockade, to correspondence proceeding to or from a blockaded port" (o).

"The inviolability of postal correspondence does not exempt a neutral mail ship from the laws and customs of maritime war respecting neutral merchant ships in general. The ship, however, may not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible" (p).

It is clear, then, that if the mail boat is an enemy vessel, she may be captured as a prize. If she is a neutral vessel, she is liable to visit and search, when it is absolutely necessary for the belligerent to exercise his right; and it is for the belligerent himself to determine when to exercise it. Thus the possibility of arbitrary treatment that existed before the Convention was made was not altogether removed by it.

Enemy coastal fishing boats were for a long time considered to be exempt from capture, so long as they did not participate in any way in the hostilities. In 1798, Sir W. Scott (Lord Stowell) held that the rule was merely one of comity (q); though a few years later it was contended by the French Government that it was an established and compulsory rule of the law of nations. In 1899 the question was examined by the American Supreme Court in the case of *The Paquete Habana* and *The Lola* (r). These were two fishing boats, sailing under the Spanish flag, which were seized off the coast of Cuba by United States cruisers engaged in the blockade of the north coast of that island. The conduct of both boats was innocent. Mr. Justice Gray, delivering the judgment of the majority of the Court in favour of the fishing boats, observed that there was an ancient usage among civilized nations conferring exemption from capture on coast fishing vessels. This usage was shown by various early treaties, edicts, and ordinances, compilations of maritime customs, and later by the practice of the United States during her wars. During the wars of the French Revolution there had, indeed, been an interruption of the usage as between Great Britain and France; but the interruption was only temporary, for the exemption was restored by Orders in Council of 1806 and 1810. Since then such immunity was recognised by all nations. Thus, in the war between Japan and China, 1894, a Japanese ordinance specifically exempted "all boats engaged in coast fisheries." It may, then, be said that at the present day by the general consent of nations, and independently of treaties or

Coastal  
fishing boats.

(o) Hague Convention (1907),  
No. XI. Art. 1.

(p) Art. 2.

(q) *The Young Jacob and Johanna*  
(1798), 1 C. Rob. 20.

(r) 175 U. S. Rep. 677.

other public acts, it is an established rule of international law that these vessels together with their implements and supplies, cargoes and crews, are exempt from capture if they are unarmed and are honestly engaged in their peaceful calling of catching and bringing in fresh fish. But if coast fishermen or their vessels are employed for a warlike purpose, or in such a way as to give aid or information to the enemy, and also if military or naval operations create an imperative necessity inconsistent with immunity, then the exemption does not apply. Nor does it apply to the case of vessels employed on the high seas in taking whales, seals, cod, or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce.

The Japanese acted in accordance with these doctrines during the Russo-Japanese war. Thus, their Prize Courts condemned the *Lesnik* in 1904, on the ground that she was a Russian deep sea fishing vessel (*s*); and the *Kotic* in 1905, which was a fishing vessel that had been engaged in police duty (*t*).

The principles enunciated above were embodied in Article 3 of the eleventh Convention of the Hague (1907):—

“Vessels employed exclusively in coast fisheries or small boats employed in local trade, together with their appliances, rigging, tackle, and cargo, are exempt from capture.

This exemption ceases as soon as they participate in any manner in hostilities.

The contracting parties bind themselves not to take advantage of the harmless character of the said boats in order to use them for military purposes while preserving their peaceful appearance” (*u*).

The expression ‘coast fisheries’ was not defined. As it is well known that fishermen do not necessarily confine their fishing to the waters adjacent to their own coasts, we must infer that the word ‘coast’ applies to any coast where the fishermen are entitled to pursue their industry. Further, the phrase ‘small boats employed in local trade’ cannot properly be held to apply to coasting steamers. Owing to the indefiniteness of these expressions, the Article certainly needs some amendment.

Certain Prize Court cases have been mentioned that occurred before the Hague Convention was brought into existence. A case that came before the British Prize Court during the Great War may be referred to (*x*). On August 5, H.M.S. *Princess Royal*

(*s*) Takahashi, Int. Law applied to the R.-J. War, p. 595.

(*t*) Takahashi, p. 593.

(*u*) Hague Convention (1907), No. XI, Art. 3.

(*x*) *The Berlin* (1914), 31 T. L. R. 38.

seized the *Berlin*, a German sailing cutter, in the North Sea, at a distance of some five hundred miles from Emden, her home port, and at a distance of about eighty miles from the coast of Scotland. On board were found a cargo of fish and materials for curing. Her condemnation was demanded, on the ground that she was not entitled to exemption because of her size and distance from the coast where she was seized. The President, after setting forth the judgment of the American Supreme Court in *The Paquete Habana* and *The Lola* (as given above), and referring to the practice of the Japanese Courts, observed that in Great Britain there appeared to be no decided case which considered such exemption to be derived from the law of nations (*y*). But after the lapse of a century it has become an established rule, apart from Conventions, that fishing vessels pursuing their industry near the coast—not necessarily in territorial waters—are free from capture, if they are employed only in such peaceable work as their industry properly involves. But the *Berlin* did not satisfy this test. Her size, equipment and voyage showed she was a deep sea fishing vessel, engaged in a commercial enterprise, which formed part of the trade of the enemy country, so that she was subject to capture. Accordingly both the ship and the cargo were condemned.

“Ships charged with religious, scientific, or philanthropic missions are equally exempt from capture” (*z*).

Ships charged with religious, scientific, or philanthropic missions.

The immunity conferred by this Article on these classes of vessels dates back to the middle of the eighteenth century, and for a long time it was regarded as being derived from an obligatory rule of the usage of nations. The right is accompanied, of course, by the reciprocal obligation to preserve an innocent character; so that protection ceases if any of these vessels take part in hostilities or otherwise aid the military or naval operations of the enemy. It has been customary for such vessels to obtain a safe-conduct from the hostile Government; and it is advisable to continue this practice, though the Convention does not demand it.

In 1801, when Great Britain and France were at war, Commander Flinders, who was commissioned to circumnavigate Australia, obtained a passport from the French Government. Whilst at Sydney he exchanged his vessel, the *Investigator*, which had been found unseaworthy, for the *Cumberland*. In 1803 his vessel was detained and he and his crew were made prisoners of war at Port Louis in Mauritius (then a French colony), on the

(*y*) Cf. *The Young Jacob and Johanna* (1798), 1 O. Rob. 20; *The Liesbet Van den Toll*, 5 O. Rob. 283.

(*z*) Hague Convention (1907), No. XI. Art. 4.



ground that the *Cumberland* was not the vessel that had obtained the passport, and that she had entered Port Louis in suspicious circumstances. He was released on parole in 1810; and the same year Mauritius capitulated to the British and the explorer's ship was retaken (*a*).

A case that arose during the Great War may be referred to. In March, 1915, the German Government protested against the seizure by British cruisers of the German steamer *Plakat*, which had been ordered by the Governor of Tsing-tao to transport the women and children from there to Tientsin, before the siege of Tsing-tao began. It was urged that the capture was a violation of international law, on the ground that the vessel was entrusted with a humanitarian mission.

To this contention, Sir Edward Grey replied (through the medium of the American Embassy) that Article 4 of the eleventh Convention does not apply to the case in question; this was made clear in the official report of the deliberations at the Hague (*b*). "In the view of his Majesty's Government the conveyance of women and children from a fortress which was about to be besieged (an action which would have the effect of increasing the power of resistance of the fortress) cannot be regarded as a philanthropic mission within the meaning of the Article; and it would indeed appear that the *Plakat* might more properly be considered as being employed on a service connected with the operations of war." Sir Edward Grey added that the protest was all the more astonishing inasmuch as a German submarine torpedoed, without notice, the French vessel *Amiral Ganteaume*, which was conveying refugees to England—no opportunity having been given to the passengers to escape in the ship's boats; whilst the *Plakat* was taken into a British port, the refugees were forwarded to their destination, and the vessel was brought before a Prize Court, where the owners are permitted to put forward their claims.

#### Cartel ships.

Cartel ships are vessels used in services relating to the exchange of prisoners of war, or other special services agreed upon between the belligerents. They should be furnished with permits from the enemy Government—not necessarily the supreme authority (*c*)—whereby they would enjoy immunity from capture whilst proceeding to their appointed services, performing them, or returning from them. The mere intention to act as a cartel ship does not

(*a*) Cf. M. Flinders, *Voyage to Terra Australis*, vol. ii. chaps. iii. *seq.*

(*b*) Cf. Sub-Annexe 10 to Protocol

of the Seventh Plenary Meeting.

(*c*) Cf. *The Carolina* (1807), 6 C. Rob. 336.

suffice; if a vessel has no pass indicating permission to carry out such intention she remains liable to capture. Either public or private vessels may be employed for the purpose. But if they engage in mercantile traffic, carry despatches or passengers, perform hostile acts, or otherwise abuse their position, their immunity is forfeited (*d*). This subject has not been determined by written international law; it depends entirely on the usage of nations.

During the war between Great Britain and Holland, two Dutch vessels proceeding from the Texel to Flushing were captured by the British. Their condemnation was opposed on the ground that they were on their way to take on board exchanged prisoners for conveyance to England. Sir W. Scott held that cartel ships were protected both whilst carrying prisoners and on their return voyage. Though the vessels in question were not at the time of capture engaged in this service, and it was the actual employment, not the future intention, on which immunity was based, yet protection might be extended to vessels that had already entered on their functions by equipping themselves for the employment, and were shown to have an honest intention to carry out the object thus indicated (*e*).

“When an empty merchant ship is captured by a belligerent, such of its crew as are nationals of a neutral State are not made prisoners of war.

The crews of enemy merchantmen captured by a belligerent.

The same rule applies in the case of the captain and officers, who are likewise nationals of a neutral State, if they promise formally in writing not to serve on an enemy ship while the war lasts” (*f*).

“The captain, officers, and members of the crew, when nationals of the enemy State, are not made prisoners of war, on condition that they bind themselves, on the faith of a formal written promise, not to undertake, while hostilities last, any service connected with the operations of the war” (*g*).

“The names of the persons retaining their liberty under the conditions laid down in Article 5, paragraph 2, and in Article 6, are notified by the belligerent captor to the other belligerent. The latter is forbidden knowingly to employ the said persons” (*h*).

“The provisions of the three preceding Articles do not apply to ships taking part in hostilities” (*i*).

(*d*) Cf. *The Venus* (1814), 4 C. Rob. 355; *La Rosine* (1800), 2 C. Rob. 372.

(*e*) *The Daifje* (1800), 3 C. Rob. 139. Cf. *La Gloire* (1804), 5 C. Rob. 198.

(*f*) Hague Convention (1907), No. XI. Art. 5.

(*g*) Art. 6.

(*h*) Art. 7.

(*i*) Art. 8.

The above Articles introduce an innovation in international law. Before the Convention was established it was a well recognised rule that officers and crews of whatever nationality who were found on captured enemy merchant vessels were prisoners of war. From time to time, however, opinions to the contrary were advanced. Thus, during the Franco-German war, 1870, Count Bismarck maintained that the treatment by the French of the crews of merchant vessels as prisoners of war was not in conformity with international usage. He cited against the French contention the decree of Berlin, November 18, 1806, in which Napoleon assigned as a reason for the establishment of the continental blockade that England rejected the law of nations as generally practised, and took as prisoners of war "les équipages des vaisseaux de commerce et des navires marchands." However this may be, the practice of the French in 1870 and of the British earlier was more in accordance with general usage than that claimed by Bismarck. The rule was justified on the ground that the services of such men might at any time be enlisted by the enemy for his transports, or supply ships, or even for his fighting navy (*lc*). Now a distinction is drawn in maritime war between duly enrolled combatants and non-combatants, by analogy with that long recognised in land warfare. The immunity conferred by the new regulations would, of course, be forfeited if the merchantmen depart from their innocent character, engage in hostilities, or offer resistance to an enemy cruiser.

**MARITIME  
CAPTURE  
AND ENEMY  
CHARACTER**

The progress of civilization has slowly, but constantly, tended (in theory) to soften the extreme severity of the operations of war by land; but it still remains unrelaxed in respect of maritime warfare, in which the private property of the enemy taken at sea or afloat in port, is liable to capture and confiscation, subject, however, to the already mentioned exemptions relative to enemy merchant vessels on the outbreak of war, hospital ships, fishing vessels, cartel ships, &c., and to the exemption introduced by the Declaration of Paris. This inequality in the operation of the laws of war, by land and by sea, was justified by alleging the former usage of considering private property when captured in cities taken by storm, as booty; and the fact that contributions are levied upon territories occupied by a hostile army, in lieu of a general confiscation of the property

Distinction  
between  
private pro-  
perty taken  
at sea and  
that taken on  
land.

(*lc*) Cf. Heffter, *Le droit int. de l'Europe* (1883), note by Geffcken to § 126, p. 289.



belonging to the inhabitants; and that the object of wars by land being conquest, or the acquisition of territory to be exchanged as an equivalent for other territory lost, the regard of the victor for those who are to be or have been his subjects, naturally restrains him from the exercise of his extreme rights in this particular; whereas, the object of maritime wars is the destruction of the enemy's commerce and navigation, the sources and sinews of his naval power—which object can only be attained by the capture and confiscation of private property.

The strictness of the rule subjecting the enemy's property on the high seas to confiscation was somewhat modified by the Declaration of Paris, 1856, which provides, in its second Article, that "the neutral flag covers enemy's goods, with the exception of contraband of war" (*l*). Almost all civilized Powers are parties to this Declaration. At the time of the Spanish-American war, 1898, neither Spain nor the United States had acceded to it; but a Royal Decree, issued by the Queen Regent of Spain, declared that her Government, "guided by the principles of international law, intends to observe" the second Article of the Declaration of Paris, and the President of the United States issued a proclamation to the same effect (*m*). At the second Hague Conference, 1907, Spain formally notified her adhesion to the Declaration.

Enemy's goods under a neutral flag.

The indiscriminate seizure of private property on land would cause the most terrible hardship, without conferring any corresponding advantage on the invader. It cannot be effected without in some measure relaxing military discipline, and is sure to be accompanied by violence and outrage. On the other hand, the capture of merchant vessels is usually a bloodless act, most merchant vessels being incapable of resisting a ship of war. Again, property on land consists of endless varieties, much of it being absolutely useless for any hostile purpose, while property at sea is almost always purely merchandise, and thus is part of the enemy's strength. It is, moreover, embarked voluntarily, and with a knowledge of the risk incurred, and its loss can be covered by insurance (*n*). An invader on land can levy contributions or a war indemnity from a vanquished country, he can occupy part of its territory and appropriate its rates and taxes, and by these and other methods, he can enfeeble the enemy and terminate the war.

Capture of private property on the high seas.

(*l*) Cf. *infra*, pp. 702 *seq.*, as to the maxims "free ships free goods," and "enemy ships enemy goods," and the liability of neutral commerce in time of war.

(*m*) Hertslet, *Map of Europe*, vol. ii. p. 1282. *Commercial Treaties*, xxi. pp. 836, 1075.

(*n*) Cf. Wheaton, ed. Dana, n. 171.

But in a maritime war, a belligerent has none of these resources, and his main instrument of coercion is crippling the enemy's commerce (*o*). If war at sea were to be restricted to the naval forces, a country possessing a powerful fleet would have very little advantage over a country with a small fleet or with none at all. If the enemy kept his ships of war in port, a powerful fleet, being unable to operate against commerce, would have little or no occupation (*p*). The United States proposed to add to the Declaration of Paris a clause exempting all private property on the high seas from seizure by public armed vessels of the other belligerent, except it be contraband; but this proposal was not acceded to (*q*). Nor does it seem likely, for the reasons stated above, that maritime nations will forgo their rights in this respect.

On the other hand, the enormous extension of railways, the increase of the practice of marine insurance, and the dependence of the greatest naval Power in the world upon an ocean-borne food supply, have deprived many of the older arguments in favour of the retention of the claim to capture private property at sea of their force, while at the same time it has inclined many persons in Great Britain, more especially those interested in shipping, to look favourably on a proposed abandonment of the claim. A nation which could blockade and harass its enemy's coasts, cut him off from his colonies, interdict the transport of his troops by water, and dominate by the guns of its fleet many most important strategic positions, would remain no mean ally and no contemptible foe, even apart from the power, as illustrated in Egypt in 1881, and in the South African war (1900), of making its base of operations wherever ships can float, and of transporting its armies to whatever striking point was required. The preponderating importance of the commerce of Great Britain, and the protection afforded under the neutral flag by the Declaration of Paris, also materially affect the consideration of this question as a matter of policy (*r*). It may be answered, again, that French predominance on the sea in 1870-71, as against Germany, was undisputed, but little harm was inflicted on German commerce; and the depredations of the *Alabama*, so often cited by the other side, were mainly possible because British ports all over the world, and British coaling stations all over the world, were open to her for refuge, for coaling, as a base of operations, and even to refit.

(*o*) Ortolan, *Diplomatie de la Mer*, liv. iii. ch. ii.

(*p*) Field, *Int. Code* (2nd ed.), p. 527.

(*q*) Halleck, ch. xx. § 3.

(*r*) Maine, *Int. Law*, lect. VI.; Heffter, Geffcken, note 2, § 139; Lawrence, *Essays on some disputed Questions in modern International Law* (1885), vii.

The United States gave expression to the principle of exemption of private property at sea from capture, for which it has long contended, in its treaty with Italy of 26th February, 1871. The maritime code of the latter country enunciates the same principle, on the condition of reciprocity. In the Austro-Prussian war of 1866, the principle of inviolability was adhered to by both parties. Germany proclaimed the same principle in 1870. The minister of the United States was instructed to express the gratification of his Government; but the position of Prussia, though consistent with former policy, was no sacrifice of Prussian interests. The proclamation was not conditional upon reciprocity; but France captured German trading ships, and the Germans abandoned their proclamation in January, 1871 (*s*). The majority of European jurists have condemned the practice. Thus the Institute of International Law has on more than one occasion (*e.g.*, in 1875 and in 1882) passed resolutions in favour of the inviolability of private property. At the first Hague Conference, 1899, the delegates of the United States submitted a proposal to the same effect, but the Conference then considered the question to be beyond its competence, though it expressed a wish—the fifth *vœu* of its Final Act—that the Conference of 1907 should take up the subject. However, at the second Hague Conference the proposal to confer immunity of innocent enemy property from maritime capture received twenty-one votes in the affirmative and eleven in the negative, whilst twelve States did not vote. The opponents included some of the great maritime Powers, *e.g.*, Great Britain, France, Russia, Japan, so that the proposal (so strenuously backed by the United States) was considered to have failed (*t*).

At the London Naval Conference (1908-1909), attended by the leading maritime Powers of the world, the question of enemy character was discussed; but owing to the lack of unanimous opinion among the representatives, only a few general rules—which are obviously inadequate—were arrived at, and embodied in the Declaration of London. This Declaration was not ratified by all the parties; so that it could not in every particular—that is, beyond the well-established customary law of nations—be considered as binding. During the Great War of 1914-1915 it was subjected to many modifications at the hands of the belligerents;

(*s*) See Heffter, Geffcken, § 139, note 2 *G*, for an able consideration of the whole question.

(*t*) As to the capture of private property at sea, see further, Cobbett, Cases, vol. ii. (1913), pp. 134 *seq.*, and the references there cited.



and where such specific modifications were not announced, the provisions of the Declaration were presumed to have been accepted. However, the rules of the Declaration of London are still of importance, whether in regard to the question of enemy character or in regard to the other subjects it deals with, because, in the first place, most of the provisions laid down are nothing more than a deliberately written expression of old-established principles, and, in the second place, the others represent the consensus of modern international opinion.

Test of the flag.

“Subject to the provisions respecting transfer to another flag (*u*) the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly.

The case where a neutral vessel is engaged in a trade which is closed in time of peace, remains outside the scope of, and is in no wise affected by, this rule” (*x*).

The official report on the Declaration of London (of the contents of which it is regarded as the authoritative interpretation) observes in reference to this provision: “Article 57 safeguards the provisions respecting transfer to another flag, as to which it is sufficient to refer to Articles 55 and 56 (*y*); a vessel may well have the right to fly a neutral flag, from the point of view of the law of the country to which she claims to belong, but may be regarded as an enemy vessel by a belligerent, because the transfer in virtue of which she has hoisted the neutral flag, is annulled by Article 55 or by Article 56” (*z*).

“The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner” (*a*).

The difficulty of this Article is found in the fact that the enemy character of the owner was not determined by the Declaration; nor has it been determined by any other international Convention. It has already been pointed out that in this respect the competing tests of hostile ownership are nationality on the one hand, and trade or war domicile on the other. The former criterion has usually been applied in France (*b*), Germany, Austria, Italy, Russia (*c*); the latter has regularly been applied in Great Britain

(*u*) See *infra*, p. 576.

(*x*) Declar. of London (1909), Art. 57.

(*y*) See *infra*, p. 578.

(*z*) Report on the Declar. of London, in Higgins, *The Hague Conferences and other International Conferences* (1909), p. 560.

(*a*) Declar. of London (1909), Art. 58.

(*b*) Cf. *Le Hardy v. La Voltigeante* (1799), in A. de Pistoye et C. Duverdy, *Traité des Prises Maritimes*, 2 vols. (Paris, 1859), vol. i. p. 321; F. Snow, *Cases* (1893), p. 337.

(*c*) Cf. *Parl. Papers, Miscell. No. 5* (1909).

and the United States, and also in a modified form in Japan, Spain, Holland (*d*). We have already considered the doctrine of commercial domicile, as established by earlier British practice, constantly affirmed in the British and American Courts (*e*), and reaffirmed during the Great War by the British Prize Courts, and the numerous Acts, Proclamations, Orders, Regulations, and other forms of emergency legislation. To the considerations already advanced we may add the concise summary of the Anglo-American doctrine, which was embodied in a Memorandum prepared for the use of the British delegates at the London Naval Conference, 1908-9:—

“1. The principle adopted by the British Courts has been to treat the domicile of the owner as the dominant factor in deciding whether property captured in time of war is enemy property; but for this purpose the principle is not limited in all respects to the domicile of origin or residence, and is applied in the following way:—

“(a) A person domiciled in a neutral country, but having a house of trade in an enemy country is deemed to acquire a commercial domicile in the enemy country in respect of transactions originating there; but the other property of such owner is not affected thereby.

“(b) A commercial domicile not being the domicile of nationality is terminated when actual steps are taken *bonâ fide* to abandon such domicile for a different one *sinc animo revertendi*.

“2. This principle applies equally to the cases of an individual, a partnership, or a corporation, residence in the two latter cases being understood to mean the place whence the business is controlled.

“3. In case of a partnership where one or more of the partners is domiciled in enemy territory, property not liable to be seized as enemy property on other grounds is presumed to be divided proportionally between the partners, and the share attributed to a partner domiciled in enemy territory is deemed to be enemy property” (*ee*).

Obviously these doctrines are not affected by Article 58 of the Declaration of London. They lay down the principle of hostile association as the determining factor of enemy character. The Article simply lays down that the enemy character of the goods

(*d*) *Ibid.*

(*e*) See *supra*, pp. 443 *seq.*

(*ee*) Parl. Papers, Miscell. No. 4 (1909), p. 11.

depends on the enemy character of the owner; and it does not say on what the enemy character of the owner is to depend.

As no agreement was reached at the London Naval Conference with regard to one definite criterion of the enemy character of goods, an effort was made to effect a compromise between the conflicting principles as indicated above. Thus it was proposed, on the one hand, that the character of goods found on board an enemy vessel should be determined by the owner's nationality, or, in case of lack of or double nationality, by his domicile; and, on the other, that the character of goods belonging to a trading corporation should be determined by the character of the territory in which the headquarters is situated. This proposal, however, was not successful.

Presumption  
of enemy  
character.

"In the absence of proof of the neutral character of goods found on board an enemy vessel, they are presumed to be enemy goods" (f).

Here we have nothing more than an enunciation of the old rule (g).

Transfers  
made in  
*transitu*.

"The enemy character of goods on board an enemy vessel continues until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are being forwarded.

If, however, prior to the capture, a former neutral owner exercises, on the bankruptcy of an existing enemy owner, a recognised legal right to recover the goods, they regain their neutral character" (h).

It is often a matter of difficulty for a Prize Court to determine to whom property captured at sea actually belongs. The general rule is that if goods are shipped on account and at the risk of the consignee, they are considered his goods during the voyage. In such a case delivery of the goods to the master is a delivery to the consignee (i). In time of peace the parties may of course agree to any terms they please, as to whose risk the property should be at during the voyage, but in time of war, or in contemplation of war, the rule of Prize Courts is, that property which has a hostile character at the commencement of the voyage, cannot change that character by assignment while it is *in transitu*, so as to protect it

(f) Declar. of London (1909), Art. 59.

(g) Cf. *The Josephine* (1801), 4 C. Rob. 25; *The Frances* (1814), 8 Cranch, 354; *The Carlos F. Roses* (1899), 177 U. S. 655.

(h) Declar. of London (1909),

Art. 60.

(i) *The Packet de Bilbao* (1799), 2 C. Rob. 133. According to the French practice, the shipper is allowed to take such risk; cf. *Les Trois Frères*, Pistoye et Duverdy, 357; Snow, Cases, p. 348.



from capture (*k*). Unless such a rule were adopted, all property passing between a neutral and a belligerent would be colourably assigned to the neutral, and the belligerent right of capture would be comparatively worthless. It is therefore the duty of a Prize Court to ascertain in whom the property was vested at the outset of the voyage, and in this inquiry all equitable liens on enemy's property are disregarded, and all revelations of risk to neutral consignors are held to be fraudulent (*l*). During the Great War, 1914, the Prize Court heard the case of *The Marie Glaeser*, involving British and neutral claims on a captured vessel. There were three kinds of claimants—shareholders, mortgagees, and persons claiming for brokerage and necessaries. The President, in the course of his judgment, said that under the old practice the flag determined the fate of the whole ship in case of capture; a shareholder was bound by the character of the ship. Maritime liens, too, were not recognised by the Prize Court. But to British merchants who had before the war supplied necessaries to a captured vessel, the Crown of its bounty might make grants out of the proceeds of the sale of prizes, according to the merits of each particular case. Claims under mortgages held by British or neutral subjects are untenable (*m*). A mortgage is no more valid against captors than is a bottomry bond or other maritime lien. The American Courts have held that neutral mortgages on enemy vessels are to be treated in prize proceedings only as liens, liable to be overridden by the superior claims of the captors (*n*). Decisions to the same effect have been pronounced in the French (*o*) and in the Japanese Prize Courts (*p*). Both the captor and the Court have regard only to the outward character of the vessel, and must disregard rights depending on private agreement. Therefore, both in principle and in practice the claims of mortgagees of enemy ships cannot prevail as against the rights of the captors (*q*). On the other hand, enemy's liens on neutral property are equally disregarded, being held not to confer such an enemy character on the ship or goods as to subject them to confiscation (*r*). If, however, the shipment, as well as the contract, laying the risk on the neutral consignor, were both made in time of peace and are proved

Neutral claims on captured vessels.

(*k*) *The Francis* (1813), 1 Gallison, 445; *The Vrow Margaretha* (1799), 1 O. Rob. 336.

(*l*) *The Josephine* (1801), 4 C. Rob. 75; *The Tobago* (1804), 5 C. Rob. 218; *The Marianna* (1805), 6 C. Rob. 24; *The Ida*, 1 Spinks, 26.

(*m*) Cf. *The Aina* (1854), Spinks, 8.

(*n*) *The Hampton* (1866), 5 Wall. 372; *The Battle*, 6 Wall. 498; *The*

*Carlos F. Roses* (1899), 177 U. S. 655.

(*o*) Cf. *Le Turner* (1870), Barboux, Jurisprudence du Conseil des Prises, 1870—1, p. 76.

(*p*) *The Nigretia* (1905), Takahashi, p. 552; *The Russia* (1904), *ibid.* p. 557.

(*q*) *The Marie Glaeser* (1914), 31 T. L. R. 8.

(*r*) *The Ariel* (1857), 11 Moo. P. C. 119.

to have been *bonâ fide*, and not in contemplation of war, the ownership which was in the neutral consignor at the beginning of the voyage remains in him until its termination, and the goods will not be condemned (s). During the Great War, 1914, the Prize Court heard a case (*The Miramichi*) in which goods were shipped by a neutral seller to an enemy buyer on a British vessel, before the outbreak of the war, though not in anticipation of it. The goods were seized on their way to the enemy, and two days later the buyers refused to accept the documents, on which money had been advanced by neutral persons. It was held that where goods are contracted to be sold and are shipped before the war and not in anticipation of it, and are seized in transit to the enemy during hostilities, they are not liable to condemnation, unless under the contract the property in the goods has by that time passed to the enemy. The determining criterion of ownership is the intention of the parties, and not the incidence of risk. As the ownership of the goods in question remained at the time of seizure in the neutral seller, they were ordered to be released (t). Nor are goods condemned when shipped by an enemy during war, if it is proved beyond all doubt that they were shipped absolutely at the risk of a neutral consignee. Such transactions are, however, carefully scrutinized in a Prize Court (u). The only case in which the right of stoppage *in transitu* can be exercised during war is in the expectation, confirmed by the event, of the insolvency of the consignee (x).

Sale of ships  
by belli-  
gerents to  
neutrals.

The transfer of ships from belligerents to neutrals during war is always looked upon very suspiciously, and clear proof of *bona fides* is required to save the ship from condemnation (y). Thus, a British ship alleged to have been sold to a neutral after hostilities had broken out between England and Holland was captured while trading between Guernsey and Amsterdam under the command of her former master, who had also been the owner. She was condemned as prize for trading with the enemy, the transfer being deemed colourable and void (z). But if the sale of a ship by a belligerent to a neutral be absolute and *bonâ fide*, and attested by appropriate evidence, it is then permitted, either during war or in contemplation of it, and whether she is lying in an enemy or a

(s) *The Atlas* (1801), 3 C. Rob. 299. Rob. 324; *Oppenheim v. Russel*, 3 Bos. & Pul. 484.  
 (t) *The Miramichi* (1914), 31 T. L. R. 72. (y) *The Ariel* (1857), 11 Moo. P. C. 119.  
 (u) *The Aurora* (1802), 4 C. Rob. 219. (z) *The Omnibus* (1805), 6 C. Rob. 71; *The Odin* (1799), 1 C. Rob. 252.  
 (x) *The Constantia* (1807), 6 C.

neutral port (*a*). All interest of the vendor in the ship must be completely divested, and there must be no agreement to reconvey her on the conclusion of the war; but the mere non-payment of part of the price is not conclusive evidence of itself that the vendor's interest is not entirely transferred (*b*). A transfer of a vessel effected whilst she was in a blockaded port (*c*), or whilst she was *in transitu* unless the purchaser had taken possession of her before capture (*d*), is regarded as invalid. It is for the claimant to prove that the transfer is genuine, and any circumstance of suspicion must be satisfactorily accounted for by him (*e*). Vessels of war lying in neutral ports cannot be sold by their belligerent owners at any time during the war, even after the vessels had been dismantled. If so sold, a ship of war, even though purchased in good faith, and fitted up as a merchant vessel, remains liable to capture by the other belligerent as long as the war lasts (*f*). And the same rule would no doubt apply to vessels that had been converted into warships, even though afterwards reconverted. Capture as prize overrides all previous liens (*g*), and it gives the captor all the owner's rights when the voyage began (*h*). Even a *bonâ fide* mortgagee, a subject of the captor's country, is not entitled to have his mortgage paid out of the proceeds of the sale of the prize (*i*).

These principles summarize the long-established British practice (*k*), with which the American practice almost entirely agrees (*l*). In continental countries, however, certain modifications of these rules appear. Thus, in France and Russia the transfer of enemy vessels to neutrals is held to be invalid unless it be unconditional and effected before the outbreak of war. In Holland all *bonâ fide* transfers are recognised, on condition that they are not made in a blockaded port. Spain and other countries follow generally the Anglo-American doctrines, subject, however, to

(*a*) *The Baltica* (1857), 11 Moo. P. C. 141; *The Benedict*, Spinks, 314; *The Rapid* (1814), Spinks, 80.

(*b*) *The Ariel* (1857), 11 Moo. P. C. 129; *The Sechs Geschwistern*, 4 C. Rob. 100.

(*c*) *The General Hamilton* (1805), 6 C. Rob. 62.

(*d*) Cf. *The Baltica* (1857), 11 Moo. P. C. 141.

(*e*) *Batten v. The Queen*, 11 Moo. P. C. 271; *The Soglasie*, Spinks, 104.

(*f*) *The Georgia*, 7 Wallace, 32; cf. *The Minerva*, 6 C. Rob. 396.

(*g*) *The Battle*, 6 Wallace, 498; *The*

*Steamer Nassau*, Blatchford, Prize Cas. 665; *The Ida* (1854), 1 Spinks, 35.

(*h*) *The Sally Magee*, 3 Wallace, 451.

(*i*) *The Hampton*, 5 Wallace, 372; *Le Turner* (1870), Barboux, Jurisp. du Conseil des Prises, 1870—71, p. 75; *The Aina* (1854), 1 Spinks, 19.

(*k*) Cf. the Memorandum prepared for the use of the British Delegates at the London Naval Conference; Parl. Papers, Miscell. (1909), No. 4.

(*l*) Cf. *The Sally Magee*, 3 Wall. 451; *The Benito Estenger* (1899), 176 U. S. 568.



some qualifications (*m*). In consequence of all these differences, an effort was made by the London Naval Conference, 1908-1909, to arrive at an agreement. As a result, some provisions on the subject were embodied in the Declaration of London (1909), the effect of which will be—if this part of the Declaration be eventually ratified—to modify to some extent the Anglo-American practice.

Transfers  
under the  
Declaration  
of London.

“The transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, a presumption that the transfer is void, if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the outbreak of hostilities. This presumption may be rebutted.

There is an absolute presumption of the validity of a transfer effected more than thirty days before the outbreak of hostilities if it is unconditional, complete, and in conformity with the laws of the countries concerned, and if its effect is such that neither the control of the vessel nor the profits arising from her employment remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities, and if the bill of sale is not on board, the capture of the vessel gives no right to damages” (*n*).

“The transfer of an enemy vessel to a neutral flag, effected after the outbreak of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.

There is, however, an absolute presumption that a transfer is void—

(1) If the transfer has been made during a voyage or in a blockaded port.

(2) If a right to repurchase or recover the vessel has been reserved to the vendor.

(3) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing have not been fulfilled” (*o*).

(*m*) Cf. Parl. Papers, Miscell. (1909), No. 5.

(*n*) Declar. of London (1909), Art. 55.

(*o*) *Ibid.* Art. 56. See the Memorandum prepared for the use of the

British Delegates at the London Naval Conference, Parl. Papers, Miscell. (1909), No. 4, pp. 99 *seq.*; and the Report annexed to the Declaration of London, in Higgins, *op. cit.* pp. 600 *seq.*

During the Great War of 1914 striking instances of transfers occurred. Thus, the German warships, the *Goeben* and the *Breslau*—flying from their pursuers—were ostensibly transferred to Turkey, which was a neutral at the time of the alleged transaction. Even if the transfer were genuine and the conveyance complete and unconditional (the circumstances clearly showed the contrary), the validity of the act none the less remained questionable on other grounds. Again, German merchantmen were proposed to be transferred to the United States flag; and in order that the last condition of Article 56 might be fulfilled, Congress attempted to pass a Bill for facilitating and validating transactions of this kind. But even if such legislative authority had been obtained, it could not necessarily have rendered valid the transfer of vessels made with a view to escaping from the consequences to which they were liable. In October, 1914, the *Brindilla*, an American oil-tank steamship, was brought before the Prize Court of Halifax (Nova Scotia), on the ground that she was transferred to the American flag by German owners contrary to Article 56 of the Declaration of London. Similarly, exception was taken to the transfer to the American Registry of the *Dacia*, a vessel of the Hamburg-American fleet. The British Government intimated that the sale was illegitimate, and the vessel was liable to seizure, if bound either for a German port or for Rotterdam, which is from a geographical point of view virtually a German port. Eventually, however, the vessel was captured by a French cruiser, and condemned at Brest.

Instances during the Great War.

The object of belligerents is to enfeeble and overcome the enemy; and among the means resorted to in naval war in order to attain this object is the destruction or seizure of enemy vessels and the confiscation of enemy goods found on them. Subject to the exceptions that have been enumerated above, all public vessels of the enemy are liable to attack, seizure, or destruction by the belligerent warships either on the high seas or in the ports and waters of either belligerent, but not in neutral or neutralized ports and waters.

The capture and destruction of prizes.

The question has sometimes arisen whether a belligerent vessel may assume false colours at any time, in order to facilitate an attack or capture or an escape. It is generally agreed that a warship may hoist a false flag or effect some other disguise in approaching an enemy vessel with the object of drawing it into action, or when pursuing an enemy ship, or when endeavouring to

Use of false colours.

escape. On the other hand, before beginning the actual attack the true colours should be shown. In earlier times such disguise was common; and it has always been recognised as legitimate. Thus, Nelson, lying in wait off Barcelona for Spanish ships, displayed the French flag for some time in the hope of luring them out; and the legality of his procedure was not questioned. During the Great War, 1914, the German cruiser, the *Emden*, frequently assumed the enemy's flag, and even disguised herself by erecting a dummy funnel during her notable career of commerce-destroying.

May merchantmen fly false colours in order to evade the enemy cruisers? During the war of 1914 the *Lusitania*, for example, assumed the United States flag, and thus eluded German warships. Whereupon Germany accused Great Britain of violating international law. It is true that under ordinary conditions a merchantman is not entitled to fly a neutral flag; but maritime custom allows it for the purpose of escaping from an enemy. The following statement on the subject was issued by the British Foreign Office, February 7, 1914: "The use of the neutral flag is, with certain limitations, well established in practice as a 'ruse de guerre.' The only effect in the case of a merchantman of wearing a flag other than her national flag is to compel the enemy to follow the ordinary obligations of naval warfare, and to satisfy himself as to the nationality of the vessel and of the character of her cargo by examination before capturing her and taking her into a Prize Court for adjudication. The British Government has considered the use of British colours by a foreign vessel legitimate for the purpose of escaping capture. It is recognised in the Merchant Shipping Act, 1894, s. 69 (1), and in the instructions to British consuls, 1914. No breach of international law is thereby committed." In an American Note, February 12, to the British Government a distinction is drawn between the occasional use of neutral flags, and "the explicit sanction by a belligerent Government for its merchant ships generally to fly the flag of a neutral Power within certain portions of the high seas"; and it is pointed out that such "general misuse of a neutral's flag jeopardizes the vessels of a neutral visiting those waters."

The title to property lawfully taken in war may, upon general principles, be considered as immediately divested from the original owner, and transferred to the captor. This general principle is modified by the positive law of nations, in its application both to personal and real property. As to personal property or moveables, the title—under the former usage of nations—was, in general,

Title to  
property  
captured in  
war.



considered as lost to the former proprietor as soon as the enemy acquired a firm possession; which, as a general rule, was considered as taking place after the lapse of twenty-four hours, or after the booty was carried into a place of safety, *infra præsidia*, of the captor (*p*).

Property of the enemy taken on land is usually called *booty*, while that captured on the high seas, with the exception of armed vessels, has acquired the name of *prize* (*q*). There is a very important distinction between them as regards the mode in which the captor acquires a title to the captured property. Booty belongs to the captor as soon as he has acquired a firm possession of it. No adjudication of any court is necessary to establish his title (*r*). On the other hand, a title to prize is acquired, as a general rule, only after the property has been condemned by a competent court (*s*). By the modern usage of nations neither the twenty-four hours' possession, nor the bringing the prize *infra præsidia*, is sufficient to change the property in the case of a maritime capture. Until the capture becomes invested with the character of prize by a sentence of condemnation, the right of property is in abeyance, or in a state of legal sequestration (*t*). If condemnation follows capture, the effects of condemnation relate back to the date of capture (*u*). Abandonment of the prize or loss of possession puts an end to the effects resulting from the original capture; so that anyone who subsequently acquires possession is regarded as the sole captor (*x*). The enemy's armed vessels are not subject to the adjudication of a Prize Court. Ships and their cargoes are not invariably prize. Thus during the American Civil War a ship captured in a river by a detached naval force in boats was held not to be a maritime prize, or to be condemned as such (*y*).

The primary title to all property taken in war, whether on land or at sea, is in the sovereign (*z*). The law of England on this point has been thus stated by Lord Brougham:—"That prize is clearly and distinctly the property of the Crown, that the sovereign

Booty and  
prize.

Prize and  
booty belong  
primarily to  
the sovereign.

(*p*) Grotius, De Jur. Bel. ac Pac. lib. iii. cap. 6, § 3; cap. 9, § 14. Klüber, Droit des Gens Moderne de l'Europe, § 254. Vattel, Droit des Gens, liv. iii. ch. 13, § 196; ch. 14, § 209. Heffter, Das Europäische Völkerrecht, § 136.

(*q*) *Genoa and its Dependencies*, 2 Dods. Ad. 446.

(*r*) *Lamar v. Browne*, 2 Otto, 195.

(*s*) Opinions of Att.-Gen. (U. S.) vol. iii. p. 379. Field, International Code, § 896. *Goss v. Withers*, 2 Burrows, 693.

(*t*) Tudor, Leading Cases on Maritime Law, pp. 1092, 1093. Calvo, ii. § 1236.

(*u*) *Andersen v. Marten*, (1908) A. C. 334.

(*x*) *The Diligentia* (1814), 1 Dods. 404.

(*y*) *The Cotton Plant*, 10 Wallace, 577.

(*z*) Phillimore, vol. iii. § cxxx. Calvo, ii. § 1237. Halleck, ch. xxx. § 3. And see the *Manila Prize Cases*, 188 U. S. Rep. 254.

in this country, the executive Government in all countries in whom is vested the power of levying the forces of the State, and of making war and peace, is alone possessed of all property in prize, is a principle not to be disputed. It is equally incontestable that the Crown possesses this property *pleno jure* absolutely and wholly without control; that it may deal with it entirely at its pleasure, may keep it for its own use, may abandon or restore it to the enemy, or, finally, may distribute it in whole or in part among the persons instrumental in its capture, making that distribution according to whatever scheme and under whatever regulations and conditions it sees fit. It is equally clear, and it follows from the two former propositions, that the title of a party claiming prize must needs in all cases be the act of the Crown, by which the royal pleasure to grant the prize shall have been signified to the subject; whether, even in that case, the same paramount and transcendent power of the Crown might not enure to the effect of preserving to His Majesty the right of modifying or altogether revoking the grant is a question which has never yet arisen, and which, when it does arise, will be found never to have been determined in the negative. But this, at all events, is clear, that when the Crown, by an act of grace and bounty, parts, for certain purposes, and subject to certain modifications, with the property in prize, it by that act plainly signifies its intention that the prize shall continue subject to the power of the Crown, and as it was before the act was done.

“This doctrine has been frequently recognised in cases where the question has arisen subsequently to the capture, and before condemnation; but the same principle was afterwards extended in the case of *The Elsebe* (a), in which, after final adjudication in the Court below, but pending an appeal, the Crown thought proper, for reasons of State and public safety, to restore the prize at the expense of the captors. In other words, it was then determined, and that too upon a solemn and most able argument, and by a judge the most learned and eminent of his time, the present Lord Stowell, that when the Crown saw fit to restore the capture, the captors, who had run the risk and suffered the loss, who had, moreover, borne the charge of bringing the prize into port, and the further costs of proceeding in the Admiralty to adjudication, and had even undergone additional expenses in contesting their claim upon appeal, were altogether without a remedy. . . . Says Lord Stowell . . . : ‘It is admitted on the part of the captors . . . that their claim rests wholly on the Order of Council, the Pro-

*The Elsebe.*



clamation, and the Prize Act. It is not, as it cannot be, denied that, independent of these instruments, the whole subject-matter is in the hands of the Crown, as well in point of interest as in point of authority. Prize is altogether a creature of the Crown. No man has, or can have, any interest but what he takes as the mere gift of the Crown; beyond the extent of that gift he has nothing. This is the principle of law on the subject, and founded on the wisest reasons. The right of making war and peace is exclusively in the Crown. The acquisitions of war belong to the Crown, and the disposal of these acquisitions may be of the utmost importance for the purposes both of war and peace. This is no peculiar doctrine of our constitution; it is universally received as a necessary principle of public jurisprudence by all writers on the subject, *Bello paria cedunt reipublicæ*” (b).

After the condemnation of a prize, it was the usual practice to sell it and to divide the whole or part of the proceeds among the officers and crew of the vessel that had captured it (c). The making of such payments has been considered by many to be indefensible. A reform in this direction was made in the United States, where prize-money was abolished in 1899 (d). At the second Hague Conference, 1907, the French delegate suggested that the practice should be generally abrogated, but no conclusion was arrived at. In Great Britain, by an Order in Council, August 28, 1914, the grant of prize proceeds to officers and crew was replaced by the award of prize bounty or head money to the officers and crew of a warship that takes or destroys an enemy armed ship. The amount to be distributed is at the rate of 5*l.* for each person on board the enemy ship at the beginning of the engagement.

The captured vessel becomes a “prize” only after the captor has taken effective possession of her *animo retinendi*; but the possession that is necessary may be either actual or constructive. The attacking commander usually takes possession of the arrested vessel by sending on board one of his officers and a portion of his crew. If this is not practicable, the captor may order the captured vessel to lower her flag and follow a course as directed by him (e). Thus, in 1801 Sir W. Scott emphasized that the test as to whether a captured vessel becomes a prize does not necessarily depend on

How capture is effected.

(b) *Alexander v. The Duke of Wellington*, 2 Russell & Mylne, 54. Lord Stowell's remarks are to be found in *The Elsebe* (1804), 5 C. Rob. 173.

(c) Cf., so far as Great Britain is concerned, the Naval Prize Act, 1864.

(d) Cf. Moore, Digest, vol. iii. p. 543.

(e) Cf. *The Hercules*, 2 Dods. 362.



the sending of a 'prize master' on board, but on the fact that the vessel passes under the actual control of the captor (*f*).

Joint capture  
of prize.

A capture may be either "separate" or "joint." A joint capture may be made by two or more vessels of the same belligerent, or by a vessel or vessels of a belligerent in co-operation with a vessel or vessels of an ally, or, again, by naval forces and land forces (*g*). In order to establish a claim of joint capture the burden of proof will lie on the claimants (*h*). All parties who have been instrumental in capturing property are entitled to share in the proceeds as joint captors. In naval warfare there was a distinction between the rights of privateers and those of public ships with regard to joint capture. A public ship, when in sight at the time the prize is taken, is considered as constructively assisting, and therefore entitled to share in the capture, while a privateer under similar circumstances was not regarded as a joint captor, unless she directly contributed to the seizure (*i*). This was founded upon the fact that privateers, being fitted-out for private gain, were not bound to put their commissions in use on every discovery of the enemy, whereas public ships, being under a constant obligation to attack when the enemy comes in sight, are presumed to be there *animo capiendi* (*k*). As a rule, when ships are associated in the same enterprise and under the same superior officer, all are entitled to share as joint captors, it being then only necessary to prove what ships actually formed part of the fleet at the time of capture (*l*). If, however, a part of the fleet is detached on a separate service, or if the detached vessels are out of the scene of the common operations for the time, the prize then belongs to the actual captors alone (*m*). During the Crimean war, France and England agreed that a joint capture made by the naval forces of both countries should be adjudicated on in the country of the highest naval officer concerned in the capture, and that in the case of a capture made by the cruiser of one nation, in sight of a cruiser of the other, such cruiser having thus contributed to the

(*f*) *The Edward and Mary* (1801), 3 C. Rob. 305.

(*g*) *The Dordrecht* (1799), 2 C. Rob. 55; *La Bellone*, 2 Dods. 343.

(*h*) Cf. *The John*, 1 Dods. 363; and for Great Britain, see the Naval Prize Act, 1864, s. 36.

(*i*) Phillimore, vol. iii. § 388; *The Dordrecht*, 2 C. Rob. 55; *Talbot v. Three Briggs*, 1 Dallas, 103; *The Forsigheid*, 3 C. Rob. 311. And see *The Mangrove Prize Money* (1902), 188 U. S. Rep. 720.

(*k*) Halleck, ch. xxx. § 7. *The Santa Brigada* (1800), 3 C. Rob. 52.

(*l*) *The Guillaume Tell*, Edw. Ad. 6; *The Forsigheid*, 3 C. Rob. 311. Cf. Halleck, ch. xxx. § 11; Phillimore, vol. iii. § 898.

(*m*) Phillimore, vol. iii. § 398. *The Forsigheid*, 3 C. Rob. 311; *The Augusta*, Marsden, Adm. Cases, 167. Ships of war are entitled to share in all captures made by their tenders: *The Carl* (1855), Spinks, 238.

intimidation of the enemy, the adjudication thereof should belong to the jurisdiction of the actual captor (*n*).

The rights of joint captors on land are not the same as those of naval captors. Joint captors are those who have assisted, or are taken to have assisted, the actual captors by conveying encouragement to them, or intimidation to the enemy. On land the union of the joint captor with the actual captor under the command of the same officer, alone constitutes the bond of association which the law recognises as a title to joint sharing. Community of enterprise does not constitute association, and is equally insufficient as a ground for joint sharing, if the bond of union, though originally well constituted, has ceased to be in force at the time of the capture. The distinctions between captures on land and captures at sea tend to show that in considering joint capture of booty, a wider application than is recognised in prize cases must be allowed to the term "co-operation," concerted action on a vaster scale than is feasible at sea being indispensable to a campaign. The rule of sight, too, which prevails at sea, is inapplicable on land. The general rule for the distribution of booty, to be adhered to as far as possible, in accordance with naval prize decisions, is the rule of actual capture. The association entitling to joint sharing must be military, and not political, and must be under the immediate command of the same commander. The co-operation which is necessary as a title to joint sharing, is a co-operation tending directly to produce the capture in question (*o*).

On the completion of a capture it is the duty of the captor to bring his prize, as soon as his other duties permit it, before a competent court (*p*). Since the property in a prize is in abeyance until a competent court has pronounced upon the capture, it is the interest of all parties to obtain a judicial decree as soon as possible. As the custody of the prize remains with the captor, it therefore lies upon him to bring it before the Court. But if prevented by imperious circumstances from bringing it to his own country, he may be excused for taking it to a foreign port, or for selling it, provided he afterwards reasonably subjects its proceeds to the Court (*q*). By unreasonable delay in bringing in the prize for adjudication, or by other misconduct, the captor may forfeit all his right of prize, and in this case the prize is condemned to the State,

Joint capture  
of booty.

Duties of  
captors.

(*n*) Convention of 20th May, 1854. As to the proceedings of joint captors in the Admiralty Court, see the Naval Prize Act, 1864, Appendix B.

(*o*) *The Banda and Kirwee Booty*, L. R. 1 A. & E. 109, where the law respecting capture of property by land and sea is fully discussed. See also

Report of Commissioners to inquire into the distribution of Army Prize, 1864; and *Alexander v. The Duke of Wellington*, 2 State Trials, N. S. 763; 2 Russ. & My. 35.

(*p*) Phillimore, vol. iii. § 341.

(*q*) Halleck, ch. xxx. § 5. *The Peacock* (1802), 4 C. Rob. 192.



if the capture was originally lawful (*r*). If the capture was made entirely without probable cause, the captor is liable for costs, and for the damages resulting from the illegal seizure, and the latter are decreed to the injured owner (*s*).

Destruction of prizes at sea.

“Sometimes,” says Chancellor Kent, “circumstances will not permit property captured at sea to be sent into port; and the captor in such cases may destroy it, or permit the original owner to ransom it” (*t*). If the vessel belong to the enemy, and the captor cannot retain possession of her or bring her into port, in consequence of exceptional circumstances—*e.g.*, her unseaworthiness, existence of infectious disease, lack of fuel or of a prize crew, stress of weather, imminent danger of recapture, serious danger to the success of naval operations—he is then justified in selling or destroying her, but it is his duty to preserve her papers and as much of the cargo as he can secure. The Confederate cruisers burnt many of their prizes at sea during the Civil War, as their own ports were all blockaded by the Federal fleets; and though this was not a proceeding to be approved of, it was not a violation of international law (*u*). At the conclusion of the war the Federal Government wished to proceed against Captain Semmes of the *Alabama* for burning and destroying ships and cargoes belonging to American citizens. They could not indict him for high treason as he had been treated as a prisoner of war. But no proceedings were actually taken. Mr. Bolles, the law officer to whom the case was referred, gave it as his opinion that Captain Semmes had done no more than the United States had themselves done to England in the war of 1812-14. During that war orders had been given that no prize should be manned or preserved unless circumstances should render her safe arrival morally certain. No prizes were to be ransomed, and almost all were to be destroyed. Mr. Bolles also pointed out that it might be policy of the Union to pursue a similar course in some future war, and therefore he deemed it improper to prosecute a person who had, under orders, simply followed an example previously set by the Government (*x*).

(*r*) *The Bothnea*, 2 Gallison, 78; *The Triton*, 4 C. Rob. 78; *Miller v. The Resolution* (1781), 2 Dallas, 1. Phillimore, vol. iii. § 381.

(*s*) Halleck, ch. xxx. § 29. Phillimore, vol. iii. § 452. *Del Col v. Arnold* (1796), 3 Dallas, 333; *The Anna Maria* (1817), 2 Wheaton, 327; *The Ostsee* (1856), 5 Moo. P. C. 150.

The rule as to the responsibility of captors is now specifically affirmed in the Declaration of London, 1909,

Art. 64, which provides for the payment of compensation to neutral owners when the seizure was shown to be unjustifiable.

(*t*) Kent, by Abdy, p. 276.

(*u*) Bernard, *Neutrality of England during Civil War*, p. 419. Lushington, *Manual of Naval Prize Law*, § 101.

(*x*) *Atlantic Monthly*, July, 1866, p. 89. *Parl. Papers*, 1873 (No. 2), p. 92.



During the Russo-Turkish war of 1877 Russia was alleged to have made a practice of sending out fast steamers from Odessa, which, while they avoided the Turkish cruisers, captured Turkish merchantmen, burnt them on the spot, and then set the crews adrift in boats. If this was true, it was an undeniable violation of international law. It was, moreover, an act of wanton and unnecessary cruelty to burn the ships and then expose the lives of their crews in open boats, and it was an act which could only influence the war by exasperating the other side, and inducing it to retaliate by similar measures (*y*).

Destruction of Turkish vessels by Russian steamers.

During the Great War, German submarines unjustifiably destroyed British merchantmen without warning, and, of course, without making any provision for the safety of the passengers and crew. The destruction of vessels such as the *Falaba* and the *Lusitania* (in the case of the latter 1,200 innocent persons, including many neutral passengers, being lost) aroused universal indignation.

The destruction of enemy prizes must be distinguished from that of neutral prizes. The latter case will be considered later (*z*):

According to the practice of some States, a captor may release a prize on terms of ransom, embodied in a ransom-bill, whereby the master of the captured vessel covenants to pay the captor a certain sum within a given time. This undertaking is generally carried out by means of a safe-conduct, empowering the master to take his vessel to a port of his own country or to any other port designated by a prescribed course and within a limited period. Unless prohibited by the law of the captor's own country, this document furnishes a complete legal protection against the cruisers of the same nation, or its allies, during the period, and within the geographical limits, prescribed by its terms. This protection results from the general authority to capture, which is delegated by the belligerent State to its commissioned cruisers, and which involves the power to ransom captured property, when judged advantageous. If the ransomed vessel is lost by the perils of the sea, before her arrival, the obligation to pay the sum stipulated for her ransom is not thereby extinguished. The captor guarantees the captured vessel against being interrupted in its course, or retaken, by other cruisers of his nation, or its allies, but he does not insure against losses by the perils of the seas. Even where it is expressly agreed that the loss of the vessel by these perils

Ransom of captured property.

(*y*) See Parl. Papers, Turkey 15th Dec. 1877.

(No. 1), 1878, p. 313; and *The Times*, (*z*) See *infra*, p. 799.

shall discharge the captured from the payment of the ransom, this clause is restricted to the case of a total loss on the high seas, and is not extended to shipwreck or stranding, which might afford the master a temptation fraudulently to cast away his vessel, in order to save the most valuable part of the cargo, and avoid the payment of the ransom. Where the ransomed vessel, having exceeded the time or deviated from the course prescribed by the ransom-bill, is retaken, the debtors of the ransom are discharged from their obligation, which is merged in the prize, and the amount is deducted from the net proceeds thereof, and paid to the first captor, whilst the residue is paid to the second captor. So if the captor, after having ransomed a vessel belonging to the enemy, is himself taken by the enemy, together with the ransom-bill, of which he is the bearer, this ransom-bill becomes a part of the capture made by the enemy; and the persons of the hostile nation, who were debtors of the ransom, are thereby discharged from their obligation. The death of the hostage taken for the faithful performance of the contract on the part of the captured does not discharge the contract; for the captor trusts to him as a collateral security only, and by losing it does not also lose his original security, unless there is an express agreement to that effect (a).

Sir William Scott states, in the case of *The Hoop*, that as to ransoms, which are contracts arising *ex jure belli*, and tolerated as such, the enemy was not permitted to sue in the British courts of justice in his own proper person for the payment of the ransom, even before British subjects were prohibited in 1781 from ransoming enemy's property (b); but the payment was enforced by an action brought by the imprisoned hostage in the courts of his own country for the recovery of his freedom. But the effect of such a contract, like that of every other which may be lawfully entered into between belligerents, is to suspend the character of enemy so far as respects the parties to the ransom-bill; and consequently, the technical objection of the want of a *persona standi in judicio* cannot, on principle, prevent a suit being brought by the captor directly on the ransom-bill. And this appears to be the practice in the maritime courts of many European countries (c).

Sometimes the grant of ransom by belligerent captors and the entering into ransom contracts by captured vessels are regulated

British law  
of ransom.

(a) Pothier, *Traité de Propriété*, Nos. 134—137. Valin, *Sur l'Ordonnance*, liv. iii. tit. 9; des Prises, Art. 19. *Traité des Prises*, ch. 11, Nos. 1—3.

(b) 22 Geo. III. c. 25; cf. 33 Geo. III. c. 46, ss. 36—39; 43 Geo. III. c. 160, ss. 33—36; 45 Geo. III. c. 72,

ss. 16—19. See also Martens, *Recueil*, vol. iv. p. 304.

(c) *The Hoop* (1799), 1 C. Rob. 201. See Lord Mansfield's judgment in the case of *Ricord v. Bettenham* (1765), 3 Burr. 1734. Cf. *Furtado v. Rogers*, 3 B. & P. 191. See also Pothier, *Propriété*, Nos. 136, 137.

or prohibited by special provisions of municipal law. Thus, in Great Britain, whilst it is forbidden to captors to grant ransom, the practice of giving ransom contracts is governed by the Naval Prize Act, 1864, which gives power to His Majesty in Council to make such orders as may seem expedient for prohibiting or allowing the ransom of British ships taken as prize by the enemy. If any person ransoms or agrees to ransom any ship or goods in contravention of such orders, he may on conviction be fined any sum not exceeding 500*l.* by the Admiralty Court (*d*). Somewhat similar restrictions are imposed by the laws of the Baltic Powers. In France ransom is allowed in case of imperative necessity. In the United States there is no legislative enactment prohibiting the practice (*e*).

As to ships and goods captured at sea, and afterwards recaptured, rules are adopted somewhat different from those which are applicable to other personal property. These rules depend upon the nature of the different classes of cases to which they are to be applied. Thus the recapture may be made either from a pirate; from a captor, clothed with a lawful commission, but not an enemy; or, lastly, from an enemy.

RECAPTURES  
AND SALVAGE.

1. In the first case, there can be no doubt the property ought to be restored to the original owner; for as pirates have no lawful right to make captures, the property has not been divested. The owner has merely been deprived of his possession, to which he is restored by the recapture. For the service thus rendered to him, the recaptor is entitled to a remuneration in the nature of salvage (*f*).

Recaptures  
from pirates.

Thus, by the Marine Ordinance of Louis XIV., of 1681, liv. iii., tit. 9, des Prises, art. 10, it is provided, that the ships and effects of the subjects or allies of France, retaken from pirates, and claimed within a year and a day after being reported at the Admiralty, shall be restored to the owner, upon payment of one-third of the value of the vessel and goods, as salvage. And the

(*d*) 27 & 28 Vict. c. 25, s. 45.

(*e*) Cf. *Maisonnaire v. Keating* (1815), 2 Gallison, 337; *Miller v. The Resolution* (1781), 2 Dallas, 15.

(*f*) Grotius, De Jur. Bel. ac Pac. lib. iii. cap. 9, § 17. Loccenius, De Jur. Marit. lib. ii. c. 2, No. 4. Brown, Civ. and Adm. Law, vol. ii. c. 3, p. 461. Dig. De capt. et postl. revers.: "Ea quæ piratæ nobis eripuerunt, non

opus habent postliminio; quia jus gentium illis non concedit, ut jus domini mutare possint." Cf. Demosthenes, De Halonneso, 2, where Demosthenes refutes the pretension of Philip, who claimed the island of Halonnesus on the ground that he had captured it from pirates, who had themselves taken it from Athens.



same is the law of Great Britain, but there is no doubt that the municipal law of any particular State may ordain a different rule as to its own subjects. Thus the former usage of Holland and Venice gave the whole property to the retakers, on the principle of public utility; as does that of Spain, if the property has been in the possession of the pirates twenty-four hours (*g*).

Opinions of  
Valin and  
Pothier.

Valin, in his commentary upon the above Article of the French Ordinance, is of opinion that if the recapture be made by a foreigner, who is the subject of a State, the law of which gives to the recaptors the whole of the property, it could not be restored to the former owner: and he cites, in support of this opinion, a decree of the Parliament of Bordeaux, in favour of a Dutch subject, who had retaken a French vessel from pirates (*h*). To this interpretation Pothier objects that the laws of Holland having no power over Frenchmen and their property within the territory of France, the French subject could not thereby be deprived of the property in his vessel, which was not divested by the piratical capture according to the law of nations, and that it ought consequently to be restored to him upon payment of the salvage prescribed by the ordinance (*i*).

Under the term 'allies' in this Article are included neutrals; and Valin holds that the property of the subjects of friendly Powers, retaken from pirates by French captors, ought not to be restored to them upon the payment of salvage, if the law of their own country gives it wholly to the retakers; otherwise there would be a defect of reciprocity, which would offend against that impartial justice due from one State to another (*k*).

Recapture  
of neutral  
property.

2. If the property be retaken from a captor clothed with a lawful commission, but not an enemy, there would still be a little doubt that it must be restored to the original owner. For the act of taking being in itself a wrongful act, could not change the property, which must still remain in him.

If, however, the neutral vessel thus recaptured were laden with contraband goods destined to an enemy of the first captor, it may, perhaps, be doubted whether they should be restored, inasmuch as they were liable to be confiscated as prize of war to the first captor. Martens states the case of a Dutch ship, captured by the British, under the rule of the war of 1756, and recaptured by the French, which was adjudged to be restored by the Council of

(*g*) Grotius, par Barbeyrac, liv. 3, ch. 9, § xvi. No. 1, and note.

(*h*) Valin, Comm. sur l'Ord. liv. 3, tit. 9, Art. 10.

(*i*) Pothier, Traité de Propriété, No. 101.

(*k*) Valin, Comm. sur l'Ord. liv. 3, tit. 9, Art. 10.

Prizes, upon the ground that the Dutch vessel could not have been justly condemned in the British Prize Courts. But if the case had been that of a trade, considered contraband by the law of nations and treaties, the original owner would not have been entitled to restitution (*l*).

In general, no salvage is due for the recapture of neutral vessels and goods, upon the principle that the liberation of a *bonæ fidei* neutral from the hands of the enemy of the captor is no beneficial service to the neutral, inasmuch as the same enemy would be compelled by the tribunals of his own country to make restitution of the property thus unjustly seized.

No salvage on recapture of neutral property.

It was upon this principle that the French Council of Prizes determined, in 1800, that the American ship *Statira*, captured by a British, and recaptured by a French, cruiser, should be restored to the original owner, although the cargo was condemned as contraband or enemy's property. The sentence of the Court was founded upon the conclusions of M. Portalis, who stated that the recapture of foreign neutral vessels by French cruisers, whether public ships or privateers, gave no title to the retakers. The French prize code only applied to French vessels and goods recaptured from the enemy. According to the universal law of nations, a neutral vessel ought to be respected by all nations. If she is unjustly seized by the cruisers of any one belligerent nation, this is no reason why another should become an accomplice in this act of injustice, or should endeavour to profit by it. From this maxim it followed as a corollary that a foreign vessel, asserted to be neutral, and recaptured by a French cruiser from the enemy, ought to be restored on due proof of its neutrality. But, it might be asked, why treat a foreign vessel with more favour in this case than a French vessel? The reason was obvious. On the supposition on which the regulations relating to this matter were founded, the French ship fallen into the hands of the enemy would have been lost for ever, if it had not been retaken; consequently the recapture is a prize taken from the enemy. If the case, however, be that of a foreign vessel, asserted to be neutral, the seizure of this vessel by the enemy does not render it *ipso facto* the property of the enemy, since its confiscation has not yet been pronounced by the competent judge; until that judgment has been pronounced, the vessel thus navigating under the neutral flag loses neither its national character nor its rights. Although it has been seized as

The case of *The Statira*.

(*l*) Martens, *Essai sur les Prises et les Reprises*, § 52. *Code des Prises*, an. 1784, tom. ii.

prize of war, it may ultimately be restored to the original owner. Under such circumstances, the recapture of this vessel cannot transfer the property to the recaptor. The question of neutrality remains entire, and must be determined, before such a transmutation of property can take place. Such was the language of all public jurists, and such was the general usage of all civilized nations. It followed that the vessel in question was not confiscable by the mere fact of its having been captured by the enemy. Before such a sentence could be pronounced, the French tribunal must do what the enemy's tribunal would have done; it must determine the question of neutrality; and that being determined in favour of the claimant, restitution would follow of course (*m*).

Exception when ship might have been confiscated by the enemy.

To this general rule, however, an important exception has been made, founded on the principle above quoted from the Code des Prises, in the case where the vessel or cargo recaptured was practically liable to be confiscated by the enemy. In that case, it is immaterial whether the property be justly liable to be thus confiscated according to the law of nations; since that can make no difference in the meritorious nature of the service rendered to the original owner by the recaptor. For the ground upon which salvage is refused by the general rule, is, that the Prize Court of the captor's country will duly respect the obligations of that law; a presumption which, in the wars of civilized States, as they are usually carried on, each belligerent nation is bound to entertain in its dealings with neutrals. But if, in point of fact, those obligations are not duly observed by those tribunals, and, in consequence, neutral property is unjustly subjected to confiscation in them, a substantial benefit is conferred upon the original owner in rescuing his property from this peril, which ought to be remunerated by the payment of salvage. It was upon this principle that the Courts of Admiralty, both of Great Britain and the United States, during the maritime war which was terminated by the peace of Amiens, pronounced salvage to be due upon neutral property retaken from French cruisers. During the revolution in France, great irregularity and confusion had arisen in the prize code formerly adopted, and had crept into the tribunals of that country, by which neutral property was liable to condemnation upon grounds both unjust and unknown to the law of nations. The recapture of neutral property which might have been exposed to confiscation by means of this irregularity and confusion, was, therefore, considered by the American and British courts of prize,

(*m*) Décision relative à la prise du navire *Le Statira*, 6 Thermidor, an. 8, pp. 2—4.



as a meritorious service, and was accordingly remunerated by the payment of salvage (*n*). These abuses were corrected under the consular government, and so long as the decisions of the Council of Prizes were conducted by that just and learned magistrate, M. Portalis, there was no particular ground of complaint on the part of neutral nations as to the practical administration of the prize code until the promulgation of the Berlin decree in 1806. This measure caused the exception to the rule as to salvage to be revived in the practice of the British Courts of Admiralty, which again adjudged salvage to be paid for the recapture of neutral property that was liable to condemnation under that decree (*o*). It is true that the decree had remained practically inoperative upon American property, until the condemnation of the cargo of the *Horizon* by the Council of Prizes, in October, 1807; and, therefore, it may perhaps be thought, in strictness, that the English Court of Admiralty ought not to have decreed salvage in the case of the *Sansom*, more especially as the convention of 1800, between the United States and France, was still in force, the terms of which were entirely inconsistent with the provisions of the Berlin decree. But as the cargo of the *Horizon* was condemned in obedience to the imperial rescript of the 18th September, 1807, having been taken before the capture of the *Sansom*, whether that rescript be considered as an interpretation of a doubtful point in the original decree, or as a declaration of an anterior and positive provision, there can be no doubt the *Sansom* would have been condemned under it; consequently a substantial benefit was rendered to the neutral owner by the recapture, and salvage was due on the principle of the exception to the general rule.

3. Lastly, the recapture may be made from an enemy.

The *jus postliminii* was a fiction of the Roman law, by which persons or things taken by the enemy were held to be restored to their former state, when coming again under the power of the nation to which they formerly belonged. It was applied not only to free persons, but also to slaves; and to real property and certain moveables, such as ships of war and private vessels, except fishing and pleasure boats. These things, therefore, when retaken, were restored to the original proprietor, as if they had never been out of his control and possession (*p*). Grotius attests,

Recapture  
from an  
enemy.

(*n*) *The War Onskan* (1799), 2 C. Rob. 299; *The Eleonora Catherina*, 4 C. Rob. 156; *The Carlotta* (1803), 5 C. Rob. 54; *The Huntress*, 6 C. Rob. 104; *Talbot v. Seeman* (1801), 1 Cranch, 1; S. C., 4 Dallas, 34.

(*o*) *The Sansom* (1807), 6 C. Rob.

410; *The Acteon*, Edw. Ad. 254.

(*p*) Inst. i. 12; Dig. 49. 15. 2. "Navibus longis atque onerariis propter belli usum postliminium est, non piscatoriis aut si quas actuarias voluptatis causâ praverunt."

and his authority is supported by that of the Consolato del Mare (*q*), that by the ancient maritime law of Europe, if the thing captured were carried *infra præsidia* of the enemy, the *jus postliminii* was considered as forfeited, and the former owner was not entitled to restitution. Grotius also states, that by the more recent law established among the European nations, a possession of twenty-four hours was deemed sufficient to divest the property of the original proprietor, even if the captured thing had not been carried *infra præsidia* (*r*). And Loccenius considers the rule of twenty-four hours' possession as the general law of Christendom at the time when he wrote (*s*). So, also, Bynkershoek states the general maritime law to be, that if a ship or goods be carried *infra præsidia* of the enemy, or of his ally, or of a neutral, the title of the original proprietor is completely divested (*t*).

Rule of amicable retaliation, or reciprocity, applied to recaptures of the property of allies.

Sir W. Scott, in delivering the judgment of the English Court of Admiralty, in the case of *The Santa Cruz* and other Portuguese vessels recaptured, in 1796 and 1797, from the common enemy by a British cruiser, stated that owing to the different practices of States with regard to recapture there appeared to be no general rule. It might be that the original owner is divested of his title by the immediate possession of the captor, or the rule of pernoctation and twenty-four hours' possession, or bringing the property *infra præsidia*, or the passing of a sentence of condemnation; but, in fact, there is no uniform rule of practice. Nations concur in principles, indeed, so far as to require firm and secure possession; but these rules of evidence respecting that possession are so discordant, and lead to such opposite conclusions, that the mere unity of principle forms no uniform rule to regulate the general practice. It would be absurd for Great Britain to lay it down as a general rule that a bringing *infra præsidia*—though probably the true rule—should in all cases of recapture be deemed necessary to divest the original proprietor of his right; for such a rule might prove unjust to British subjects, if other nations adopted the criterion, say, of immediate possession. In these circumstances it would be a liberal and rational proceeding to apply in the first instance the rule of that country to which the

(*q*) A private collection of maritime rules derived from practice in the Mediterranean. Certain of its elements had been applied in the latter part of the thirteenth century by the sea consuls of Barcelona. After successive enlargements, the compilation was published in Barcelona, 1494.

(*r*) Grotius, De Jur. Bel. ac Pac.

lib. iii. cap. 6, § 3. Consolato del Mare, cap. 287, § 1. Wheaton, Rep. vol. v. Appendix, p. 56. Ayala, De Jur. Bel. ac Pac. cap. v. Wheaton, Hist. Law of Nations, p. 45.

(*s*) Loccenius, De Jure Marit. lib. ii. cap. 4, § 4.

(*t*) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 5.



recaptured property belongs. Failing reciprocal treatment, redress must be sought by retaliatory measures. Each State has its law of usage, if not its ordinances; but should a case be found where a country has no rule at all on the subject, then the recapturing country must of necessity apply its own rule. As to the maritime law of England, it adopts a liberal rule of restitution or salvage with respect to the recaptured property of its own subjects, and gives the benefit of that rule to its allies, unless they act towards British property on a less liberal principle. In such a case it adopts their rule, and treats them according to their own measure of justice. This principle of reciprocity operates in other cases of maritime law (*u*).

The law of the United States proceeds on the same principle of reciprocity, as to the restitution of vessels or goods belonging to friendly foreign nations, and recaptured from the enemy by our ships of war. By the Act of Congress of the 3rd March, 1800, ch. xiv. § 3, it is provided that the vessels or goods of persons permanently resident within the territory and under the protection of any foreign Government in amity with the United States, and retaken by their vessels, shall be restored to the owner, he paying, for salvage, such portion of the value thereof, as by the law and usage of such foreign Governments shall be required of any vessel or goods of the United States under like circumstances of recapture; and where no such law or usage shall be known, the same salvage shall be allowed as is provided in the case of the recapture of the property of persons resident within, or under the protection of the United States. Provided that no such vessel or goods shall be restored to such former owner, in any case where the same shall have been condemned as prize by competent authority, before the recapture; nor in any case, where by the law and usage of such foreign Government, the vessels or goods of citizens of the United States would not be restored in like circumstances.

American law adopts the rule of reciprocity as to restitution of the property of friendly nations, recaptured from an enemy.

It becomes then material to ascertain what is the law of different maritime nations on the subject of recaptures; and this must be sought for either in the prize code and judicial decisions of each country, or in the treaties by which they are bound to each other.

Laws of different countries as to recaptures.

The present British law of military or prize salvage was established by the statutes of the 43rd Geo. III. ch. 160, and the 45th Geo. III. ch. 72, which provide that any vessel or goods

British law.

(*u*) *The Santa Cruz* (1798), 1 C. Rob. 50. Cf. *The Two Friends* (1799), 1 C. Rob. 271, which involved the recapture of property by a crew, including neutrals.



therein, belonging to British subjects, and taken by the enemy as prize, which shall be retaken, shall be restored to the former owners, upon payment for salvage of one-eighth part of the value thereof, if retaken by his Majesty's ships; and if retaken by any privateer (*x*), or other ship or vessel under his Majesty's protection, of one-sixth part of such value. And if the same shall have been retaken by the joint operation of his Majesty's ships and privateers, then the proper court shall order such salvage to be paid as shall be deemed fit and reasonable. But if the vessel so retaken shall appear to have been set forth by the enemy as a ship of war, then the same shall not be restored to the former owners, but shall be adjudged lawful prize for the benefit of the captors (*y*).

American  
law.

The Act of Congress of the 3rd March, 1800, ch. xiv. §§ 1, 2, provides that, in case of recaptures of vessels or goods belonging to persons resident within, or under the protection of the United States, the same not having been condemned as prize by competent authority, before the recapture, shall be restored on payment of salvage of one-eighth of the value if recaptured by a public ship; and if the recaptured vessel shall appear to have been set forth and armed as a vessel of war before such capture, or afterwards, and before the recapture, then the salvage to be one moiety of the value. If the recaptured vessel previously belonged to the Government of the United States and be unarmed, the salvage is one-sixth, if recaptured by a private vessel, and one-twelfth, if recaptured by a public ship; if armed, then the salvage to be one moiety if recaptured by a private vessel, and one-fourth if recaptured by a public ship. In respect to public armed ships, the cargo pays the same rate of salvage as the vessel, by the express words of the Act; but in respect to private vessels, the rate of salvage (probably by some unintentional omission in the Act) is the same on the cargo, whether the vessel be armed or unarmed (*z*).

It will be perceived, that there is a material difference between the American and British laws on this subject; the Act of Parliament continuing the *jus postliminii* for ever between the original owners and recaptors, even if there has been a previous sentence of condemnation, unless the vessel retaken appears to have been set forth by the enemy as a ship of war; whilst the Act of Congress

(*x*) Privateering is now abolished, by the Declaration of Paris, 1856.

(*y*) These Acts are now repealed (27 & 28 Vict. c. 23), and the Naval Prize Act, 1864 (27 & 28 Vict. c. 25), re-enacts their provisions with some

modifications. See also *The Progress*, Edw. Ad. 210, as to the valuation of a prize.

(*z*) Cf. *The Adeline* (1815), 9 Cranch, 244. See U. S. Revised Statutes, tit. Prize.

continues the *jus postliminii* until the property is divested by a sentence of condemnation in a competent court, and no longer; which was also the maritime law of England, until the statute stepped in, and, as to British subjects, revived the *jus postliminii* of the original owner.

Under the French law on the subject of recaptures, if a French vessel be retaken from the enemy after being in his hands more than twenty-four hours, it is good prize to the recaptor; but if retaken before twenty-four hours have elapsed, it is restored to the owner, with the cargo, upon the payment of one-third the value for salvage, in case of recapture by a privateer, and one-thirtieth in case of recapture by a public ship. But in case of recapture by a public ship, after twenty-four hours' possession, the vessel and cargo are restored on a salvage of one-tenth. French law.

Although the letter of the ordinances, previous to the Revolution, condemned as good prize French property recaptured after being twenty-four hours in possession of the enemy, whether the same be retaken by public or private armed vessels; yet it seems to have been the constant practice in France to restore such property when recaptured by the king's ships (*a*). The reservation contained in the ordinance of the 15th of June, 1779, by which property recaptured after twenty-four hours' possession by the enemy, was condemned to the Crown, which reserved to itself the right of granting to the recaptors such reward as it thought fit, made the salvage discretionary in every case, it being regulated by the king in Council according to circumstances (*b*).

France applies her own rule to the recapture of the property of her allies. Thus, the Council of Prizes decided on the 9th February, 1801, as to two Spanish vessels recaptured by a French privateer after the twenty-four hours had elapsed, that they should be condemned as good prize by the recaptor. Had the recapture been made by a public ship, whether before or after twenty-four hours' possession by the enemy, the property would have been restored to the original owner, according to the usage with respect to French subjects, and on account of the intimate relation subsisting between the two Powers (*c*).

The French law also restores, on payment of salvage, even after twenty-four hours' possession by the enemy, in cases where the

(*a*) Valin, Sur l'Ord. liv. iii. tit. 9, Art. 3. *Traité des Prises*, ch. 6, § 1, No. 8, § 88. Pothier, *Traité de Propriété*, No. 97. *Émérigon, Traité des Assurances*, tom. i. p. 497.

(*b*) *Émérigon, Traité des Assurances*, tom. i. p. 497.

(*c*) Pothier, *Traité de Propriété*, No. 100. *Émérigon, tom. i. p. 499*. Azuni, *Droit Maritime de l'Europe*, Partie ii. ch. 4, § 11.



enemy leaves the prize a derelict, or where it reverts to the original proprietor in consequence of the perils of the seas, without a military recapture. Thus the Marine Ordinance of Louis XIV., of 1681, liv. iii. tit. 9, art. 9, provides that, "if the vessel, without being recaptured, is abandoned by the enemy, or if in consequence of storms or other accident, it comes into the possession of our subjects, before it has been carried into an enemy's port (*avant qu'il ait été conduit dans aucun port ennemi*); it shall be restored to the proprietor, who may claim the same within a year and a day, although it has been more than twenty-four hours in the possession of the enemy." Pothier is of opinion that the above words, "*avant qu'il ait été conduit dans aucun port ennemi*," are to be understood, not as restricting the right of restitution to the particular case mentioned of a vessel abandoned by the enemy before being carried into port, which case is mentioned merely as an example of what ordinarily happens, "*parceque c'est le cas ordinaire auquel un vaisseau échappé à l'ennemi qui l'a pris, ne pouvant pas guère lui échapper lorsqu'il a été conduit dans ses ports*" (*d*). But Valin holds, that the terms of the ordinance are to be literally construed, and that the right of the original proprietor is completely divested by the carrying into an enemy's port. He is also of opinion that this species of salvage is to be likened to the case of shipwreck, and that the recaptors are entitled to one-third of the value of the property saved (*e*). Azuni contends that the rule of salvage in this case is not regulated by the ordinance, but is discretionary, to be proportioned to the nature and extent of the service performed, which can never be equal to the rescue of property from the hands of the enemy by military force, or to the recovery of goods lost by shipwreck (*f*). Émérigon is also opposed to Valin on this question (*g*).

Spanish law.

Spain formerly adopted the law of France as to recaptures, having borrowed its prize code from that country ever since the accession of the house of Bourbon to the Spanish throne. In the case of *The San Jago* (mentioned by Lord Stowell in that of *The Santa Cruz*), the Spanish law was applied, upon the principle of reciprocity, as the rule of British recapture of Spanish property. But by the subsequent Spanish prize ordinance of the 20th of June, 1801, Article 38, it was modified as to the property of friendly nations; it being provided that when the recaptured ship

(*d*) Pothier, *Traité de Propriété*, No. 99.

(*e*) Valin, *Sur l'Ord. loc. cit.*

(*f*) Azuni, *Droit Maritime*, Partie ii. ch. 4, §§ 8, 9.

(*g*) Émérigon, *Traité des Assurances*, tom. i. pp. 504—505. He cites in support of his opinion the *Consolato del Mare*, cap. 287; and *Targa*, cap. 46, No. 10.



is not laden for enemy's account, it shall be restored, if recaptured by public vessels, for one-eighth, if by privateers for one-sixth salvage: provided that the nation to which such property belongs has adopted, or agrees to adopt, a similar conduct towards Spain. The ancient rule is preserved as to recaptures of Spanish property; it being restored without salvage, if recaptured by a king's ship before or after twenty-four hours' possession; and if recaptured by a privateer within that time, upon payment of one-half for salvage; if recaptured after that time, it is condemned to the recaptors. The Spanish law has the same provisions with the French in cases of captured property becoming derelict, or reverting to the possession of the former owners by civil salvage.

Portugal adopted the French and Spanish law of recaptures, in her ordinances of 1704 and 1796. But in May, 1797, after the *Santa Cruz* was taken, and before the judgment of the English High Court of Admiralty was pronounced in that case, Portugal revoked her former rule by which twenty-four hours' possession by the enemy divested the property of the former owner, and allowed restitution after that time, on salvage of one-eighth, if the capture was by a public ship, and one-fifth if by a privateer. In *The Santa Cruz* and its fellow cases, Sir W. Scott distinguished between recaptures made *before* and *since* the ordinance of May, 1797; condemning the former where the property had been twenty-four hours in the enemy's possession, and restoring the latter upon payment of the salvage established by the Portuguese ordinance.

Portuguese law.

The ancient law of Holland regulated restitution on the payment of salvage at different rates, according to the length of time the property had been in the enemy's possession (*h*).

Dutch law.

The ancient law of Denmark condemned after twenty-four hours' possession by the enemy, and restored, if the property had been a less time in the enemy's possession, upon paying a moiety of the value as salvage. But the ordinance of the 28th March, 1810, restored Danish or allied property without regard to the length of time it might have been in the enemy's possession, upon payment of one-third the value.

Danish law.

By the Swedish ordinance of 1788, it is provided, that the rates of salvage on Swedish property shall be one-half the value, without regard to the length of time it may have been in the enemy's possession.

Swedish law.

What constitutes a "setting forth as a vessel of war" has been determined by the British Courts of Prize, in cases arising under

What constitutes a "setting

(*h*) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 5.

forth as a vessel of war," under the Prize Act.

the clause in the Act of Parliament. Thus it has been settled that where a ship was originally armed for the slave-trade, and after capture an additional number of men were put on board, but there was no commission of war, and no additional arming, it was not a setting forth as a vessel of war under the Act (*i*). But a commission of war is decisive if there be guns on board (*k*). And where the vessel, after the capture, has been fitted out as a privateer, it is conclusive against her, although when recaptured, she is navigating as a mere merchant ship; for where the former character of a captured vessel had been obliterated by her conversion into a ship of war, the legislature meant to look no further, but considered the title of the former owner for ever extinguished (*l*). Where it appeared that the vessel had been engaged in the military service of the enemy, under the direction of his minister of the marine, it was held as a sufficient proof of a setting forth as a vessel of war (*m*). So where the vessel is armed, and is employed in the public military service of the enemy by those who have competent authority so to employ it, although it be not regularly commissioned (*n*). But the mere employment in the enemy's military service is not sufficient; but if there be a fair semblance of authority in the person directing the vessel to be so employed, and nothing upon the face of the proceedings to invalidate it, the Court will presume that he is duly authorized; and the commander of a single ship may be presumed to be vested with this authority as commander of a squadron (*o*).

Recapture by a non-commissioned vessel.

It is no objection to an allowance of salvage on a recapture, that it was made by a non-commissioned vessel; it is the duty of every citizen to assist his fellow-citizens in war, and to retake their property out of the enemy's possession; and no commission is necessary to give a person so employed a title to the reward which the law allots to that meritorious act of duty (*p*). And if a convoying ship recaptures one of the convoy, which has been previously captured by the enemy, the recaptors are entitled to salvage (*q*). But a mere rescue of a ship engaged in the same common enterprise gives no right to salvage (*r*).

Actual rescue necessary for military salvage for recapture.

To entitle a party to salvage, as upon a recapture, there must have been an actual or constructive capture; for military salvage will not be allowed in any case where the property has not been

(*i*) *The Horatio* (1806), 6 C. Rob. 320.

(*k*) *The Ceylon*, 1 Dods. Ad. 105.

(*l*) *The Actif*, Edw. Ad. 185.

(*m*) *The Santa Brigada* (1800), 3 C. Rob. 65.

(*n*) *The Ceylon*, 1 Dods. Ad. 105.

(*o*) *The Georgiana*, 1 Dods. Ad. 397.

(*p*) *The Helen* (1801), 3 C. Rob. 224.

(*q*) *The Wight* (1804), 5 C. Rob. 315.

(*r*) *The Belle*, Edw. Ad. 66.



actually rescued from the enemy (*s*). But it is not necessary that the enemy should have actual possession; it is sufficient if the property is completely under the dominion of the enemy (*t*). If, however, a vessel be captured going in distress into an enemy's port, and is thereby saved, it is merely a case of civil and not of military salvage (*u*). But to constitute a recapture, it is not necessary that the recaptors should have a bodily and actual possession; it is sufficient if the prize be actually rescued from the grasp of the hostile captor (*x*). Where a hostile ship is captured, and afterwards recaptured by the enemy, and again recaptured from the enemy, the original captors are not entitled to restitution on paying salvage, but the last captors are entitled to the whole rights of prize; for, by the first recapture, the right of the original captors is entirely divested (*y*). Where the original captors have abandoned their prize, and it is subsequently captured by other parties, the latter are solely entitled to the property (*z*). But if the abandonment be involuntary, and produced by the terror of superior force, and especially if produced by the act of the second captors, the rights of the original captors are completely revived (*a*). And where the enemy has captured a ship, and afterwards deserted the captured vessel, and it is then recaptured, this is not to be considered as a case of derelict; for the original owner never had the *animus delinquendi*, and therefore it is to be restored on payment of salvage; but as it is not strictly a recapture within the Prize Act, the rate of salvage is discretionary (*b*). But if the abandonment by the enemy be produced by the terror of hostile force, it is a recapture within the terms of the Act (*c*). Where the captors abandon their prize, and it is afterwards brought into port by neutral salvors, it has been held that the neutral Court of Admiralty has jurisdiction to decree salvage, but cannot restore the property to the original belligerent owners; for by the capture, the captors acquired such a right of property as no neutral nation can justly impugn or destroy, and, consequently, the proceeds, (after deducting salvage,) belong to the original captors; and neutral nations ought not to inquire into the validity of a capture

(*s*) *The Franklin* (1801), 4 C. Rob. 147.

(*t*) *The Edward and Mary* (1801), 3 C. Rob. 305; *The Pensamento Feliz* (1809), Edw. Ad. 116.

(*u*) *The Franklin* (1801), 4 C. Rob. 147.

(*x*) *The Edward and Mary* (1801), 3 C. Rob. 305.

(*y*) 4 C. Rob. 217, note *a*; *The Astrea*, 1 Wheaton, 125; Valin, Sur

l'Ord. tom. ii. pp. 257—259; *Traité des Prises*, ch. 6, § 1. Pothier, *Traité de Propriété*, No. 99.

(*z*) *The Lord Nelson*, Edw. Ad. 79; *The Diligentia* (1814), 1 Dods. Ad. 404.

(*a*) *The Mary* (1817), 2 Wheaton, 123.

(*b*) *The John and Jane* (1802), 4 C. Rob. 216.

(*c*) *The Gage* (1806), 6 C. Rob. 273.



between belligerents (*d*). But if the captors make a donation of the captured vessel to a neutral crew, the latter are entitled to a remuneration as salvors; but after deducting salvage the remaining proceeds will be decreed to the original owner (*e*). And it seems to be a general rule, liable to but few exceptions, that the rights of capture are completely divested by a hostile recapture, escape, or voluntary discharge of the captured vessel (*f*). And the same principle seems applicable to a hostile rescue, but if the rescue be made by the neutral crew of a neutral ship, it may be doubtful how far such an illegal act, which involves the penalty of confiscation, would be held, in the Prize Courts of the captor's country, to divest his original right in case of a subsequent recapture.

Case of  
*The Emily*  
*St. Pierre*.

An interesting illustration of the law respecting the rescue of a captured neutral ship by part of her own crew occurred during the American Civil War. The *Emily, St. Pierre*, a British ship, was on a voyage from Calcutta with orders to make the coast of South Carolina, and ascertain whether it was still under blockade. If so, she was to go to New Brunswick; if not, she was to enter Charlestown harbour. She had no contraband on board. While heading for Charlestown, and about ten or twelve miles from shore, she was seized by one of the blockading cruisers, on the 18th March, 1862. Her crew were taken out, except the master, cook, and steward, who were kept on board to give evidence before a Prize Court. Two officers and thirteen men were put on board, and ordered to take her to Philadelphia. On their way thither, the three prisoners rose against their captors, disarmed, and secured them, and, with the assistance of three or four of the prize crew, who volunteered to lend a hand rather than remain confined, but who were all landsmen, managed to take her to Liverpool. Mr. Adams demanded the restitution of this vessel, and cited the cases of *The Catherina Elizabeth* (*g*) and *The Dispatch* (*h*), as evidence of Lord Stowell's condemnation of such a proceeding. Lord Russell, however, declined to seize the ship and give her up to the United States, on the ground that Her Majesty's Government had no jurisdiction or legal power to take or to acquire possession of her, or to interfere with her owners in relation to their property in her (*i*). "Acts of forcible resistance," said his Lordship, "to

(*d*) *The Mary Ford* (1796), 3 Dallas, 188.

(*e*) *The Adventure* (1814), 8 Cranch, 227.

(*f*) *Hudson v. Guestier* (1810), 4 Cranch, 293; S. C., 6 Cranch, 281;

*The Diligentia* (1814), 1 Dods. Ad. 404.

(*g*) (1804), 5 C. Rob. 232.

(*h*) (1801), 3 C. Rob. 278.

(*i*) Earl Russell to Mr. Adams, 7th May, 1862. U. S. Dipl. Cor. 1862, p. 87.

the rights of belligerents, when lawfully exercised over neutral merchant ships on the high seas, such, for instance, as rescue from capture, however cognizable or punishable as offences against international law, in the Prize Courts of the captor administering such law, are not cognizable by the municipal law of England, and cannot by that law be punished either by confiscation of the ship, or by any other penalty; and Her Majesty's Government cannot raise in an English court the question of the validity of the capture of the *Emily St. Pierre*, or of the subsequent rescue and recapture of that vessel, for such recapture is not an offence against the municipal law of this country" (i). The discussion ended by its being discovered that in 1800 England had asked the United States to do precisely the same thing, and that the American Government had refused to comply on the very grounds put forward by Lord Russell (k). It may therefore be taken as a settled point, that if a neutral vessel is captured by a belligerent cruiser, and before condemnation she manages to escape and reach her own country, the neutral Government is not bound to surrender her to that of the captor.

As to recaptors, although their right to salvage is extinguished by a subsequent hostile recapture and regular sentence of condemnation, divesting the original owners of their property, yet if the vessel be restored upon such recapture, and resume her voyage, either in consequence of a judicial acquittal, or a release by the sovereign Power, the recaptors are reintegrated in their right of salvage (l). And recaptors and salvors have a legal interest in the property, which cannot be divested by other subjects, without an adjudication in a competent court; and it is not for the Government's ships or officers, or for other persons, upon the ground of superior authority, to dispossess them without cause (m).

Salvage on second recapture.

In all cases of salvage where the rate is not ascertained by positive law, it is in the discretion of the Court, as well upon recaptures as in other cases (n). And where, upon a recapture, the parties have entitled themselves to a *military* salvage, under the Prize Act, the Court may also award them, in addition, a civil salvage, if they have subsequently rendered extraordinary services in rescuing the vessel in distress from the perils of the seas (o).

Rate of salvage.

(i) See note (i), previous page.

(k) U. S. Dipl. Cor. 1862, p. 113.

(l) *The Charlotte Caroline*, 1 Dods. Ad. 192.

(m) *The Blendenhall* (1814), 1 Dods. Ad. 414.

(n) *Talbot v. Seeman* (1801), 1 Cranch, 1; 3 C. Rob. 308. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 5.

(o) *The Louisa*, 1 Dods. Ad. 317;

*Jecker v. Montgomery* (1851), 13 Howard, 515.



PRIZE COURTS.  
Their  
functions.

The validity of maritime captures must be determined in a court of the captor's Government, sitting either in his own country or in that of an ally. This rule of jurisdiction applies, whether the captured property be carried into a port of the captor's country, into that of an ally, or into a neutral port.

Condemna-  
tion of pro-  
perty lying in  
the ports of  
an ally.

Respecting the first case, there can be no doubt. In the second case, where the property is carried into the port of an ally, there is nothing to prevent the Government of the country, although it cannot itself condemn, from permitting the exercise of that final act of hostility, the condemnation of the property of one belligerent to the other; there is a common interest between the two Governments, and both may be presumed to authorize any measures conducing to give effect to their arms, and to consider each other's ports as mutually subservient. Such an adjudication is therefore sufficient, in regard to property taken in the course of the operations of a common war.

Property  
carried into  
a neutral  
port.

But where the property is carried into a *neutral* port, it may appear, on principle, more doubtful whether the validity of a capture can be determined even by a Court of Prize established in the captor's country; and the reasoning of Sir W. Scott, in the case of *The Henrick and Maria*, is certainly very cogent, as tending to show the irregularity of the practice; but he considered that the English Court of Admiralty had gone too far in its own practice of condemning captured vessels lying in neutral ports, to recall it to the proper purity of the original principle. In delivering the judgment of the Court of Appeals in the same case, Sir William Grant also held that Great Britain was whecluded by her own inveterate practice, and that neutral merchants were sufficiently warranted in purchasing under such a sentence of condemnation, by the constant adjudications of the British tribunals (*p*). The same rule has been adopted by the Supreme Court of the United States, as being justifiable on principles of convenience to belligerents as well as neutrals; and though the prize was in fact within a neutral jurisdiction, it was still to be considered as under the control of the captor, whose possession is considered as that of his sovereign (*q*). This rule is now confirmed by Article 23 of the thirteenth Convention of the Hague Conference, 1907, which provides that a neutral Power may allow prizes to enter its ports

(*p*) *The Henrick and Maria* (1799), 4 C. Rob. 43; 6 C. Rob. 138, note (*a*).

(*q*) See also *The Polka*, 1 Spinks, 57; and the American cases, *Hudson v. Guestier* (1810), 4 Cranch, 293; *The Invincible*, 2 Gall. 39. Bynkershoek,

Quæst. Jur. Pub. lib. i. cap. 5 (Duponceau's Transl. Note, p. 38). Kent, Commentaries on American Law, vol. i. p. 103. Wheaton, Hist. Law of Nations, p. 321.



and waters when they are brought there to be sequestered pending the decision of a Prize Court.

This jurisdiction of the national courts of the captor, to determine the validity of captures made in war under the authority of his Government, is exclusive of the judicial authority of every other country, with three exceptions only:—1. Where the capture is made within the territorial limits of a neutral State. 2. Where it is made by armed vessels fitted out within the neutral territory (*r*). 3. Where the prize was abandoned by the captor, and is the subject of a salvage claim made by neutrals (*s*).

Jurisdiction of the courts of the captor, how far exclusive.

In either of the first two cases, the judicial tribunals of the neutral State have jurisdiction to determine the validity of the captures thus made, and to vindicate its neutrality by restoring the property of its own subjects, or of other States in amity with it, to the original owners. These exceptions to the exclusive jurisdiction of the national courts of the captor have been extended by the municipal regulations of some countries to the restitution of the property of their own subjects, in all cases where the same has been unlawfully captured, and afterwards brought into their ports; thus assuming to the neutral tribunal the jurisdiction of the question of prize or no prize, wherever the captured property is brought within the neutral territory. Such a regulation is contained in the marine ordinance of Louis XIV., of 1681, and its justice is vindicated by Valin, upon the ground that this is done by way of compensation for the privilege of asylum granted to the captor and his prizes in the neutral port. There can be no doubt that such a condition may be expressly annexed by the neutral State to the privilege of bringing belligerent prizes into its ports, which it may grant or refuse at its pleasure, provided it be done impartially to all the belligerent Powers; but such a condition is not implied in a mere general permission to enter the neutral ports. The captor, who avails himself of such a permission, does not thereby lose the military possession of the captured property, which gives to the Prize Courts of his own country exclusive jurisdiction to determine the lawfulness of the capture. This jurisdiction may be exercised either whilst the captured property is lying in the neutral port, or the prize may be carried thence *infra præsidia* of the captor's country where the tribunal is sitting. In either case, the claim of any neutral proprietor, even a subject of the State into whose ports the captured vessel or

(*r*) *The Estrella* (1819), 4 Wheaton, 298; *The Santissima Trinidad* (1822), 7 Wheaton, 283; *The Gran Para* (1822), 7 Wheaton, 471.  
 (*s*) *The Mary Ford* (1796), 3 Dall. 188.

goods may have been carried, must, in general, be asserted in the Prize Court of the belligerent country, which alone has jurisdiction of the question of prize or no prize (*t*).

Condemnation by consular tribunal sitting in the neutral country.

This jurisdiction cannot be exercised by a delegated authority in the neutral country, such as a consular tribunal sitting in the neutral port, and acting in pursuance of instructions from the captor's State. Such a judicial authority, in the matter of prize of war, cannot be conceded by the neutral State to the agents of a belligerent Power within its own territory, where even the neutral Government itself has no right to exercise such a jurisdiction, except in cases where its own neutral jurisdiction and sovereignty have been violated by the capture. A sentence of condemnation, pronounced by a belligerent consul in a neutral port, is, therefore, considered as insufficient to transfer the property in vessels or goods captured as prize of war, and carried into such port for adjudication (*u*).

In 1793, during the war between Great Britain and France, Genêt, the newly-appointed Minister of the French Republic, attempted—among other acts in contravention of American neutrality—to set up consular Prize Courts within the territory of the United States, for the purpose of trying and condemning British vessels captured by French cruisers. Washington demanded and secured his recall (*x*).

Responsibility of the captor's Government for the acts of its commissioned cruisers and courts.

The jurisdiction of the court of the capturing nation is conclusive upon the question of property in the captured thing. Its sentence forecloses all controversy respecting the validity of the capture, as between claimant and captors, and those claiming under them, and terminates all ordinary judicial inquiry upon the subject-matter. But where the responsibility of the captors ceases, that of the State begins. It is responsible to other States for the acts of the captors under its commission, the moment these acts are confirmed by the definitive sentence of the tribunals which it has appointed to determine the validity of captures in war.

Unjust sentence of a foreign court, ground of reprisals.

Grotius states that a judicial sentence plainly against right ("in re minimè dubiâ"), to the prejudice of a foreigner, entitles his nation to obtain reparation by reprisals:—"For the authority of the judge" (says he) "is not of the same force against strangers as against subjects. Here is the difference: subjects are bound up and concluded by the sentence of the judge, though it be unjust,

(*t*) Valin, Comment. sur l'Ordon. de la Marine, liv. iii. tit. 9, Des Prises, Art. 15; tom. ii. p. 274. Lampredi, Trattato del Commercio de' Popoli Neutrali in Tempo de Guerra, p. 228.

(*u*) *The Flad Oyen* (1799), 1 O. Rob. 135.

(*x*) Cf. Moore, Digest, vol. iv. pp. 486, 487.

so that they cannot lawfully oppose its execution, nor by force recover their own right, on account of the controlling efficacy of that authority under which they live. But strangers have coercive power [that is, of reprisals], though it be not lawful to use it so long as they can obtain their right in the ordinary course of justice" (*y*).

So, also, Bynkershoek, in treating the same subject, puts an unjust judgment upon the same footing with naked violence, in authorizing reprisals on the part of the State whose subjects have been thus injured by the tribunals of another State. And Vattel, in enumerating the different modes in which justice may be refused, so as to authorize reprisals, mentions "a judgment manifestly unjust and partial"; and though he states what is undeniable, that the judgments of the ordinary tribunals ought not to be called in question upon frivolous or doubtful grounds, yet he is manifestly far from attributing to them that sanctity which would absolutely preclude foreigners from seeking redress against them (*z*).

These principles are sanctioned by the authority of numerous treaties between the different Powers of Europe regulating the subject of reprisals, and declaring that they shall not be granted unless in case of the denial of justice. An unjust sentence must certainly be considered a denial of justice, unless the mere privilege of being heard before condemnation is all that is included in the idea of justice (*a*).

Another means adopted by a neutral State in order to protect its subjects' interests in view of what it considers an incorrect decision is intervention. Thus, in 1879, during the war between Chile and Peru, a German vessel was condemned by a Peruvian Court; whereupon the German Government, regarding the condemnation as unjustifiable, intervened and obtained the release of the vessel.

Even supposing that unjust judgments of municipal tribunals do not form a ground of reprisals, there is evidently a wide distinction in this respect between the ordinary tribunals of the State, proceeding under the municipal law as their rule of decision, and prize tribunals, appointed by its authority, and professing to administer the law of nations to foreigners as well as subjects. The ordinary municipal tribunals acquire jurisdiction over the

Distinction between municipal tribunals and courts of prize.

(*y*) Grotius, *De Jur. Bel. ac Pac.* liv. ii. ch. 18, § 350.  
lib. iii. cap. 2, § 5, No. 1.

(*z*) Bynkershoek, *Quaest. Jur. Pub.* (a) For such an instance of reprisals, see the case of the Silesian Loan, lib. i. cap. 24. Vattel, *Droit des Gens*, *infra*, p. 611.



person or property of a foreigner by his consent—either express by the fact of his voluntarily bringing the suit, or implied by the fact of his bringing his person or property within the territory. But when Courts of Prize exercise their jurisdiction over vessels captured at sea, the property of foreigners is brought by force within the territory of the State by which those tribunals are constituted. By natural law, the tribunals of the captor's country are no more the rightful exclusive judges of captures in war, made on the high seas from under the neutral flag, than are the tribunals of the neutral country. The equality of nations would, on principle, seem to forbid the exercise of a jurisdiction thus acquired by force and violence, and administered by tribunals which cannot be impartial between the litigating parties, because created by the sovereign of the one to judge the other. Such, however, is the actual constitution of the tribunals, in which, by the positive international law, is vested the exclusive jurisdiction of prizes taken in war. But the imperfection of the voluntary law of nations, in its present state, cannot oppose an effectual bar to the claim of a neutral Government seeking indemnity for its subjects who have been unjustly deprived of their property, under the erroneous administration of that law. The institution of these tribunals, so far from exempting, or being intended to exempt, the sovereign of the belligerent nation from responsibility for the acts of his commissioned cruisers, is designed to ascertain and fix that responsibility. Those cruisers are responsible only to the sovereign whose commissions they bear. So long as seizures are regularly made upon apparent grounds of just suspicion, and followed by prompt adjudication in the usual mode, and until the acts of the captors are confirmed by the sovereign in the sentences of the tribunals appointed by him to adjudicate in matters of prize, the neutral has no ground of complaint, and what he suffers is the inevitable result of the belligerent right of capture. But the moment the decision of the tribunal of the last resort has been pronounced, (supposing it not to be warranted by the facts of the case, and by the law of nations applied to those facts,) and justice has been thus finally denied, the capture and the condemnation become the acts of the State, for which the sovereign is responsible to the Government of the claimant. There is nothing more irregular in maintaining that the sovereign is responsible towards foreign States for the acts of his tribunals, than in maintaining that he is responsible for his own acts, which, in the intercourse of nations, are constantly made the ground of complaint, of reprisals, and even of war. No greater sanctity can be imputed to the proceed-

ings of prize tribunals, even by the most extravagant theory of the conclusiveness of their sentences, than is justly attributed to the acts of the sovereign himself. But those acts, however binding upon his own subjects, if they are not conformable to the public law of the world, cannot be considered as binding upon the subjects of other States. A wrong done to them forms an equally just subject of complaint on the part of their Government, whether it proceeds from the direct agency of the sovereign himself, or is inflicted by the instrumentality of his tribunals. The tribunals of a State are but a part, and only a subordinate part, of the Government of that State. But the right of redress against injurious acts of the whole Government, of the supreme authority, incontestably exists in foreign States, whose subjects have suffered by those acts. Much more clearly than must it exist, when those acts proceed from persons, authorities, or tribunals, responsible to their own sovereign, but irresponsible to a foreign Government, otherwise than by its action on their sovereign.

These principles, so reasonable in themselves, are also supported by the authority of the writers on public law, and by historical examples.

“The exclusive right of the State, to which the captors belong; to adjudicate upon the captures made by them,” says Rutherforth, “is founded upon another; that is, its right to inspect into the conduct of the captors, both because they are members of it, and because it is responsible to all other States for what they do in war; since what they do in war is done either under its general or its special commission. The captors are therefore obliged, on account of the jurisdiction which the State has over their persons, to bring such ships or goods as they seize in the main ocean into their own ports, and they cannot acquire property in them until the State has determined whether they were lawfully taken or not. The right which their own State has to determine this matter is so far an exclusive one, that no other State can claim to judge of their conduct until it has been thoroughly examined into by their own; both because no other State has jurisdiction over their persons, and likewise because no other State is answerable for what they do. But the State to which the captors belong, whilst it is thus examining into the conduct of its own members, and deciding whether the ships or goods which they have seized are lawfully taken or not, is determining a question between its own members and the foreigners who claim the property; and this controversy did not arise within its own territory, but in the main ocean. The right, therefore, which it exercises is not civil juris-

Opinion of  
Rutherforth.



diction; and the civil law, which is peculiar to its own territory, is not the law by which it ought to proceed. Neither the place where the controversy arose, nor the parties who are concerned in it, are subject to this law. The only law by which this controversy can be determined, is the law of nature, applied to the collective bodies of civil societies, that is, the law of nations; unless, indeed, there have been any particular treaties made between the two States, to which the captors and the other claimants belong, mutually binding them to depart from such rights as the law of nations would otherwise have supported. Where such treaties have been made, they are a law to the two States, as far as they extend, and to all the members of them, in their intercourse with one another. The State, therefore, to which the captors belong, in determining what might or might not be lawfully taken, is to judge by these particular treaties, and by the law of nations, taken together. This right of the State, to which the captors belong, to judge exclusively, is not a complete jurisdiction. The captors, who are its own members, are bound to submit to its sentence, though this sentence should happen to be erroneous, because it has a complete jurisdiction over their persons. But the other parties to the controversy, as they are members of another State, are only bound to submit to its sentence so far as this sentence is agreeable to the law of nations, or to particular treaties; because it has no jurisdiction over them, either in respect of their persons, or of the things that are the subject of the controversy. If justice, therefore, is not done to them, they may apply to their own State for a remedy; which may, consistently with the law of nations, give them a remedy, either by solemn war or reprisals. In order to determine when their right to apply to their own State begins, we must inquire when the exclusive right of the other State to judge in this controversy, ends. As this exclusive right is nothing else but the right of the State, to which the captors belong, to examine into the conduct of its own members before it becomes answerable for what they have done, such exclusive right cannot end until their conduct has been thoroughly examined. Natural equity will not allow that the State should be answerable for their acts, until those acts are examined by all the ways which the State has appointed for this purpose. Since, therefore, it is usual in maritime countries to establish not only inferior courts of marine, to judge what is and what is not lawful prize, but likewise superior courts of review, to which the parties may appeal, if they think themselves aggrieved by the inferior courts; the subjects of a neutral State can have no right



to apply to their own State for a remedy against an erroneous sentence of an inferior court, till they have appealed to the superior court, or to the several superior courts, if there are more courts of this sort than one, and till the sentence has been confirmed in all of them. For these courts are so many means appointed by the State, to which the captors belong, to examine into their conduct; and, till their conduct has been examined by all these means, the State's exclusive right of judging continues. After the sentence of the inferior court has been thus confirmed, the foreign claimants may apply to their own State for a remedy, if they think themselves aggrieved; but the law of nations will not entitle them to a remedy, unless they have been actually aggrieved. When the matter is carried thus far, the two States become the parties in the controversy. And since the law of nature, whether it is applied to individuals or civil societies, abhors the use of force till force becomes necessary, the supreme rulers of the neutral State, before they proceed to solemn war or to reprisals, ought to apply to the supreme rulers of the other State, both to satisfy themselves that they have been rightly informed, and likewise to try whether the controversy cannot be adjusted by more gentle methods" (b).

In the celebrated report made to the British Government, in 1753, upon the case of the reprisals granted by the King of Prussia, on account of captures made by the cruisers of Great Britain of the property of his subjects, the exclusive jurisdiction of the captor's country over captures made in war, by its commissioned cruisers, is asserted; and it is laid down that "the law of nations, founded upon justice, equity, convenience, and the reason of the thing, does not allow of reprisals, except in case of violent injuries, directed or supported by the State, and justice absolutely denied 'in re minimè dubiâ,' by all the tribunals, and afterwards by the prince;" plainly showing that, in the opinion of the eminent persons by whom that paper was drawn up, if justice be denied in a clear case, by all the tribunals, and afterwards by the prince, it forms a lawful ground of reprisals against the nation by whose commissioned cruisers and tribunals the injury is committed. And that Vattel was of the same opinion, is evident from the manner in which he quotes this paper to support his own doctrine, that the sentences of the tribunals ought not to be made the ground of complaint by the State against whose subjects they are pronounced, "excepting the case of a refusal of justice,

Report on  
the Silesian  
Loan causes.

(b) Rutherford, Inst. vol. ii. b. ii. ch. 9, § 19.

palpable and evident injustice, a manifest violation of rules and forms," &c. (c).

In the case above referred to, the King of Prussia (then neutral) had undertaken to set up within his own dominions a commission to re-examine the sentences pronounced against his subjects in the British Prize Courts; a proceeding regarded by the authors of the report to the British Government as an innovation, "which was never attempted in any country of the world before. Prize or no prize must be determined by Courts of Admiralty belonging to the Power whose subjects made the capture." But the report proceeds to state, that "every foreign prince in amity has a right to demand that justice should be done to his subjects in these courts, according to the law of nations, or particular treaties, where they are subsisting. If 'in re minimè dubiâ,' these courts proceed upon foundations directly opposite to the law of nations, or subsisting treaties, the neutral State has a right to complain of such determination."

The King of Prussia did complain of the determinations of the British tribunals, and made reprisals by stopping the interest upon a loan due to British subjects, and secured by hypothecation upon the revenues of Silesia, until he actually obtained from the British Government an indemnity for the Prussian vessels unjustly captured and condemned. The proceedings of the British tribunals, though they were asserted by the British Government to be the only legitimate mode of determining the validity of captures made in war, were not considered as excluding the demand of Prussia for redress upon the Government itself (d).

Mixed commission under treaty of 1794.

So, also, under the treaty of 1794, between the United States and Great Britain, a mixed commission was appointed to determine the claim of American citizens, arising from the capture of their property by British cruisers, during the existing war with France, according to justice, equity, and the law of nations. In the course of the proceedings of this board, objections were made, on the part of the British Government, against the commissioners proceeding to hear and determine any case where the sentence of condemnation had been affirmed by the Lords of Appeal in Prize Causes, upon the ground that full and entire credit was to be given to their final sentence; inasmuch as, according to the general law of nations, it was to be presumed that justice had been administered by this, the competent and supreme tribunal in matters of prize. But this

(c) Vattel, Droit des Gens, liv. ii. ch. 7, § 84.

(d) Wheaton, Hist. Law of Nations,

pp. 206—217; C. de Martens, Causes Célèbres de Droit des Gens, 2 vols. (Leipzig, 1827), vol. ii. p. 97.



objection was overruled by the board, upon the grounds and principles already stated, and a full and satisfactory indemnity was awarded in many cases where there had been a final sentence of condemnation.

In 1871 a mixed commission was appointed to determine British claims arising out of the alleged wrongful judgments pronounced against British vessels by the United States Prize Courts during the American Civil War (*e*).

Many other instances might be mentioned of arrangements between States, by which mixed commissions have been appointed to hear and determine the claims of the subjects of neutral Powers, arising out of captures in war, not for the purpose of revising the sentences of the competent Courts of Prize, as between the captors and captured, but for the purpose of providing an adequate indemnity between State and State, in cases where satisfactory compensation had not been received in the ordinary course of justice. Although the theory of public law treats prize tribunals, established by and sitting in the belligerent country, exactly as if they were established by and sitting in the neutral country, and as if they always adjudicated conformably to the international law common to both; yet it is well known that, in practice, such tribunals do take for their guide the prize ordinances and instructions issued by the belligerent sovereign, without stopping to inquire whether they are consistent with the paramount rule. If, therefore, the final sentences of these tribunals were to be considered as absolutely conclusive, so as to preclude all inquiry into their merits, the obvious consequence would be to invest the belligerent State with legislative power over the rights of neutrals, and to prevent them from showing that the ordinances and instructions, under which the sentences have been pronounced, are repugnant to that law by which foreigners alone are bound.

Conclusive-  
ness of prize  
decisions.

These principles received confirmation in the negotiation between the American and Danish Governments respecting the captures of American vessels and cargoes made by the cruisers of Denmark during the last war between that Power and Great Britain. In the course of this negotiation, it was objected by the Danish ministers that the validity of these captures had been finally determined in the competent Prize Court of the belligerent country, and could not be again drawn in question. On the part of the American Government it was admitted that the jurisdiction

Danish  
indemnities  
under treaty  
of 1830.

(*e*) Cf. *The Betsey*, in Moore, International Arbitrations, vol. iii. 2833; *The Springbok* (1866), 5 Wallace, 1;

Moore, *ibid.* vol. iv. 3928; *The Sir William Peel*, Moore, *ibid.* 3935.



of the tribunals of the capturing nation was conclusive and complete upon the question of prize or no prize, so as to transfer the property in the things condemned from the original owner to the captors, or those claiming under them; that the final sentence of those tribunals is conclusive as to the change of property operated by it, and cannot be again incidentally drawn in question in any other judicial forum; and that it has the effect of closing for ever all private controversy between the captors and the captured. The demand which the United States made upon the Danish Government was not for a judicial revision and reversal of the sentences pronounced by its tribunals, but for the indemnity to which the American citizens were entitled in consequence of the denial of justice by the tribunals in the last resort, and of the responsibility thus incurred by the Danish Government for the acts of its cruisers and tribunals. The Danish Government was, of course, free to adopt any measures it might think proper, to satisfy itself of the injustice of those sentences, one of the most natural of which would be a re-examination and discussion of the cases complained of, conducted by an impartial tribunal under the sanction of the two Governments, not for the purpose of disturbing the question of title to the specific property which had been irrevocably condemned, or of reviving the controversy between the individual captors and claimants which had been for ever terminated, but for the purpose of determining between Government and Government whether injustice had been done by the tribunals of one Power against the citizens of the other, and of determining what indemnity ought to be granted to the latter. The accuracy of this distinction was acquiesced in by the Danish ministers, and a treaty concluded, by which a satisfactory indemnity was provided for the American claimants (f).

Municipal  
laws adminis-  
tered in  
Prize Courts.

As Prize Courts are municipal and not international tribunals, it is a question of great nicety how far they are bound to enforce a municipal law against foreigners when that municipal law is contrary to the law of nations. In a case before Lord Stowell, it was argued that the Orders in Council of 1807 and 1809 (issued as a reply to Napoleon's Berlin Decree, 1806, and his Milan Decree, 1807) were a violation of international law, and that he therefore was bound to disregard them. His lordship was of opinion that as the Orders in Council were retaliatory they did not contravene the law of nations, but he added, "I have no hesitation in saying that they would cease to be just if they ceased to be

(f) Martens, *Nouveau Recueil*, tom. viii. p. 350.

retaliatory; and they would cease to be retaliatory from the moment the enemy retracts, in a sincere manner, those measures of his which they were intended to retaliate" (*g*). In another case (*h*), Stowell pointed out that it was the duty of a Prize Court not to pronounce occasional and shifting opinions to serve present purposes of particular national interest, but to administer impartially that justice which international law holds out without distinction to independent States, and to claim nothing for one belligerent which would not in like circumstances be conceded to the other (*i*). Similarly, in 1854, Dr. Lushington observed that it was incumbent on a Prize Court to preserve undiminished the rights of neutral States, without derogating from the rights of belligerent Powers, as both are sanctioned by the law of nations (*k*). Sir R. Phillimore is of opinion "that it has never been the doctrine of the British Prize Courts that, because they sit under the authority of the Crown, the Crown has authority to prescribe to them rules which violate international law" (*l*). However reasonable such opinions may be, there is no doubt that a Prize Court, being really a municipal institution, would be bound to take cognizance of and observe the enactments and orders of the sovereign authority of its State, even if they were in conflict with principles of international law. An example is found in the above-mentioned retaliatory Orders in Council. The law administered by such tribunals is based on custom, statutes, and special regulations issued by their Government; but every Government is, as a rule, bound, in drawing up these statutes and regulations, to conform to the established principles of international law.

The prize jurisdiction in Great Britain is assigned to the Probate, Divorce, and Admiralty Division of the High Court, from which appeal lies to the Judicial Committee of the Privy Council. The unsuccessful Naval Prize Bill, 1911, intended, *inter alia*, to substitute a special Supreme Court as the appellate tribunal, from which a further appeal would lie to the International Prize Court proposed by the Hague Conference, 1907.

The present procedure of the British Prize Court is regulated by rules made by the Privy Council under the Naval Prize Act, 1864, and the Prize Courts Act, 1894; but the President of the Court is empowered to make supplementary rules of procedure when and as necessity arises. On August 5, 1914, an Order in Council was

(*g*) *The Fox* (1811), Edw. Ad. 312.

5 Moo. P. C. 150; *The Snipe*, Edw. Ad. 381.

(*h*) *The Maria* (1799), 1 C. Rob.

(*k*) *The Leucade* (1854), Spinks, 217.

(*i*) Cf. also *The Recovery* (1807), 6 C. Rob. 341, 348; *The Ostsee* (1856),

(*l*) Phillimore, vol. iii. § 436.



issued whereby certain antiquated elements were removed, and the procedure assimilated to that of an ordinary civil action. In some countries Prize Courts are presided over by administrative officials rather than by judges, so that their procedure hardly assumes a strictly judicial form (*m*).

The proposed International Prize Court.

Prize Courts being municipal tribunals, various drawbacks and disadvantages—from the point of view of international law—invariably arise. As they are called upon to determine the validity of captures effected by subjects of their own countries, there is naturally a leaning in favour of the captors. Moreover—as has already been pointed out—they are bound to observe the practice prescribed for them by their own sovereign authority, and to depart from the prevailing rules of international law when ordered to do so by the same authority. In order to remedy these imperfections (which are, of course, more flagrant and more serious in some countries than in others), proposals have from time to time been made for the establishment of an international prize court. One of these proposals was advanced as early as 1759. In 1887 a more practicable project was set forth by the Institute of International Law. Twenty years later the second Hague Conference fully considered the question, and eventually drew up the remarkable project embodied in the twelfth Convention. The main difficulty that was felt was as to the law such a court would apply, seeing that on many matters of naval warfare there is a difference of opinion as well as of practice among some of the leading maritime Powers of the world. Accordingly, an effort was made at the London Naval Conference, 1908—9, to come to an agreement on those questions. The result of the deliberations—the Declaration of London, 1909—did not, however, receive the ratification of all the States represented. Furthermore, the Prize Court Convention, which was originally signed by thirty-eight States (though in ten cases with a reservation as to the constitution of the Court), failed altogether of ratification. Hence the scheme remains purely theoretical; but as it will sooner or later be taken up again for practical application, a brief analysis of it is desirable.

Provision is made for its applicability to belligerents who are parties to it, for the time of coming into force, for its revision or denunciation (*n*). A protocol of 1910 provides that States unable

(*m*) The American system closely resembles the British. For other systems, cf. Phillimore, vol. iii. pp. 658

*seq.* For the Japanese system, see Takahashi, p. 528.

(*n*) Hague Convention (1907), No. XII., Arts. 51 *seq.*



by their constitution to appeal from their Supreme Courts to an external tribunal may bring simply a claim for compensation, without overriding the decision of their Courts.

The Court is to hear appeals, on questions of either fact or law, from the national Prize Courts (1) when the judgment of the latter affects the property of a neutral Power or individual; (2) when it affects even enemy property but relates to (a) cargo on board a neutral ship, or (b) an enemy ship captured in the territorial waters of a neutral Power which has not made the capture the subject of a diplomatic claim, or (c) enemy property, alleged to have been captured contrary to a convention subsisting between the belligerents or some enactment of the captor's State (*o*). If the national Court pronounces a capture to be null, then the appeal will lie only on the question of damages; so that the International Court cannot interfere with a decree of restitution (*p*). The decrees of the International Court are to be binding on the parties, and to be carried out as expeditiously as possible (*q*).

Jurisdiction  
of the Inter-  
national Prize  
Court.

An appeal may be brought (1) by a neutral Power, if the judgment of the national Prize Court injuriously affects its property or that of its nationals, or if the capture is alleged to have taken place in its territorial waters; (2) by a neutral person, if such judgment affects his property, unless his own State forbids the appeal or undertakes it in his place; (3) by an enemy person, if such judgment affects his property, and if the capture was made on a neutral vessel, or was contrary to some convention between the belligerents or enactment of the captor's State; but where the capture involves a violation of neutral waters, only the neutral State may appeal (*r*). The appeal may be brought either from the national Court of first instance or after one appeal, as provided by the captor's law; but if no judgment is delivered within two years, the case may be then taken direct to the International Court (*s*).

Who may  
make the  
appeal.

The International Court is to apply, first, the provisions of any relevant treaty existing between the parties; then, the recognised rules of international law relative to the issue; finally, the general principles of justice and equity. Where the ground of appeal is the violation of an enactment issued by the captor's State, the Court must enforce such enactment. The Court may disregard failure to comply with the procedure laid down by the laws of the

What law is  
to be applied.

(*o*) *Ibid.*, Art. 3.  
(*p*) Art. 8.  
(*q*) Art. 9.

(*r*) Art. 4.  
(*s*) Art. 6.

captor when it holds them to be unjust or inequitable in their consequences (*t*). If the Court confirms the capture of a vessel or cargo, they are to be disposed of in accordance with the captor's law. If it pronounces the capture to be null, then it shall order restoration and fix the amount of damages, if any; but if the prize has been sold or destroyed, it shall determine the amount of compensation to be paid to the owners (*u*).

Constitution  
of the Court.

The Court is to be composed of fifteen competent judges of high character, of whom nine will form a quorum. In order to constitute it, each signatory Power is to appoint a judge and a deputy judge (*x*). Both are appointed for six years. Provision is made for cases of absence, resignation or death, and for rank, precedence, oath of office, and immunities (*y*). From the body of these nominated judges the Court is to be constituted thus: The judges appointed by Great Britain, the United States, France, Germany, Austria-Hungary, Russia, Italy and Japan are to be permanent members of the Court, whilst the other seven judges sit according to a prescribed rota (*z*). But if it happens, under the rota, that a belligerent State has not a judge in the Court, then one of the judges may be withdrawn by lot, and its own included (*a*). No person may sit as judge who has been a party to the sentence pronounced in the national Court; and no judge or deputy judge may, during his term of office, act for any party before the International Court (*b*). A belligerent captor, or a neutral Power being a party to the proceedings, may appoint a naval officer of high rank to sit as assessor, but with no voice in the decision (*c*). Provision is made for the election of the President and Vice-President (*d*).

The judges may not be paid by their own Government or by any other Power, but only out of a common fund (*e*). The Court is to sit at The Hague, and may not sit elsewhere except in case of compulsion ('force majeure'), and then only if the belligerents consent (*f*). The ministerial functions of the Court are to be performed by the Administrative Council and the International Bureau (*g*). The Court shall determine what languages may be used, but in all cases the official language of the national Court which has heard the case before may be used (*h*). The parties

- (*t*) Art. 7.
- (*u*) Art. 8.
- (*x*) Arts. 14, 10.
- (*y*) Arts. 11, 12, 16.
- (*z*) Art. 15.
- (*a*) Art. 16.
- (*b*) Art. 17.
- (*c*) Art. 18.

- (*d*) Art. 19.
- (*e*) Art. 20.
- (*f*) Art. 21.
- (*g*) Arts. 22, 23, 27. Cf. Hague Convention (1907), No. I. Art. 49, *supra*, on the International Court of Arbitration.
- (*h*) Art. 24.



may appoint agents and advocates to act for them and plead their cause (*i*).

Provision is made for the mode and time of entering the Procedure. appeal (*k*), service of notices and procuring of evidence (*l*), for written pleadings and oral discussions (*m*). After the close of the pleadings, the Court is to fix a day for a public sitting, when the parties state their view of the case both as to the law and the facts (*n*). A party may demand that discussion be held in private (*o*). All questions are decided in private by a majority of the judges present (*p*); the judgment must state the reasons on which it is based (*q*), and must be delivered in open court (*r*). Each party bears its own costs; but the party against whom the Court decides must pay in addition the costs of the trial (*s*). The Court may draw up further rules of procedure and make modifications in the rules contained in the Convention; these must be notified to the contracting Powers (*t*).

For a long time there was a difference of opinion with regard to some of the fundamental questions of naval bombardment. Most NAVAL BOM- jurists and publicists contended that the destruction of open and BARDMENT. undefended coast towns, and the exaction of enormous ransoms by threats of bombardment were reprehensible proceedings; but in some quarters—considering frequent naval practices—they were regarded as permissible operations for bringing pressure to bear on the enemy with a view to overcome him. The conflicting views related to the fundamental principle of warfare—whether any kind and any amount of injury and damage may be inflicted on the enemy, or only that kind and to that extent which will manifestly contribute to the defeat of the military and naval forces. In 1896 the subject of naval bombardment was considered by the Institute of International Law, which drew up a number of progressive rules. It was then agreed by the leading international jurists that the basic principles of bombardment on land should apply to bombardment on sea. Two of the Articles arrived at indicate the prevailing juristic opinion. Article 4 says that conformably to the general principles that had been formulated, the naval bombardment of an open town is inadmissible, save for the purpose of

(*i*) Arts. 25, 26.

(*k*) Art. 28.

(*l*) Art. 27.

(*m*) Art. 34.

(*n*) Art. 35.

(*o*) Art. 39.

(*p*) Art. 43.

(*q*) Art. 44.

(*r*) Art. 45.

(*s*) Art. 46.

(*t*) Arts. 49, 50. The full text will be found in a convenient form in Higgins, *op. cit.* pp. 407 *seq.*



obtaining by requisitions or contributions what is necessary for the fleet, and for the purpose of destroying sheds, military erections, depôts of war munitions or of warships in port. An open town that defends itself against the entrance of troops or of disembarked marines may be bombarded for the purpose of protecting such disembarkation and covering their operations if resistance continues. Bombardment of which the object is merely to extract a ransom, or force submission by attacks on the peaceful inhabitants and their property, is forbidden. Article 5 declares that an open town may not be bombarded simply because it is the capital of the State or the seat of the Government, or because it is occupied by troops or is ordinarily a garrison (*u*).

The Hague  
Rules.

In 1899 the matter came before the first Hague Conference; no agreement was reached, though a desire was expressed that a subsequent Conference should consider the question. Accordingly, in 1907, a Convention (the ninth) was established, whereby a compromise was effected between the claims of military necessity and those of humanity. The rules are as follows:—

Undefended  
towns.

“The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden.

A place may not be bombarded solely on the ground that automatic submarine contact mines are anchored off the harbour” (*v*).

The most important word of this Article, viz., ‘undefended,’ was not defined. Attempts were, indeed, made; but they failed on account of the difficulty that was experienced in drawing a distinction between the defence of a coast and of a town near the coast. The second paragraph of the Article, however, limits the denotation of the term, by specifying a particular proceeding which shall not be deemed to amount to a measure of defence. The representatives of several States were unable to accept this limitation, on the ground that anchoring mines off the harbour is a means of defence. Accordingly, reservations were entered against the second paragraph by Great Britain, France, Germany, Spain, Japan, and China. The simplest way to determine whether a place is undefended is to supply an answer to the question: Is it left open for the enemy forces to enter, if they should succeed in reaching it? Special exceptions to the general rule formulated in the first paragraph are given in the ensuing Articles.

Military  
works, &c.

“Military works, military or naval establishments, depôts of arms or war material, workshops or plant which could be utilized for

(*u*) Cf. *Annuaire de l'Institut de Droit International* (1896), pp. 313 —315.      (*v*) *Hague Convention* (1907), No. IX. Art. 1.

the needs of the hostile fleet or army, and ships of war in harbour, are not, however, included in this prohibition. The commander of a naval force may destroy them by artillery, after a summons followed by a reasonable interval of time, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed.

The commander incurs no responsibility for any unavoidable damage that may be caused by a bombardment in such circumstances.

If for military reasons immediate action is necessary, and no delay can be allowed to the enemy, it is nevertheless understood that the prohibition to bombard the undefended town holds good, as in the case given in the first paragraph, and that the commander shall take all due measures in order that the town may suffer as little harm as possible" (x).

An instance showing the application of this Article occurred in the Turco-Italian war, February 25, 1912. An Italian commander having surprised, at dawn, a Turkish gun-boat and a torpedo-boat in the port of Beirut, demanded their surrender. The demand was at the same time notified to the Governor and the consular authorities, and an interval of time (till 9 o'clock a.m.) was allowed for compliance therewith. When the interval expired, the Turkish vessels were again called upon, by signal, to surrender. As no reply was given, they were fired at; the attacked vessels returned the fire, but they were destroyed by the bombarding squadron. Some of the assailant's shells missed their objective, exploded on the quay, killed and injured several persons and damaged a number of buildings. Having regard to those facts, it is clear that under the above Article the Italian commander incurred no responsibility for the injury and damage which he had unavoidably caused.

"If the local authorities, on a formal summons being made to them, decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force before the place in question, the bombardment of undefended ports, towns, villages, dwellings, or buildings may be commenced after due notice has been given.

Refusing to  
comply with  
requisitions.

Such requisitions shall be proportional to the resources of the place. They shall be demanded only in the name of the commander of the said naval force, and they shall, as far as possible, be paid for in ready money; if not, receipts shall be given" (y).

(x) Art. 2.

(y) Art. 3.



This Article allows too heavy a price to be paid for refusal to fulfil readily the demand for requisitions.

“The bombardment of undefended ports, towns, villages, dwellings, or buildings, on account of failure to pay money contributions, is forbidden” (z).

Thus the old practice of exacting ransom from coast towns is prohibited.

Protected  
buildings.

“In bombardment by naval forces all necessary measures must be taken by the commander to spare as far as possible buildings dedicated to public worship, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, provided that they are not used at the time for military purposes.

It is the duty of the inhabitants to indicate such monuments, buildings, or places by visible signs, which shall consist of large stiff rectangular panels divided diagonally into two painted triangular portions, the upper portion black, the lower portion white” (a).

“Unless military exigencies render it impossible, the officer in command of an attacking naval force must, before commencing the bombardment, do all in his power to warn the authorities” (b).

“It is forbidden to give over to pillage a town or place even where taken by assault” (c).

Aerial bom-  
bardment.

In the Great War of 1914 the use of aircraft bombs was remarkably extensive and systematic. Much unnecessary havoc was thereby wrought, and many non-combatant innocent persons were killed by bombs hurled from German aircraft. Unfortunately, there are few positive and specific rules on the subject of aerial hostilities. In 1899, at the first Hague Conference, the following Declaration was signed: “The contracting Powers agree to prohibit for a term of five years the discharge of projectiles and explosives from balloons or by other new methods of a similar nature.” It has already been pointed out (d) that at the second Hague Conference, 1907, many States agreed to forbid for a period extending to the close of the third Conference the discharge of projectiles and explosives from aircraft, and that as several leading Powers refused to sign this provision it cannot be considered to possess binding force.

In order, therefore, to arrive at some regulative principles, it is

(z) Art. 4.

(a) Art. 5.

(b) Art. 6.

(c) Art. 7.

(d) See *supra*, p. 499.



necessary to consider the established laws of warfare in general, and the Hague Conventions as to land and naval bombardment in particular. We must also appeal to the "laws of humanity" and the "dictates of the public conscience," which were frequently referred to and recognised at the Hague Conferences and other international congresses. Having regard, then, to the existing law of war, we may say that it is unlawful for aerial belligerents to destroy deliberately, or carelessly, churches, hospitals, historic monuments, science and art buildings and other places protected in land or sea warfare, to make reckless attacks on centres of population, to inflict superfluous injury (*e.g.*, by poisonous gases), to destroy or kill for the sake of destroying or killing and irrespectively of definite military objects to be attained, to terrorize the population, to drop bombs indiscriminately. The fundamental criterion of the legitimacy of belligerent operations throughout is, Do they manifestly subserve military interests? (*e*).

Maritime mines were used, for defensive purposes, during the American Civil War, 1862—1865, and ships of the Northerners were sunk by these dreadful instruments of warfare. They were used also in the Franco-German war, 1870-1871, in the Russo-Turkish war, 1878, in the Spanish-American war, 1898, and in the Russo-Japanese war, 1904-5. But in no previous war have mines been used so extensively and with such disastrous results to combatants and neutrals alike as in the Great War, 1914-1915.

SUBMARINE  
MINES.

The sufferings that were indiscriminately inflicted by this means in the Russo-Japanese war showed the civilized world that it was absolutely necessary to lay down regulations on the subject. Accordingly, the second Hague Conference, 1907, after much discussion, drew up the rules contained in its eighth Convention. In the preamble the Conference declared that it was "inspired by the principle of the freedom of the seas as the common highway of all nations," and stated that its intention was to diminish the rigours of warfare and protect peaceful commerce. This aim, however, was not realized, because, on the one hand, the regulations as they stand are intrinsically unsatisfactory, and, on the other, they were made only provisional. Thus—apart from the usual clause as to the applicability of the Convention only between contracting Powers, and then only if all the belligerents are

The Mines  
Convention.

(*e*) For examples of licentious conduct on the part of belligerent airmen during the Great War, see Phillipson,

Int. Law and the Great War, pp. 177 *seq.*

parties (*f*)—Article 11 says that it shall remain in force for seven years, dating from the sixtieth day after the date of the first deposit of ratifications, and provides for its denunciation by any signatory Power; and by Article 12 the contracting parties agreed to reopen the question six months before the expiry of the seven years, if not settled by the third Peace Conference. The following are the rules:—

Prohibitions.

“It is forbidden (1) to lay unanchored automatic contact mines, unless they are so constructed as to become harmless one hour at most after the person who laid them has ceased to control them; (2) to lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings; (3) to use torpedoes which do not become harmless when they have missed their mark” (*g*).

As no means has been devised to exercise effective control over unanchored mines, a more rational solution of the difficulty would have been to adopt the proposal of the British delegates to prohibit entirely their employment. Further, the experience of previous wars has shown that even those mines that are anchored are liable to break adrift from their moorings. At the Conference it was proposed that the use of anchored mines should be forbidden in all cases except for purposes of defence; but the proposal failed owing to disagreement regarding the definition of attack and defence.

“It is forbidden to lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping” (*h*).

It is obvious that the word ‘sole’ renders the Article ineffective; for a naval commander will hardly ever be at a loss to allege some other object.

Precautions  
to be taken.

“When anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping. The belligerents undertake to do their utmost to render these mines harmless after a limited time has elapsed, and, should the mines cease to be under observation, to notify the danger zones as soon as military exigencies permit, by a notice to mariners, which must also be communicated to the Governments through the diplomatic channel” (*i*).

This rule, too, is to a large extent nugatory, owing to the indefiniteness of the phrase “military exigencies,” and owing to the

(*f*) Hague Convention (1907),  
No. VIII. Art. 7.  
(*g*) Art. 1.

(*h*) Art. 2.  
(*i*) Art. 3.



omission to impose a time limit within which such mines are to become innocuous.

“The contracting Powers which do not at present own perfected mines of the description contemplated in the present Convention, and which, consequently, could not at present carry out the rules laid down in Articles 1 and 3, undertake to convert the material of their mines as soon as possible so as to bring it into conformity with the foregoing requirements” (*k*).

Grave defects in Articles 1 and 3 have been pointed out. The provisions contained in the last cited Article intensify the ineffectiveness of these Articles 1 and 3.

“Neutral Powers which lay automatic contact mines off their coasts must observe the same rules and take the same precautions as are imposed on belligerents. The neutral Powers must give notice to mariners in advance of the places where automatic contact mines have been laid. This notice must be communicated at once to the Governments through the diplomatic channel” (*l*).

Neutral  
mines.

“At the close of the war, the contracting Powers undertake to do their utmost to remove the mines which they have laid, each Power removing its own mines. As regards anchored automatic contact mines laid by one of the belligerents off the coast of the other, their position must be notified to the other party by the Power that laid them, and each Power must proceed with the least possible delay to remove the mines in its own waters” (*m*).

Removal at  
close of war.

The most conspicuous failure of this Mines Convention is the absence of provisions restricting in some definite manner the laying of mines on the high seas, for the protection of neutral merchantmen which are entitled to sail there. At the Hague Conference the British delegates proposed, not only that unanchored mines or any other mines that do not become harmless as soon as they get loose should be forbidden, but also that none should be permitted except in the territorial waters of the belligerents or within a distance of ten miles from the shore batteries of a naval station. These proposals were opposed by certain States. However, after the present Convention had been voted on, one of the British representatives emphasized, in a noteworthy statement, that there are binding rules of international law on the subject apart from the few regulations laid down by the Conference. “. . . The British delegation,” he said, “desires to declare that it cannot regard this arrangement as furnishing a final solution of the question, but only as marking a stage in inter-

The British  
proposals and  
declaration at  
the Hague.

(*k*) Art. 6.

(*l*) Art. 4.

(*m*) Art. 5.



national legislation on the subject. It does not consider that adequate account has been taken in the Convention of the right of neutrals to protection, nor of humanitarian sentiments which cannot be neglected; it has done all that is possible to bring the Conference to share its views, but its efforts in this direction have remained without result. The high seas . . . are a great international highway. If in the present state of international law and custom belligerents are permitted to fight their battles there, it is none the less incumbent on them to do nothing which might, long after their departure from a particular place, render this highway dangerous to neutrals who have an equal right to use it. We declare without hesitation that the right of the neutral to security of navigation of the high seas ought to take precedence of the transitory right of the belligerent to employ these seas as the scene of the operations of war." After pointing out the serious results of mine-laying and the necessity to restrict the practice in the interests of the civilized world, he added, in reference to the Convention that had been arrived at: "As . . . this constitutes only a partial and insufficient solution of the problem, it cannot . . . be regarded as a complete exposition of international law on the subject. Therefore the legitimacy of a given act cannot be presumed for the mere reason that the Convention has not forbidden it" (n).

Reply of the  
German  
delegation.

To these observations the German delegate, Baron Marshall von Bieberstein, replied in a speech which was no less remarkable. He acknowledged that there are general principles applicable to the question in addition to those expressed in written provisions, but he at the same time insisted on the exigencies of military necessity. "A belligerent," he said, "who lays mines assumes a very heavy responsibility towards neutrals and peaceful shipping. On that point we are all agreed. No one will resort to such means unless for military reasons of an absolutely urgent character. But military acts are not governed solely by principles of international law. There are other factors. Conscience, good sense, and the sentiment of duty imposed by principles of humanity will be the surest guides for the conduct of sailors, and will constitute the most effective guarantee against abuses. The officers of the German navy, I loudly proclaim it, will always fulfil in the strictest fashion the duties which emanate from the unwritten law of humanity and civilization. I have no need to tell you that I entirely recognise the importance of the codification of rules to be

(n) Parl. Papers, Miscell. No. 4 (1908), p. 54.

followed in war. But it would be well not to issue rules the strict observance of which might be rendered impossible by the force of things. It is of the first importance that the international maritime law which we desire to create should only contain clauses the execution of which is possible from a military point of view, even in exceptional circumstances. . . . As to the sentiments of humanity and civilization, I cannot admit that there is any Government or country which is superior in these sentiments to that which I have the honour to represent" (o).

The old extravagant claims of military necessity need not be further considered here (p). Suffice it to say that the very edifice of international law was erected—and on broad foundations approved by the ethical and juridical consciousness of mankind—for the very purpose of setting limits to the arbitrary assumptions of military necessity and the licentious conduct of combatants. However this may be, the high professions made by the German delegation at the Hague Conference were not carried out during the Great War. Thus, on August 23, 1914, the British Admiralty stated that the Germans laid mines indiscriminately upon the ordinary trade routes; that they were laid not in the interests of any definite military scheme, but on the chance of sinking individual British vessels. A large number of ships were destroyed, including many belonging to neutral States. The German authorities issued no information with regard to the mines they laid and their localities, and adopted no measures for protecting neutral shipping.

Mine-laying  
in the Great  
War.

As this conduct on the part of Germany was persisted in, the British Admiralty announced on October 2, 1914, that Great Britain was compelled in her self-defence and by way of retaliation to sow mines in the southern waters of the North Sea. Their position was indicated, and regulations were issued to ensure the safety of neutral vessels. Similarly, Russia for the same reasons soon afterwards resorted to the use of mines in the Baltic, and notified the dangerous areas. On November 2, the Admiralty again drew attention to the increasingly lawless mine-laying by the Germans, frequently carried out under a neutral flag by trawlers and other protected vessels; and accordingly gave notice that the whole of the North Sea was to be considered a military area (q).

(o) *Ibid.*

(p) See Phillipson, *Int. Law and the Great War*, pp. 129, 134 *seq.*

(q) See more fully, Phillipson, *ibid.* pp. 378 *seq.*

## CHAPTER IV.

## RIGHTS OF WAR AS TO NEUTRALS.

CONCEPTION  
OF NEU-  
TRALITY.

THERE are no words in the Greek or Latin language that precisely answer to the English expressions, 'neutral' and 'neutrality.' The terms 'neutralis,' 'neutralitas,' which are used by some modern writers, are barbarisms, not to be met with in any classical author. The Roman civilians and historians make use of the words 'amici,' 'medii,' 'pacati,' 'socii,' which are very inadequate to express what we understand by neutrals, and they have no substantive whatever corresponding to neutrality. The cause of this deficiency is obvious. According to the laws of war, observed even by the most civilized nations of antiquity, the right of one nation to remain at peace, whilst other neighbouring nations were engaged in war, was not admitted to exist. He who was not an ally was an enemy; and as no intermediate relation was known, so no word had been invented to express such relation. The modern public jurists, who wrote in the Latin language, were consequently driven to the necessity of inventing terms to express those international relations which were unknown to the Pagan nations of antiquity, and which had grown out of a milder dispensation, struggling against the inveterate customs of the dark ages which preceded the revival of letters. Grotius terms neutrals 'medii,' 'middle men' (a). Bynkershoek, in treating of the subject of neutrality, says:—"Non hostes appello, qui neutrarum partium sunt, nec ex fœdere his illisve quicquam debent; si quid debeant, fœderati sunt, non simpliciter amici" ("I call neutrals ('non hostes') those who take part with neither of the belligerent Powers, and who are not bound to either by any alliance. If they are so bound, they are no longer neutrals but allies") (b).

Different  
species of  
neutrality.

Two species of neutrality were usually recognised by international law: firstly, natural, or perfect neutrality; and secondly, imperfect, qualified, or conventional neutrality. From the modern point of view, this distinction is scarcely applicable

(a) Grotius, De Jur. Bel. ac Pac. lib. iii. cap. 9.

(b) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9; De Statu belli inter non

hostes. We shall hereafter see that this definition is merely applicable to that species of neutrality which was not modified by special compact.



in actual practice (*bb*); but the difference between the two kinds may be indicated for the sake of throwing light on the recent development of the conception of neutrality.

Natural, or perfect neutrality, is that which every sovereign State has a right, independent of positive compact, to observe in respect to the wars in which other States may be engaged. Perfect neutrality.

The right of every independent State to remain at peace, whilst other States are engaged in war, is an incontestable attribute of sovereignty. It is, however, obviously impossible that neutral nations should be wholly unaffected by the existence of war between those communities with whom they continue to maintain their accustomed relations of friendship and commerce. The rights of neutrality are connected with corresponding duties. Among these duties is that of impartiality between the contending parties. The neutral is the common friend of both parties, and consequently is not at liberty to favour one party to the detriment of the other (*c*). Bynkershoek states it to be "the duty of neutrals to be every way careful not to interfere in the war, and to do equal and exact justice to both parties. 'Bello se non interponant,' " that is to say, "as to what relates to the war, let them not prefer one party to the other, and this is the only proper conduct for neutrals. A neutral has nothing to do with the justice or injustice of the war; it is not for him to sit as judge between his friends, who are at war with each other, and to grant or refuse more or less to the one or the other, as he thinks that their cause is more or less just or unjust. If I am a neutral, I ought not to be useful to the one, in order that I may hurt the other" (*d*). These, Bynkershoek adds, are "the duties applicable to the condition of those Powers who are not bound by any alliance, but are in a state of perfect neutrality. These I merely call 'friends,' in order to distinguish them from confederates and allies" (*e*).

Imperfect, qualified, or conventional neutrality, is that which is modified by special compact. Imperfect neutrality.

The public law of Europe affords several examples of this species of neutrality.

1. Thus the political independence of the confederated Cantons of Switzerland, which had so long existed in fact, was first formally recognised by the Germanic Empire, of which they originally constituted an integral portion, at the peace of Westphalia, 1648. Neutrality of the Swiss Confederation.

(*bb*) See *infra*, p. 639.

(*c*) Bynkershoek, *Quæst. Jur. Pub.* lib. i. cap. 9. Vattel, *Droit des Gens*, liv. iii. ch. 7, §§ 103—110.

(*d*) Bynkershoek, *Quæst. Jur. Pub.*

lib. i. cap. 9.

(*e*) *Ibid.*

The Swiss Cantons had observed a prudent neutrality during the Thirty Years' War, and from this period to the war of the French Revolution, their neutrality had been, with some slight exceptions, respected by the bordering States. But this neutrality was qualified by the special compact existing between the Confederation, or the separate Cantons, and foreign States, forming treaties of alliance or capitulations for the enlistment of Swiss troops in the service of those States. The policy of respecting the neutrality of Switzerland was mutually felt by the two great monarchies of France and Austria, during their long contest for supremacy under the houses of Bourbon and Hapsburg (*f*).

Switzerland during wars of French revolution.

During the wars of the French Revolution the neutrality of Switzerland was alternately violated by both the great contending parties, and her once peaceful valleys became the bloody scene of hostilities between the French, Austrian, and Russian armies. The expulsion of the allied forces, and the subsequent withdrawal of the French army of occupation, were followed by violent internal dissensions, which were finally composed by the mediation of Bonaparte as first consul of the French Republic, in 1803. A treaty of alliance was simultaneously concluded between the Republic and the Helvetic Confederation. According to the stipulations of this treaty, the neutrality of Switzerland was recognised by France, whilst the Confederation stipulated not to grant a passage through its territories to the armies of France, and to oppose such passage by force of arms in case of its being attempted. The Confederation also engaged to permit the enlisting of eight thousand Swiss troops for the service of France, in addition to the sixteen thousand troops to be furnished according to the capitulation signed on the same day with the treaty. It was, at the same time, expressly declared that its alliance, being merely defensive, should not, in any respect, be construed to prejudice the neutrality of Switzerland (*g*).

Proposal of the allies to Switzerland in 1815.

When the allied armies advanced to invade the French territory, in 1813, the Austrian corps under Prince Schwartzberg passed through the territory of Switzerland, and crossed the Rhine at three different places, at Basle, Lauffenberg, and Schaffhausen, without opposition on the part of the federal troops. The perpetual neutrality of Switzerland was, nevertheless, recognised by the final Act of the Congress of Vienna, March 20th, 1815 (*h*); but on the return of Napoleon from the Island of Elba, the allied

(*f*) Cf. Thiers, *Histoire du Consulat et de l'Empire*, tom. i. liv. 3, p. 182.  
(*g*) Schoell, *Histoire des Traités de*

*Paix*, tom. ii. ch. 33, p. 339.  
(*h*) Wheaton, *Hist. Law of Nations*, p. 493.



Powers invited the Confederation to accede to the general coalition against France. In the official note delivered by their ministers to the Diet at Zurich, on the 6th of May, 1815, it was stated, that although the allied Powers expected that Switzerland would not hesitate to unite with them in accomplishing the common object of alliance, which was to prevent the re-establishment of the usurped revolutionary authority in France, yet they were far from proposing to Switzerland the development of a military force disproportioned to her resources and to the usages of her people. They respected the military system of a nation, which, uninfluenced by the spirit of ambition, armed for the single purpose of defending its independence and its tranquillity. The allied Powers well knew the importance attached by Switzerland to the maintenance of the principle of her neutrality; and it was not with the purpose of violating this principle, but with the view of accelerating the epoch when it might become applicable in an advantageous and permanent manner, that they proposed to the Confederation to assume an attitude and to adopt energetic measures, proportioned to the extraordinary circumstances of the moment without at the same time forming a rule for the future (i).

In the answer of the Diet to this note, dated the 12th May, 1815, it was declared, that the relations which Switzerland maintained with the allied Powers, and with them only, could leave no doubt as to her views and intentions. She would persist in them with that constancy and fidelity which had at all times distinguished the Swiss character. Twenty-two small republics, united together for their security and the maintenance of their independence, must seek for their national strength in the principle of their Confederation. This resulted inevitably from the nature of things, the geographical position, the constitution, and the character of the Swiss people. A consequence of this principle was the neutrality of Switzerland, recognised as the basis of its future relations with all other States. It followed from the same principle, that the most efficacious participation of Switzerland in the great struggle which was about to take place must necessarily consist in the defence of her frontiers. In adopting this course, she did not separate herself from the common cause of the allied Powers, which thus became her own national cause. The defence of a frontier fifty leagues in length, serving as a *point d'appui* for the movements of two armies, was in itself a co-operation not only real, but also of the highest importance.

Reply of the  
Swiss Diet.

(i) Martens, Nouveau Recueil, tom. ii. p. 166.



More than thirty thousand men had already been levied for this purpose. Determined to maintain this development of her forces, Switzerland had a right to expect from the favourable disposition of the allied Powers, that, so long as she did not claim their assistance, their armies would respect the integrity of her territory. Assurances to this effect on their part were absolutely necessary in order to tranquillize the Swiss people, and engage them to support with fortitude the burden of an armament so considerable (*k*).

On the 20th of May, 1815, a convention was concluded at Zurich, to regulate the accession of Switzerland to the general alliance between Austria, Great Britain, Prussia, and Russia; by which the allied Powers stipulated, that, in case of urgency, where the common interest rendered necessary a temporary passage across any part of the Swiss territory, recourse should be had to the authority of the Diet for that purpose. The left wing of the allied army accordingly passed the Rhine between Basle and Rheinfelden, and entered France through the territory of Switzerland (*l*).

Declaration  
of 1815 as  
to Swiss  
neutrality.

On the re-establishment of the general peace, a declaration was signed at Paris, on the 20th November, 1815, by the four allied Powers and France, by which these five Powers formally recognised the perpetual neutrality of Switzerland, and guaranteed the integrity and inviolability of her territory within its new limits, as established by the final Act of the Congress of Vienna, and by the Treaty of Paris of the above date. They also declared that the neutrality and inviolability of Switzerland, and her independence of all foreign influence, were conformable to the true interests of the policy of all Europe, and that no inference unfavourable to the rights of Switzerland, in respect to her neutrality, ought to be drawn from the circumstances which had led to the passage of a part of the allied forces across the Helvetic territory. This passage, freely granted by the Cantons in the convention of the 20th May, was the necessary result of the entire adherence of Switzerland to the principles manifested by the allied Powers in the treaty of alliance of the 25th March (*m*).

Neutrality of  
part of Savoy.

At the second Peace of Paris, 1815, the allied Powers agreed that the neutrality of Switzerland should be extended to a portion of Savoy, at that time a part of the kingdom of Sardinia (*n*). In 1860, Savoy was transferred by Sardinia to France. By the second Article of the Treaty of Transfer it was provided "that

(*k*) Martens, tom. ii. p. 170.

(*l*) *Ibid.*

(*m*) Martens, tom. iv. p. 186.

(*n*) Art. iii. Hertslet, Map of Europe, vol. i. p. 346.

his Majesty the King of Sardinia cannot transfer the neutralized parts of Savoy, except on the conditions upon which he himself possesses them, and that it will appertain to his Majesty the Emperor of the French to come to an understanding on this subject, both with the Powers represented at the Congress of Vienna, and with the Swiss Confederation, and to give them the guaranties required by the stipulations referred to in this Article (o). No such understanding was, however, arrived at (p). At the outbreak of the Franco-German war, the Swiss Government declared that Switzerland would maintain and defend during that war her neutrality and the integrity of her territory by all the means in her power; and that if violence was offered to that neutrality she would energetically repulse every aggression. With reference to the neutralized parts of Savoy, the Swiss Government reminded the Powers that Switzerland had a right to occupy that territory, and that the right would be exercised in accordance with the treaties respecting it, should circumstances require its exercise for the defence of Swiss neutrality (q). The French Minister, the Duc de Grammont, replied that "he had not rejected nor even contested the right so claimed by Switzerland, but had confined himself to declaring that, under the eventualities referred to, it would have to be made the subject of special arrangement between the two Governments" (r). The question did not arise, as the war did not extend to that part of France. It may be added that in 1883 the obligation of France with regard to the conventional neutrality of her acquired portion of Savoy was recognised, when the French Government, having commenced the construction of fortifications there not far from Geneva, discontinued the works owing to the protest of the Swiss Federal Council (s).

2. The geographical position of Belgium, forming a natural barrier between France on the one side, and Germany and Holland on the other, would seem to render the independence and neutrality of Belgium essential to the preservation of peace between the latter Powers, as is that of Switzerland to its maintenance between France and Austria. Belgium covers the most vulnerable point of the northern frontier of France against invasion from Prussia, whilst it protects the entrance of Germany against the armies of France, on a frontier less strongly fortified than that of the Rhine from Basle to Mayence. But so long as the Low Countries

Neutrality of  
Belgium.

(o) *Ibid.*, vol. ii. p. 1430.

(p) Calvo, vol. ii. § 1046.

(q) Note of Swiss Government,  
18th July, 1870.

(r) Archives Diplomatiques, 1871—2,  
Pt. I. p. 262.

(s) Annual Register, 1883, pp. 269,  
270.



belonged to the house of Austria, either of the Spanish or the German branch, these provinces had been, for successive ages, the battle-ground on which the great contending Powers of Europe struggled for the supremacy. The security of the independence of Holland against the encroachments of France was provided for by the barrier-treaties concluded at Utrecht, in 1713, and at Antwerp, in 1715, between Austria, Great Britain, and Holland, by which the fortified towns on the southern frontier of the Austrian Netherlands were to be permanently garrisoned with Dutch troops. The kingdom of the Netherlands was created by the Congress of Vienna, in 1815, for the purpose of forming a barrier for Germany against France; and on the dissolution of that kingdom into its original component parts, the perpetual neutrality of Belgium was guaranteed by the five great European Powers, and made an essential condition of the recognition of her independence, in the treaties for the separation of Belgium from Holland (*t*).

Belgian  
neutrality  
in 1870.

In 1870, special treaties were entered into by England with France and Prussia for the maintenance of the neutrality of Belgium during the war, each of the belligerents binding itself to cooperate with England in case this neutrality was violated by the other. These treaties were to last during the war, and for twelve months after the ratification of any treaty of peace (*u*).

Belgian  
neutrality  
in 1914.

In the summer of 1914 the solemnly guaranteed neutrality of Belgium was violated; Belgium, mindful of her obligations, offered a wonderful resistance to the invaders; and Great Britain, one of the guarantors of Belgian neutrality, was obliged to go to war in defence of the violated territory (*x*).

Neutrality  
of Cracow.

3. We have already seen that by the final Act of the Congress of Vienna, 1815, Article 6, the city of Cracow, with its territory, was declared to be a perpetually free, independent, and neutral State, under the joint protection of Austria, Prussia, and Russia (*y*). The neutrality, thus created by special compact, and guaranteed by the three protecting Powers, was made dependent upon the reciprocal obligation of the city of Cracow not to afford an asylum, or protection, to fugitives from justice, or military deserters belonging to the territories of those Powers. How far the neutrality of the free and independent State thus created was actually respected by the protecting Powers, or how far the successive temporary occupations of its territory by their military

(*t*) Wheaton, Hist. Law of Nations, p. 552.

(*u*) Hertlet, Map of Europe, vol. iii. pp. 1886—1891.

(*x*) See Phillipson, Int. Law and the Great War, pp. 1 *seq.*

(*y*) *Vide supra*, Pt. I. ch. 2, p. 52.



forces, and how far their repeated forcible interference in its internal affairs, were justified by the non-fulfilment of the above obligation on the part of Cracow, or by other circumstances authorizing such interference according to the general principles of international law, were questions which gave rise to diplomatic discussions between the great European Powers, contracting parties to the treaties of Vienna, but which are foreign to the present object (*z*). The subsequent annexation of Cracow by Austria (1846) has already been referred to (*a*).

4. The Duchy of Luxemburg formed part of the German Confederation, and on the dissolution of that Confederacy in 1867, the King of Holland happened to be the Grand Duke. Either France or Prussia would have viewed with jealousy and concern the possession of the fortress of the city of Luxemburg by the other. It was provided by the treaty of London, 11th May, 1867, that the Grand Duchy was to be perpetually neutralized, under the guaranty of Austria, Great Britain, Prussia, and Russia. The Grand Duke was to see to the demolition of the fortress, which was not to be rebuilt, nor was the city to be occupied by any armed forces. In the war of 1870-1871, Count Bismarck complained of the non-observance by Luxemburg of the obligations of a neutral; in respect of which complaint it was maintained by Count Beust, the Austrian minister, that the question of whether anything had been done by a neutralized State to disentitle it to the protection and benefit of its neutrality, was one for the consideration of all the signatory Powers, and did not rest upon the decision of one of the belligerent Powers (*b*).

Neutrality of  
Luxemburg.

5. By the second Article of the treaty of 14th November, 1863, by the second Article of the Protocol of 25th January, 1864, and by the second Article of the treaty with Greece of the 29th March, 1864, the Courts of Great Britain, France, and Russia, in their character of guaranteeing Powers of Greece, declare, with the assent of the Courts of Austria and Prussia, that the islands of Corfu and Paxo, as well as their dependencies, shall, after their union with the Hellenic kingdom, enjoy the advantages of perpetual neutrality (*c*).

Neutrality of  
Corfu and  
Paxo.

The permanent neutrality of Switzerland, Belgium, Luxem-

Conventional  
or guaranteed  
neutrality.

(*z*) Wheaton, *Hist. Law of Nations*, pp. 441-445.

(*a*) See *supra*, p. 52.

(*b*) Calvo, iii. § 2313, p. 450; Wool-

sey, *Int. Law*, § 163.

(*c*) Holland, *European Concert*, pp. 49-54. Calvo, iii. p. 452.

of Europe (*d*). But the conventional neutrality thus created differs essentially from that natural or perfect neutrality which every State has a right to observe, independent of special compact, in respect to the wars in which other States may be engaged. The consequences of the latter species of neutrality only arise in case of hostilities. It does not exist in time of peace, during which the State is at liberty to contract any eventual engagements it thinks fit as to political relations with other States. A permanent neutral State, on the other hand, by accepting this condition of its political existence, is bound to avoid in time of peace every engagement which might prevent its observing the duties of neutrality in time of war. As an independent State, it may lawfully exercise, in its intercourse with other States, all the attributes of external sovereignty. It may form treaties of amity, and even of alliance with other States; provided it does not thereby incur obligations, which, though perfectly lawful in time of peace, would prevent its fulfilling the duties of neutrality in time of war. Under this distinction, treaties of offensive alliance, applicable to a specific case of war between any two or more Powers, or guaranteeing their possessions, are of course interdicted to the permanently neutral State. But this interdiction does not extend to defensive alliances formed with other neutral States for the maintenance of the neutrality of the contracting parties against any Power by which it might be threatened with violation (*e*).

Neutral  
obligations.

The question remains, whether this restriction on the sovereign power of the permanently neutral State is confined to political alliances and guaranties, or whether it extends to treaties of commerce and navigation with other States. Here it again becomes necessary to distinguish between the two cases of natural and perfect or qualified and conventional neutrality. In the case of ordinary neutrality, the neutral State is at liberty to regulate its commercial relations with other States according to its own view of its national interests, provided this liberty be not exercised so as to affect that impartiality which the neutral is bound to observe towards the respective belligerent Powers. Vattel states that the impartiality which a neutral nation is bound to observe relates solely to the war. "In whatever does not relate to the war, a neutral and impartial nation will not refuse to one of the belligerent parties, on account of its present quarrel, what it grants to

(*d*) In 1907 a treaty was entered into at Christiania whereby the leading European Powers guaranteed the integrity of Norway; but the neutralization in this case was in many

respects different from that in the case of Switzerland, Belgium, and Luxemburg.

(*e*) Arendt, *Essai sur la Neutralité de la Belgique*, pp. 87—95.



the other. This does not deprive the neutral of the liberty of making the advantage of the State the rule of its conduct in its negotiations, its friendly connections, and its commerce. When this reason induces it to give preferences in things which are at the free disposal of the possessor, the neutral nation only makes use of its right, and is not chargeable with partiality. But to refuse any of these things to one of the belligerent parties, merely because he is at war with the other, and in order to favour the latter, would be departing from the line of strict neutrality" (f).

These general principles must be modified in their application to a permanently neutral State. The liberty of regulating its commercial relations with other foreign States, according to its own views of its national interests, which is an essential attribute of national independence, does not authorize the permanently neutral State to contract obligations in time of peace inconsistent with its peculiar duties in time of war (g).

Neutrality was also liable, formerly, to be modified by antecedent engagements, by which the neutral was bound to one of the parties to the war. Thus the neutral could be bound by treaty, previous to the war, to furnish one of the belligerent parties with a limited succour 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 did not necessarily forfeit his neutral character, nor render him the enemy of the other belligerent nation, because it was not deemed to constitute him the general associate of its enemy (h).

Neutrality modified by a limited alliance with one of the belligerent parties.

How far a neutrality, thus limited, might be tolerated by the opposite belligerent, often depended more upon considerations of policy than of strict right. Thus, where Denmark, in consequence of a previous treaty of defensive alliance, furnished limited succours in ships and troops to the Empress Catharine II. of Russia, in the war of 1788 against Sweden, the abstract right of the Danish court to remain neutral, except so far as regarded the stipulated succours, was scarcely contested by Sweden and the allied mediating Powers. But it is evident, from the history of these transactions, that if the war had continued, the neutrality of Denmark would not have been tolerated by these Powers, unless she had withheld from her ally the succours stipulated by the

(f) Vattel, *Droit des Gens*, liv. iii. ch. 7, § 104.

(g) See also *ante*, pp. 380 *seq.*

(h) Bynkershoek, *Quæst. Jur. Pub.* lib. i. cap. ix. Vattel, *Droit des Gens*,

liv. iii. ch. 6, §§ 101—105. As to the general principles to be applied to such treaties, and when the *casus fœderis* arises, *vide supra*, Pt. III. ch. 2, p. 386.



treaty of 1773, or Russia had consented to dispense with its fulfilment (*i*).

Right to  
make such  
treaties.

“There remains,” says Sir R. Phillimore (in his work issued in 1854-1861), “the grave question whether a State has any right to stipulate, in time of peace, that, when the time of war arrives, it will do the act of a belligerent and yet claim the immunity of a neutral.” The learned author concludes that a State has no right to enter into such a stipulation, and then to claim neutrality while fulfilling it (*k*). The more recent development of the law of neutrality, especially as witnessed in the Hague Conventions, has assumed a course contrary to the earlier practice; so that neutral States are now forbidden to furnish aid to a belligerent in any circumstances whatever.

Qualified  
neutrality  
arising out  
of antecedent  
treaty stipu-  
lations,  
admitting the  
armed vessels  
and prizes of  
one belli-  
gerent into  
the neutral  
ports, whilst  
those of the  
other are  
excluded.

Another case of qualified neutrality was deemed to arise out of treaty stipulations antecedent to the commencement of hostilities, by which the neutral may be bound to admit the vessels of war of one of the belligerent parties, with their prizes, into his ports, whilst those of the other may be entirely excluded, or only admitted under limitations and restrictions. Thus, by the treaty of amity and commerce of 1778, between the United States and France, the latter secured to herself two special privileges in the American ports: firstly, admission for her privateers, with their prizes, to the exclusion of her enemies; secondly, admission for her public ships of war, in case of urgent necessity, to refresh, victual, repair, &c., but not exclusively of other nations at war with her. Under these stipulations, the United States, not being expressly bound to exclude the public ships of the enemies of France, granted an asylum to British vessels and those of other Powers at war with her. Great Britain and Holland still complained of the exclusive privileges allowed to France in respect to her privateers and prizes, whilst France herself was not satisfied with the interpretation of the treaty by which the public ships of her enemies were admitted into the American ports. To the former, it was answered by the American Government, that they enjoyed a perfect equality, qualified only by the exclusive admission of the privateers and prizes of France, which was the effect of a treaty made long before, for valuable considerations, not with a view to circumstances such as had occurred in the war of the French Revolution, nor against any nation in particular, but against all nations in general, and which

(*i*) Annual Register, vol. xxx. pp. 181, 182. State Papers, p. 292. Eggers, Leben von Bernstorff, 2 Ab-

theil, pp. 118—195.

(*k*) Phillimore, vol. iii. § 146. Calvo, vol. iii. p. 452.

might, therefore, be observed without giving just offence to any (*l*).

On the other hand, the minister of France asserted the right of arming and equipping vessels for war, and of enlisting men, within the neutral territory of the United States. Examining this question under the law of nations and the general usage of mankind, the American Government produced proofs, from the most enlightened and approved writers on the subject, that a neutral nation must, in respect to the war, observe an exact impartiality towards the belligerent parties; that favours to the one, to the prejudice of the other, would import a fraudulent neutrality, of which no nation would be the dupe; that no succour ought to be given to either, unless stipulated by treaty, in men, arms, or anything else, directly serving for war; that the right of raising troops being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign Power can levy men within the territory without its consent; that, finally, the Treaty of 1778, making it unlawful for the enemies of France to arm in the United States, could not be construed affirmatively into a permission to the French to arm in those ports, the treaty being express as to the prohibition, but silent as to the permission (*m*).

Fundamental principles of neutrality.

The above considerations indicate the effects of conventional neutralization of States, the fundamental principles of the law of neutrality and certain distinctions that were formerly current, *e.g.*, between perfect and imperfect neutrality. Nowadays the reciprocal rights and duties existing between belligerents and neutrals depend partly on customary law, but more particularly on the Hague Regulations and the Declaration of London, which together constitute a code of international law on the subject. Under this present system the distinctions between 'perfect' and 'imperfect' or 'qualified' neutrality, and that between 'favourable,' 'benevolent,' or 'armed' neutrality, possess neither legal significance nor practical importance. For the sake of convenience, we may in the ensuing exposition divide the rights and duties of neutrality into those relating to land warfare and those relating to maritime war. Throughout it is necessary to distinguish between the rights and duties appertaining to States and those relating to individuals. We shall find, for example, that in-

NEUTRALITY  
IN LAND  
WARFARE.

(*l*) Mr. Jefferson's Letter to Mr. Hammond and Mr. Van Berekel, Sept. 9, 1793; Waite, American State Papers, vol. i. pp. 169, 172.

(*m*) Mr. Jefferson's Letter to Mr. G. Morris, the United States minister to France, Aug. 16, 1793; Waite, American State Papers, vol. i. p. 140. Cf. Moore, Digest, vol. vii. § 1293.

dividuals are not necessarily debarred from doing many things which are positively prohibited in the case of States.

Neutral  
territory  
inviolable.

"The territory of neutral Powers is inviolable" (*n*).

"Belligerents are forbidden to move troops or convoys, whether of munitions of-war or of supplies, across the territory of a neutral Power" (*o*).

"A neutral Power must not allow any of the acts referred to in Articles 2 to 4 to occur in its territory. It is not bound to punish acts in violation of neutrality, unless such acts have been committed on its own territory" (*p*).

"The fact that a neutral Power repels, even by force, attempts to violate its neutrality cannot be regarded as a hostile act" (*q*).

The rights of war may be exercised only within the territory of the belligerent Powers, upon the high seas, or in a territory, belonging to no one. Hence it follows, that hostilities cannot lawfully be exercised within the territorial jurisdiction of the neutral State, which is the common friend of both parties (*r*).

Passage  
through the  
neutral  
territory.

This exemption extends to the passage of an army or fleet through the limits of the territorial jurisdiction, which can hardly be considered an innocent passage, such as one nation has a right to demand from another; and, even if it were such an innocent passage, it was regarded as one of those *imperfect* rights, the exercise of which depends upon the consent of the proprietor, and which cannot be compelled against his will. Formerly it was held that it might be granted or withheld, at the discretion of the neutral State; but its being granted was no ground of complaint on the part of the other belligerent Power, provided the same privilege was granted to him, unless there were sufficient reasons for withholding it (*s*). Now the prohibition is absolute.

A neutral State may not allow passage to a belligerent even if there had been a treaty between them stipulating such a right. Thus during the Anglo-Boer war, the Portuguese Government refused for some time to allow British persons and goods to pass through Portuguese territory in East Africa, in spite of the Anglo-Portuguese treaty of 1891. Eventually Portugal gave permission, and notified this to the Transvaal Government, alleging the necessity to fulfil a previously arranged undertaking that depended

(*n*) Hague Convention (1907),  
No. V. Art. 1.

(*o*) Art. 2.

(*p*) Art. 5.

(*q*) Art. 10.

(*r*) Bynkershoek, Quæst. Jur. Pub.

lib. i. cap. 8. Martens, Des Prises et Reprises, ch. 2, § 18.

(*s*) Vattel, Droit des Gens, liv. iii. ch. 7, §§ 119—131. Grotius, De Jur. Bel. ac Pac. lib. ii. cap. 2, § 13. *The Twee Gebroeders* (1801), 3 C. Rob. 353.



on reciprocity. The Transvaal Government urged in reply—and rightly so—that such a treaty cannot be applied, in time of war, by a neutral State to the detriment of a third party; for the obligations of neutrality must cause it to be suspended for the duration of war.

If a belligerent violates neutral territory, and the neutral State does not or cannot take effective measures to expel them, the other belligerent is entitled to enter the territory and prevent the violation from operating to his disadvantage. Reasons of self-preservation may justify an entry into neutral territory, when—as Daniel Webster, the American Secretary of State, put it in 1841—there is a “necessity of self-defence, instant, overwhelming, and leaving no choice of means and no moment for deliberation” (though the last condition as to there being no moment for deliberation is perhaps superfluously stringent) (*t*).

“Belligerents are forbidden (a) to erect on the territory of a neutral Power a wireless telegraphy station, or other apparatus for the purpose of communicating with belligerent forces on land or sea; (b) to use any installation of this kind established by them before the war on the territory of a neutral Power for purely military purposes, and which has not been opened for the service of public messages” (*u*).

Wireless  
telegraphy  
stations on  
neutral  
territory.

“A neutral Power is not bound to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables, or of wireless telegraphy apparatus belonging to it, or to companies or private individuals” (*x*).

The Report of the Hague Committee points out that there is no contradiction between the two foregoing Articles. Article 3 “contemplates the installation of a station or an apparatus by the belligerent parties on the territory of the neutral State, or the use of a station or apparatus installed by them there during peace, for an exclusively military purpose and without being opened to the public. Article 8, on the other hand, refers to an apparatus used for the public service, and administered either by the neutral State or by a company or individuals.”

In November, 1914, Great Britain and France protested against the alleged use by Germany of the wireless installations in Ecuador and Colombia. The Chargé d’Affaires of the Colombian Legation replied that on September 1 his Government had issued a decree to safeguard the neutrality of the Republic with regard to the

(*t*) Cf. the case of *The Caroline* (1841), Moore, Digest, vol. ii. § 217; Snow, Cases, p. 177.

(*u*) Hague Convention (1907), No. V. Art. 3.  
(*x*) Art. 8.

working of the wireless stations at Cartagena and Santa Marta; that the contracts under which they were installed stipulated the observance of neutrality; and that on September 11 another decree demanded proof of their innocent operations.

Export of  
arms, &c.

“ A neutral Power is not bound to prevent the export or transit, on behalf of either belligerent, of arms, munitions of war, or, in general, of anything which could be of use to an army or fleet ” (y).

Duty of  
impartiality.

“ A neutral Power must apply impartially to the belligerents every restriction or prohibition which it may enact in regard to the matters referred to in Articles 7 and 8. The neutral Power shall see that the same obligation is observed by companies or private owners of telegraph or telephone cables or wireless telegraphy apparatus ” (z).

Loans to  
belligerents  
by neutrals.

In connection with Article 7, quoted above, we may refer to the question of war loans raised in neutral countries for the use of the belligerents. It has happened, not infrequently, that neutral subjects who sympathize with a belligerent have raised loans for the purpose of assisting him in the war. In connection with the Greek War of Independence, the Law Officers of the Crown gave an opinion in 1823 to the effect that such subscriptions for the use of one of two belligerents, entered into by individual subjects of a neutral, are inconsistent with that neutrality, and contrary to the law of nations. Such subscriptions, however, would not give the other belligerent the right to consider this as an act of hostility, although, if carried to any considerable extent, they might afford a just ground of complaint. If a loan is purely commercial, and real interest be charged for the money, it is then no infringement of neutrality (a). In 1842, American citizens advanced funds to the Government of Texas, then independent. Mexico protested, but the American Government pointed out that the loan was not unlawful, and added that there were acts which no State undertook to prevent. In the Crimean war, money was raised for Russia in Germany and Holland, despite the protest of France; in the Franco-German war a French loan and a German loan were issued in London; and in the Russo-Japanese war, 1904, Japan raised funds in England and Germany, and Russia in France and Germany. In 1873, Mr. Gladstone expressed a strong disapproval in the House of Commons of a gratuitous loan then being raised in

(y) Art. 7. As to the export of arms, ammunition, &c., see further the corresponding provision in reference to maritime warfare, *infra*, p. 664.

(z) Art. 9.

(a) See Phillimore, vol. iii. Appendix, p. 928. See *De Wutz v. Hendricks* (1824), Moore, Com. Pleas, 586.



England for the Spanish Pretender, Don Carlos (*b*). A neutral State is not obliged to prohibit its subjects from taking stock in loans issued by a belligerent in the ordinary way of business. But sometimes Governments have seen fit to lay restrictions on their citizens in order to fulfil strictly the duties of neutrality. Thus, soon after the outbreak of the Great War, 1914, the United States Government announced that "loans by American bankers to any foreign nation which is at war was inconsistent with the true spirit of neutrality." This announcement was subjected to much adverse criticism in America; it was agreed that a national loan would be inadmissible, but it was contended that loans by individual subjects are not inconsistent with true neutrality. The United States Secretary of State, however, observed: ". . . A war loan, if offered for popular subscription in the United States, would be taken up chiefly by those who are in sympathy with the belligerent seeking the loan. The result would be that great numbers of the American people might become more earnest partisans, having a material interest in the success of the belligerent whose bonds they hold;" and he added that the prohibition to participate in such transactions affects all the belligerents alike, so that it is in conformity with the fundamental principles of neutrality (*c*).

"Corps of combatants must not be formed, nor recruiting agencies opened, on the territory of a neutral Power, on behalf of the belligerents" (*d*). Levying of troops.

"A neutral Power will not incur responsibility merely from the fact that persons cross the frontier individually in order to place themselves at the service of one of the belligerents" (*e*).

This Article does not apply to a belligerent State's subjects who proceed to their country for the purpose of fulfilling their military duties.

Vattel states that the impartiality, which a neutral nation ought to observe between the belligerent parties, consists of two points: (1) the neutral State must give no assistance where there is no previous stipulation to give it; nor voluntarily 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 assist at the same time two Neutral impartiality, in what it consists.

(*b*) The Times, 25th April, 1873.      lished by the State Department, Jan. 24, 1915 (The Times, Jan. 26, p. 10).  
 (*c*) Communication made by Mr. Bryan, the United States Secretary of State, to the Chairman of the Senate Committee on Foreign Relations, published by the State Department, Jan. 24, 1915 (The Times, Jan. 26, p. 10).  
 (*d*) Art. 4.  
 (*e*) Art. 6.



enemies. 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 munitions, &c., furnished under different circumstances, are no longer equivalent succours." (2) "In whatever does not relate to the war, the neutral State must not refuse to one of the parties, merely because he is at war with the other, what it grants to that other" (f).

Arming and equipping vessels, and enlisting men within the neutral territory, by either belligerent, unlawful.

These principles were appealed to by the American Government, when its neutrality was attempted to be violated on the commencement of the European war, in 1793, by M. Genêt, the French Minister accredited to the United States. As soon as he arrived at Charleston, he commenced to arm and equip vessels, and enlist men within United States territory. Thereupon the British Minister protested to the American Government, which undertook to prevent such proceedings, despite the existence of a treaty made with France, 1778, allowing the latter to fit out vessels and deposit prizes in the ports of the United States. The American authorities stated that if the neutral Power might not, consistently with its neutrality, furnish men to either party for their aid in war, as little could either enrol them in the neutral territory. The authority both of Wolf and Vattel was appealed to in order to show, that the levying of troops is an exclusive prerogative of sovereignty, which no foreign Power can lawfully exercise within the territory of another State, without its express permission. The testimony of these and other writers on the law and usage of nations was sufficient to show, that the United States, in prohibiting all the belligerent Powers from equipping, arming, and manning vessels of war in their ports, had exercised a right and a duty with justice and moderation (g).

Prohibition enforced by American municipal statutes.

The same principles were afterwards incorporated in a law of Congress passed in 1794, and revised and re-enacted in 1818, by which it is declared to be a misdemeanour for any person, within the jurisdiction of the United States, to augment the force of any armed vessel, belonging to one foreign Power at war with another Power, with which they are at peace; or to prepare any military expedition against the territories of any foreign nation with which they are at peace; or to hire or enlist troops or seamen for foreign military or naval service; or to be concerned in fitting out any vessel, to cruise or commit hostilities in foreign service, against

(f) *Droit des Gens*, liv. iii. ch. 7, § 104.

(g) Jefferson, Secretary of State, to the United States Minister to France,

August 16, 1793; American State Papers, vol. i. pp. 47, 116, 148, 150.

Cf. *supra*, p. 344.

a nation at peace with them: and the vessel, in this latter case, is made subject to forfeiture. The President is also authorized to employ force to compel any foreign vessel to depart, which by the law of nations or by treaties ought not to remain within the United States, and to employ generally the public force in enforcing the duties of neutrality prescribed by the law (*h*).

With regard to enlisting, it has been held by the American Courts that it is not an offence under the Act of 1818 to leave the United States with intent to enlist in foreign service, or to transport persons out of the country with their own consent, with an intention of such enlistment. To constitute an offence within the Act, such persons must be hired or retained in America to go abroad with an intention so to enlist (*i*).

The example of America was soon followed by Great Britain, in the Act of Parliament 59 Geo. III. c. 69, entitled, "An Act to prevent the Enlisting or Engagement of His Majesty's Subjects to serve in foreign Service, and the Fitting out or Equipping in His Majesty's Dominions Vessels for warlike purposes, without His Majesty's Licence." The previous statutes, 9 and 29 Geo. II., enacted for the purpose of preventing the formation of Jacobite armies in France and Spain, made it a capital offence to enter the service of a foreign State. The 59 Geo. III. c. 69, commonly called the Foreign Enlistment Act, provided a less severe punishment, and also supplied a defect in the former law, by introducing after the words "king, prince, state, or potentate," the words "colony or district assuming the powers of a government," in order to reach the case of those who entered the service of unacknowledged as well as of acknowledged States. The Act also provided for preventing and punishing the offence of fitting out armed vessels, or supplying them with warlike stores, upon which the former law had been entirely silent.

British  
Foreign  
Enlistment  
Act.

In the debates which took place in Parliament upon the enactment of the last-mentioned Act in 1819, and on the motion for its repeal in 1823, it was not denied by Sir J. Mackintosh and other members who opposed the bill that the sovereign power of every State might interfere to prevent its subjects from engaging in the wars of other States, by which its own peace might be endangered, or its political and commercial interests affected. It was, however, insisted that the principles of neutrality only re-

Debates on  
the Act of  
1819.

(*h*) Rev. Stat. §§ 5281—5291; Kent, Comm. on American Law, vol. i. p. 123 (5th ed.). Cf. *Hoyt v. Gelston*, 3 Wheaton, 246; S. C., 4 Curtis, 228.

(*i*) *U. S. v. Kazinski*, 2 Sprague, 7. Cf. Opinions of Attorneys-General (U. S.), vol. vii. p. 367.



quired the British legislature to maintain the laws in being, but could not command it to change any law, and least of all to alter the existing laws for the evident advantage of one of the belligerent parties. Those who assisted insurgent States, however meritorious the cause in which they were engaged, were in a much worse situation than those who assisted recognised Governments, as they could not lawfully be reclaimed as prisoners of war, and might, as engaged in what was called rebellion, be treated as rebels. The proposed new law would go to alter the relative risks, and operate as a law of favour to one of the belligerent parties. To this argument it was replied by Mr. Canning, that when peace was concluded between Great Britain and Spain, in 1814, an Article was introduced into the treaty by which the former Power stipulated not to furnish any succours to what were then denominated the revolted colonies of Spain. In process of time, as those colonies became more powerful, a question arose of a very difficult nature, to be decided on a due consideration of their *de jure* relation to Spain on the one hand, and their *de facto* independence on the other. The law of nations afforded no precise rule as to the course which, under circumstances so peculiar as the transition of colonies from their allegiance to the parent State, ought to be pursued by foreign Powers. It was difficult to know how far the statute law or the common law was applicable to colonies so situated. It became necessary, therefore, in the Act of 1819, to treat the colonies as actually independent of Spain; and to prohibit mutually, and with respect to both, the aid which had been hitherto prohibited with respect to one only. It was in order to give full and impartial effect to the provisions of the treaty with Spain, which prohibited the exportation of arms and ammunition to the colonies, but did not prohibit their exportation to Spain, that the Act of Parliament declared that the prohibition should be mutual. When, however, from the tide of events flowing from the proceedings of the Congress of Verona, war became probable between France and Spain, it became necessary to review these relations. It was obvious that if war actually broke out, the British Government must either extend to France the prohibition which already existed with respect to Spain, or remove from Spain the prohibition to which she was then subject, provided they meant to place the two countries on an equal footing. So far as the exportation of arms and ammunition was concerned, it was in the power of the Crown to remove any inequality between the belligerent parties, simply by an Order in Council. Such an order was consequently issued, and the prohibition of exporting arms



and ammunition to Spain was removed. By this measure the British Government offered a guaranty of their *bonâ fide* neutrality. The mere appearance of neutrality might have been preserved by the extension of the prohibition to France, instead of the removal of the prohibition from Spain; but it would have been a prohibition of words only, and not at all in fact; for the immediate vicinity of the Belgic ports to France would have rendered the prohibition of direct exportation to France totally nugatory. The repeal of the Act of 1819 would have, not the same, but a corresponding effect to that which would have been produced by an Order in Council prohibiting the exportation of arms and ammunition to France. It would be a repeal in words only as respects France, but in fact respecting Spain; and would occasion an inequality of operation in favour of Spain, inconsistent with an impartial neutrality. The example of the American Government was referred to, as vindicating the justice and policy of preventing the subjects of a neutral country from enlisting in the service of any belligerent Power, and of prohibiting the equipment in its ports of armaments in aid of such Power. Such was the conduct of that Government under the presidency of Washington, and the secretaryship of Jefferson: and such was more recently the conduct of the American legislature in revising their neutrality statutes in 1818, when the Congress extended the provisions of the Act of 1794 to the case of such unacknowledged States as the South American colonies of Spain, which had not been provided for in the original law (*k*).

The controversy relating to the "Alabama claims" having shown the weakness of the Act of 1819, a more stringent Foreign Enlistment Act was passed in 1870. It goes beyond the provisions of the American Neutrality Laws; for it forbids British subjects to enlist or accept a commission without license in the service of any foreign State at war with a friendly State, whether the engagement is made within or without His Majesty's dominions (*l*). The requirements of both the British and the American legislation on the subject are much more comprehensive and restrictive than those laid down by international law.

"A neutral Power which receives in its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war.

Internment of  
belligerents.

(*k*) Annual Register, vol. lxi. p. 71. vol. v. p. 34.  
Canning, Speeches, vol. iv. p. 150; (l) See further *infra*, pp. 674 *seq.*

It may keep them in camps, and even confine them in fortresses or in places set apart for this purpose.

It shall decide whether officers may be left at liberty on giving their parole not to leave the neutral territory without permission" (*m*).

"In the absence of a special Convention, the neutral Power shall supply the interned with the food, clothing, and relief which the dictates of humanity prescribe. At the conclusion of peace, the expenses caused by the internment shall be made good" (*n*).

Under the customary law of nations, and independently of special treaties on the subject, a neutral State was not obliged to admit within its territory bodies of troops belonging to the belligerents. If it accorded them admission it was entitled to disarm and intern them till the end of the war. In order to regulate their maintenance and repayment of expenses incurred, it was usual to draw up a special Convention between the neutral State and the belligerent State to which the admitted troops belonged. A noteworthy instance is that of 1871, when 85,000 French troops—the rest of the ill-fated army of General Bourbaki—escaped into Switzerland from the pursuit of General von Manteuffel. An agreement was then concluded between their commander, General Clinchant (who had succeeded Bourbaki after the latter had shot himself) and the Swiss authorities. The French army thereby undertook to surrender all arms, equipment, artillery-material, munitions of war (except the officers' arms and horses)—which were to be restored to France at the end of the war—and to pay the expenses incurred by Switzerland. In the same war, many French troops crossed over the Belgian frontier; they were likewise disarmed and interned. In this case no engagement was concluded as to reimbursement for the cost of their maintenance.

It is to be observed that a neutral Power remains, under the above Articles, entitled to refuse admission to fugitive combatants. It may refuse or consent to receive them, as it deems fit; but whichever course it adopts in the case of one belligerent, the same course will, through the duty of impartiality, have to be taken in the case of the other belligerent.

To the customary rule requiring the restoration of property brought by the interned, an exception may be made in regard to material liable to deteriorate or too expensive to keep (*e.g.*, a large number of horses). Such property may be sold by the neutral

(*m*) Hague Convention (1907), No. V. Art. 11. Cf. Hague Regula-  
tions (1899), Art. 57.  
(*n*) Art. 12.

Government, and the proceeds should then be deducted from the cost of internment (o).

Where it appears clearly that troops crossed over by mistake into neutral territory, they ought to be permitted to leave at once, after having made good any damage done.

“ A neutral Power that receives escaped prisoners of war shall leave them at liberty. If it allows them to remain in its territory it may assign them a place of residence. Prisoners of war.”

The same rule applies to prisoners of war brought by troops taking refuge in the territory of a neutral Power ” (p).

The German Manual lays down that prisoners who escape to a neutral country must be interned there (q); but the new regulation of the Hague (1907) overrides this provision, which is scarcely consistent with usage or principle. During the Franco-German war escaped French officers and soldiers were allowed by Luxemburg to pass freely through its territory. Bismarck protested; but the non-interference of Luxemburg was not a contravention of the law of neutrality. As to prisoners of war brought by fugitive troops, there was formerly a difference of opinion; some held that they should be interned, others that they should be liberated. The provision made in Article 13 is unimpeachable on the ground of fairness and justice. In 1871 the Swiss Government set free the Prussian prisoners who were in the hands of General Clinchant's fugitive army, and also sent back to France an equal number of interned French troops.

“ A neutral Power may authorize the passage into its territory of the sick and wounded belonging to the belligerent armies, on condition that the trains and other means of transport by which they are conveyed shall carry neither personnel nor war material. In such a case the neutral Power is bound to take whatever measures of safety and control are necessary for the purpose. Sick and wounded.”

The sick or wounded of one belligerent brought under these conditions into neutral territory by the other belligerent must be so guarded by the neutral Power as to ensure their taking no further part in the military operations. The same duty shall devolve on the neutral Power with regard to the sick and wounded of the other army who may be committed to its care ” (r).

“ The Geneva Convention applies to sick and wounded interned in neutral territory ” (s).

(o) Such a rule is expressly laid down in the German Manual, *Kriegsbrauch im Landkriege*, p. 70.  
(p) Art. 13.

(q) *Kriegsbrauch*, p. 69.  
(r) Art. 14.  
(s) Art. 15.



With regard to the passage of the sick and wounded through neutral territory, there was no definite rule before the provision of the Hague Conference was made. During the Franco-German war, German evacuations were allowed to pass through Switzerland, but not through Belgium. The permission of the latter was refused, owing to the protest of France; the French authorities urged that to allow trains to proceed through Belgium and Luxembourg to Germany would free lines and enable the enemy to bring up forces and war material (*t*). It is to be noted that under the present rules sick and wounded prisoners brought by fugitive troops into neutral territory are to be liberated, whilst those brought by a convoy of evacuation are to be interned. This difference of treatment is based on the ground that in the former case the fugitive troops might, but for the asylum sought, be captured by the adversary and their prisoners therefore taken away from them, whilst in the latter case the sick and wounded were brought voluntarily by their own side.

**Neutral  
persons.**

“The nationals of a State which is not taking part in the war are considered to be neutrals” (*u*).

“Neutral subjects taking part in hostilities on behalf of one belligerent are liable to be treated by the other belligerent in every respect as if they were enemy subjects, and their own Government has no right to object to their being so treated. Neutral subjects resident in the territory of a belligerent are, equally with the other inhabitants of the country, liable to suffer in person and property through the events of the war; and their Governments acquire thereby no right to claim compensation on their behalf. Such compensation, if not awarded by the special provisions of a treaty, is given only as a matter of grace and favour. They are, for instance, liable to be removed from their homes or even to be banished from the country, on suspicion of misconduct towards an occupying army, or for reasons of strategic convenience” (*x*). Proposals put forward at the Hague to secure protection for neutral inhabitants of an invaded country were rejected, because of the great difficulties that would be involved in the attempt to draw a clear line of demarcation between them and the enemy subjects. From the point of view of practice, the essential criterion—with regard to treatment—is not personality, but locality. If neutral subjects choose to remain in the belligerent territory, they thus

(*t*) Cf. *Kriegsbrauch im Landkriege*,  
p. 73.  
(*u*) Art. 16.

(*x*) Holland, *The Laws of War on  
Land*, § 136.

identify themselves, in the eyes of the invader, with the nationals of the enemy, and so are equally liable to suffer the misfortunes of war.

During the Spanish-American war, when the bombardment of San Juan (Porto Rico) by the United States forces had become imminent, the neutral consuls in the city proposed to set apart a neutral zone for the use of the foreign residents. Hostilities ceasing, however, before the American forces reached San Juan, the proposal was not carried out. But the law of nations does not empower neutral consuls to neutralize a part of the theatre of war, without the consent of both belligerents.

In the Anglo-Boer war (1900) many neutral inhabitants who suffered through the British invasion, *e.g.*, by being compelled to leave South Africa on account of the military exigencies of the invaders, received compensation; but the British Government offered it as an act of grace only, and not through legal obligation (*y*).

“A neutral cannot claim the benefit of his neutrality: (a) if he commits hostile acts against a belligerent; (b) if he commits acts in favour of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties.

Acts of  
neutral  
persons.

In such cases the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act” (*a*).

“The following acts shall not be considered as acts committed in favour of one belligerent within the meaning of Article 17 (*b*): (a) the furnishing of supplies or the making of loans to one of the belligerents, provided that the person so doing lives neither in the territory of the other party nor in the territory occupied by him, and that the supplies do not come from these territories; (b) services rendered in matters of police or civil administration” (*b*).

It was made clear in the Report of the Hague Committee that Article 17 (*a*) does not preclude newspapers or other journals from making commentaries on the war, even though they are unfavourable to one of the belligerents; and, conversely, that Article 17 (*b*) does not debar newspapers or individuals from expressing their sympathy with one of the contending parties.

Further, the Report thus illustrates the application of Articles 17 (*b*) and 18 (*a*): “In case of a war between State A. and

(*y*) British and Foreign State Papers, vol. xciv. p. 645; Cobbett, Cases, vol. ii. pp. 264 *seq.*

(*a*) Art. 17.  
(*b*) Art. 18.

State B., if a neutral residing in A., or the territory occupied by A., were to furnish supplies to B., or subscribe to a loan issued by B., he would by so doing commit an act in favour of B., falling under the terms of Article 17 (b), and he would lose, in A.'s eyes, his quality of a neutral as a result of the sale or loan. It would be the same if the neutral, without being resident in A., or in the territory occupied by A., were to deliver to B. supplies coming from A., or from the territory occupied by A."

In the Franco-German war, the neutral diplomatic agents resident in Paris during the siege protested against the German interference with their despatches destined for neutral countries, and urged that it constituted a breach of the right of legation. Bismarck replied that if the despatches were not subjected to censorship, important information of a military character might pass out of the besieged city to the detriment of Prussia; and the rights of neutral diplomatic agents who chose to remain in Paris could not be allowed to prevail over the supreme interests of a belligerent. The German Manual lays down that neutral States are entitled to continue without hindrance their diplomatic relations with belligerents on condition that considerations of military necessity do not raise temporary obstacles to their doing so (d). This rule is not inconsistent with war law; but the difficulty here, as everywhere else, is to determine fairly and reasonably the significance of 'military necessity.'

The above Articles 16, 17, 18, were adopted by the Hague Conference from among twelve Articles proposed by Germany; but the German policy was opposed by Great Britain, France, Russia, Japan, and Holland. Even these three Articles were not ratified by Great Britain. Objection was offered by these States to the German project, on the ground that it sought to make the principle of nationality, instead of that of domicile, the criterion of status within belligerent territory, and that it accorded too great immunity to neutrals. By way of compensating to some extent for the rejected Articles, the Conference (1907) adopted the following 'Voeux'—resolutions embodying pious aspirations:—

"That in case of war the competent authorities, civil and military, should make it their special duty to ensure and safeguard the maintenance of pacific relations, more particularly of a commercial and industrial nature, between the inhabitants of the belligerent States and neutral countries.

That the Powers should regulate by special Conventions the



position, as regards military obligations, of foreigners residing within their territory.”

“ Railway material coming from the territory of neutral Powers, whether belonging to those Powers, or to companies or private persons, and recognisable as such, shall not be requisitioned or utilized by a belligerent except when and to the extent that it is absolutely necessary. It shall be sent back as soon as possible to the country of its origin. Neutral property—  
railway material.

A neutral Power may likewise, in case of necessity, retain and utilize to a corresponding extent railway material coming from the territory of the belligerent Power.

Compensation shall be paid by one party or the other in proportion to the material used and to the period of usage” (*d*).

This Article, relating to the so-called right of angary (to which we have already referred in regard to the immediate effects of the outbreak of war) (*e*), deals only with the use by a belligerent of neutral railway material. As a supplement to this written provision, the following customary rule of international law may be given: “ Property of neutrals of other kinds found in territory which is the scene of hostilities, even though not placed by them at the disposal of the enemy, is liable to be taken possession of, or even destroyed, for strategic reasons by either belligerent; but compensation must in this case be made by the belligerent so acting to the neutral owners for the loss they have sustained” (*f*).

Two notable examples of the exercise of this right of angary occurred in the Franco-German war. One of these—viz., the seizure and sinking by the Germans of six British colliers in the Seine—has already been mentioned (*g*). The other case was the seizure by the Germans of a large quantity of rolling stock belonging to the Swiss Central Railway. This was used for some time, on the same ground of military necessity. Again, the right of angary was exemplified in a striking manner in the Great War, 1914. Four warships lying in course of construction in British dockyards, and destined for Chile and Turkey (which was at the time neutral), were taken over by the British Government, who promised to pay full compensation.

The principles of the customary law of neutrality in maritime NEUTRALITY  
IN MARITIME  
WARFARE.

(*d*) Art. 19.

(*e*) See *supra*, p. 409.

(*f*) Holland, *The Laws of War on Land*, § 140.

(*g*) See *supra*, p. 409.

warfare have been consolidated and in some respects enlarged by the thirteenth Convention of the Hague Conference (1907). The preamble states that it is desirable that neutral Powers should lay down specific enactments regulating the consequences of the status of neutrality, that the provisions thus adopted are to be marked by strict impartiality, and that in cases where the present Convention is silent the general principles of international law apply.

Fundamental principles.

“ Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality ” (h).

In case of violation of neutral territory or neutral waters by a belligerent the neutral Government is entitled to seek reparation. There is no specific provision to this effect in the Convention, but the right obviously exists by implication. Moreover, it is the neutral's duty to obtain reparation, if the violation was detrimental to the other belligerent; for acquiescence or indifference might be construed as connivance, and therefore as an offence to the injured belligerent.

“ Any act of hostility, including capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden ” (i).

“ When a ship has been captured in the territorial waters of a neutral Power, such Power must, if the prize is still within its jurisdiction, employ the means at its disposal to release the prize with its officers and crew, and to intern the prize crew. If the prize is not within the jurisdiction of the neutral Power, the captor Government must, on the demand of the neutral Power, liberate the prize with its officers and crew ” (k).

Captures within the maritime territorial jurisdiction, or by vessels stationed within it, or hovering on the coasts.

Not only are all captures made by the belligerent cruisers within the limits of the maritime territorial jurisdiction absolutely illegal and void, but captures made by armed vessels stationed in a bay or river, or in the mouth of a river, or in the harbour of a neutral State, for the purpose of exercising the rights of war from this station, are also invalid. Thus, where a British privateer stationed itself within the river Mississippi, in the neutral territory of the United States, for the purpose of exercising the rights of war from the river, by standing off and on, obtaining information at the Balize, and overhauling vessels in

(h) Hague Convention (1907), No. XIII. Art. 1. Cf. the fifth Convention (1907), relating to land warfare, Art. 1, *supra*, p. 640.  
 (i) Art. 2.  
 (k) Art. 3.



the course down the river, and made the capture in question within three English miles of the alluvial islands formed at its mouth, restitution of the captured vessel was decreed by Sir W. Scott (*l*). So, also, where a belligerent ship, lying within neutral territory, made a capture with her boats out of the neutral territory, the capture was held to be invalid; for though the hostile force employed was applied to the captured vessel lying out of the territory, yet no such use of a neutral territory for the purposes of war is to be permitted. This prohibition is not to be extended to *remote* uses, such as procuring provisions and refreshments, which the law of nations universally tolerates; but no *proximate* acts of war are in any manner to be allowed to originate on neutral ground (*m*).

In 1863, during the Civil War, the United States merchant-ship *Chesapeake*, while on a voyage from New York to Portland, was seized upon by a number of her passengers, who killed and wounded some of the crew, and put the rest on shore. They ran the vessel to several small ports in Nova Scotia, representing her as the Confederate war-steamer *Retribution*, and finally abandoned her off Sambro, a port of Nova Scotia. The *Chesapeake* was there found and captured by a United States ship-of-war, and taken to Halifax. There were then on board two British subjects who had been employed by the passengers as engineers; and Wade, one of the ringleaders, was discovered on board a small schooner lying near where the *Chesapeake* had been abandoned. The three men were made prisoners, and conveyed to Halifax. In the discussion resulting from this case, the United States disclaimed any intention of exercising jurisdiction in the waters of Nova Scotia, and explained that their naval authorities had acted "under the influence of a patriotic and commendable zeal to bring to punishment outlaws who had offended against the peace and dignity of both countries" (*n*). It was admitted that these acts were, in strictness of law, "a violation of the law of nations, and of the friendly relations existing between the two countries." This was deemed a satisfactory explanation by Her Majesty's Government. England was entitled to look upon this capture as, *primâ facie*, a belligerent act. The Civil War was flagrant at the time, and the *Chesapeake* had been originally seized by persons representing themselves as acting on behalf of the Confederates. As a matter of fact, they failed to produce any valid belligerent commission; but this did not give the United States any right to capture the

Case of *The Chesapeake*.

(*l*) *The Anna* (1805), 5 C. Rob. 373.

(*n*) Mr. Seward to Lord Lyons, 9th

(*m*) *The Twee Gebroeders* (1800), Jan. 1864.

3 C. Rob. 162.



ship in British waters. Beyond seizing the vessel, the passengers had committed no piratical acts. They were thus entitled to prove themselves belligerents if they could, and their failure to do this laid them open to the charge of piracy. The United States demanded the extradition of the persons captured with the vessel, but the British Government insisted on their being first released and set upon British soil, and they managed to escape before they could be re-arrested. The ship itself was restored to the owners. Some of the parties concerned afterwards appeared in Canada, and were apprehended, but the Court decided that they could not be extradited (o).

Capture of  
the *Florida*.

In 1864, a flagrant violation of neutral jurisdiction was committed by a United States ship-of-war. The *Florida*, the well-known Confederate cruiser, entered the port of Bahia, in Brazil, to obtain provisions and coals, and to effect some necessary repairs; and while there the *Wachusett*, a Federal man-of-war, also entered the port. The Brazilian authorities took all necessary measures to prevent a conflict, and assigned a berth in the harbour to each ship. During the night, and while a large part of the *Florida's* crew were on shore, the *Wachusett* steamed across the harbour, fastened a cable to the *Florida*, towed her out to sea, and escaped from the pursuit of the local forces. The Brazilian Government demanded an explanation and reparation. Mr. Seward admitted "that the President would disavow and regret the proceedings at Bahia," but he persisted in maintaining that the *Florida* was a pirate, and "that the harbouring and supplying piratical ships and their crews in Brazilian ports were wrongs and injuries for which Brazil justly owes reparation to the United States." The captured crew of the *Florida* were, however, set at liberty, and the vessel herself sank in Hampton Roads by "an unforeseen accident which cast no responsibility upon the United States" (p). The absurdity of calling the *Florida* a pirate at that period of the war is manifest; but had she been the most atrocious of pirates, her capture under such circumstances would have been wholly unjustifiable.

The *Ryeshitelni*.  
Hostilities  
in neutral  
territory.

In 1904, during the Russo-Japanese war, a Russian torpedo-boat, the *Ryeshitelni*, escaped from Port Arthur (then besieged by Japan) and took refuge in the Chinese port of Chefoo. Two Japanese destroyers went in pursuit, waited outside the harbour for a few hours, and then entered it. The Japanese officers alleged

(o) See Parl. Papers, 1876, N. America (No. 10). Wheaton, ed. Dana, note 207. (p) Parl. Papers, 1873, N. America (No. 2), pp. 176—178.

that the vessel had been allowed to take there a supply of coal, and that no measures had been adopted to dismantle her. The Russian and the Chinese officers, on the contrary, maintained that steps had been taken for interning her. However this may be, a Japanese party boarded the Russian vessel and called upon her commander either to surrender or put to sea within an hour. Both alternatives were refused, whereupon an unsuccessful attempt was made to blow her up, a struggle followed, then she was seized by the Japanese and carried off. Protests were made by both Russia and China. In reply, the Japanese Government contended that as the war was waged in or near Chinese territory, such territory became conditionally neutral; but as Russia did not respect its neutrality, she made it for the time being belligerent territory. Moreover, Japan held that Russia had violated Chinese neutrality on several occasions; and that the *Ryeshitelni* had remained fully armed and manned to the end, and had been the first to commence hostilities in the harbour. Thus, the case was different from that of the *Florida*, because the neutrality of Brazil was unconditional, and the port of Bahia was far from the theatre of war. Notwithstanding these contentions, it appears that the Russians were not the aggressors in the port of Chefoo; nor was Chinese territory conditionally neutral; so that the Japanese action was a violation of neutrality. Even if China had permitted the acts alleged, and had not proceeded to dismantle the *Ryeshitelni*, the Japanese commander ought first to have called upon the Chinese authorities to disarm her and adopt measures for internment. If the latter had failed to take steps after a reasonable interval, the Japanese would have been entitled to seize her. A further point arises from this case: Is a belligerent vessel entitled to fight in neutral waters, if she is attacked there by the enemy? When the attack becomes imminent, the former should first appeal to the neutral Government for protection; then if effective protection is not granted, measures of self-defence are legitimate and do not *per se* constitute a violation of neutrality (q).

The latter point, together with the question of a neutral's responsibility for hostilities committed within its territory, came up in the case of the *General Armstrong*. In 1814, during the war between Great Britain and the United States, an American privateer, the *General Armstrong*, attacked British vessels that

*The General  
Armstrong.  
A neutral's  
responsibility.*

(q) On the case of *The Ryeshitelni*, see Takahashi, pp. 437 *seq.*; Smith and Sibley, *op. cit.* pp. 116 *seq.*; Lawrence, War and Neutrality, pp. 291 *seq.*; Hershey, Russo-Japanese War, pp. 260 *seq.*; Cobbett, Cases, vol. ii. pp. 295 *seq.*



had just entered the port of Fayal, in Portuguese territory, but was fired at in return and destroyed within the limits of the port. The United States Government thereupon demanded indemnity from Portugal, on the ground that she was responsible for the loss of the vessel, as she had not interfered to prevent the British action and protect her neutrality. In 1851 the dispute was submitted to Louis Napoleon, then President of the French Republic. In his award the following year he declared that a neutral Power is bound to make good a belligerent's loss incurred within the neutral jurisdiction through the action of the enemy, if the neutral takes no steps to prevent it. But in the present case Portugal was absolved from liability, inasmuch as the *General Armstrong* did not appeal for protection at the time, and replied to the attack. The United States, however, was not satisfied with the award, because she did not consider the alleged facts on which it was based to have been clearly proved. "The principle of the decision must certainly be confined to cases where the vessel attacked has reason to believe that effectual protection can be reasonably effected by the neutral, and makes a fair choice to take the chances of the combat rather than to appeal to neutral protection" (r).

Vessels  
chased into  
the neutral  
territory,  
and there  
captured.

Although the immunity of the neutral territory from the exercise of any act of hostility is generally admitted, yet an exception to it has been attempted to be raised in the case of a hostile vessel met on the high seas and pursued; which it is said may, in the pursuit, be chased within the limits of a neutral territory. The only text-writer of authority who has maintained this anomalous principle is Bynkershoek (s). He admits that he had never seen it mentioned in the writings of the public jurists, or among any of the European nations, the Dutch only excepted; thus leaving the inference open, that even if reasonable in itself, such a practice never rested upon authority, nor was sanctioned by general usage. The extreme caution, too, with which he guards this license to belligerents, can hardly be reconciled with the practical exercise of it; for how is an enemy to be pursued in a hostile manner within the jurisdiction of a friendly Power, without imminent danger of injuring the subjects and property of the latter? 'Dum fervet opus'—in the heat and animation excited against the flying foe, there is too much reason to presume that little regard will be

(r) Moore, Digest, vol. ii. § 210. Cf. Calvo, Droit International, vol. iv. § 2662.

(s) Quæst. Jur. Pub. lib. i. cap. 8. This opinion of Bynkershoek, in which Casaregis seems to concur, is repro-

bated by several other public jurists; Azuni, Diritto Marittimo, Pt. I. c. 4, Art. 1. Valin, Traité des Prises, ch. 4, § 3, No. 4, Art. 1. D'Habreu, Sobre las Prisas, Pt. I. ch. 4, § 15.



paid to the consequences that may ensue to the neutral. There is, then, no exception to the rule, that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful. "When the fact is established," says Sir W. Scott, "it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding that it may actually belong to the enemy" (t).

Though it is the duty of the captor's country to make restitution of the property thus captured within the territorial jurisdiction of the neutral State, yet it is a rule of the Prize Courts to restore to the individual claimant, in such a case, only on the application of the neutral Government whose territory has been thus violated. This rule is founded upon the principle, that the neutral State alone has been injured by the capture, and that the hostile claimant has no right to appear for the purpose of suggesting the invalidity of the capture (u).

Claim on the ground of violation of neutral territory must be sanctioned by the neutral State.

The Supreme Court of the United States has more recently determined that neither an enemy nor a neutral acting the part of an enemy can demand restitution on the sole ground of capture in neutral waters. This fact alone will not prevent condemnation if done without intent to violate neutral jurisdiction (x). Lord Stowell also said long ago, "It is a known principle of this Court that the privilege of territory will not itself enure to the protection of property, unless the State from which that protection is due steps forward to assert the right" (y).

Where a capture of enemy's property is made within neutral territory, or by armaments unlawfully fitted out within the same, it is the right as well as the duty of the neutral State, where the property thus taken comes into its possession, to restore it to the original owners. This restitution is generally made through the agency of the courts of admiralty and maritime jurisdiction. Traces of the exercise of such a jurisdiction are found at a very early period in the writings of Sir Leoline Jenkins, who was Judge of the English High Court of Admiralty in the reigns of Charles II. and James II. In a letter to the king in council, dated October 11, 1675, relating to a French privateer seized at Harwich with her prize (a Hamburg vessel bound to London), Sir Leoline states several questions arising in the case, among which was

Restitution by the neutral State of property captured within its jurisdiction, or otherwise in violation of its neutrality. Captures within the 'King's Chambers.'

(t) *The Vrow Anna Catharina* (1803), 5 C. Rob. 15.

(u) Case of *The Etrusco* (1795), 3 C. Rob. note; *The Anne*, 3 Wheaton, 447.

(x) *The Adela* (1867), 6 Wallace, 266.

(y) *The Purissima Concepcion* (1805), 6 C. Rob. 45. See also *The Sir William Peel* (1866), 5 Wallace, 517.

“Whether this Hamburger, being taken within one of your Majesty’s chambers (z), and being bound for one of your ports, ought not to be set free by your Majesty’s authority, notwithstanding he were, if taken upon the high seas out of those chambers, a lawful prize. I do humbly conceive he ought to be set free, upon a full and clear proof that he was within one of the king’s chambers at the time of the seizure, which he, in his first memorial, sets forth to have been eight leagues at sea, over against Harwich. King James (of blessed memory) his direction, by proclamation, March 2nd, 1604, being that all officers and subjects, by sea and land, shall rescue and succour all merchants and others, as shall fall within the danger of such as shall await the coasts, in so near places to the hinderance of trade outward and homeward; and all foreign ships, when they are within the king’s chambers, being understood to be within the places intended in those directions, must be in safety and indemnity, or else when they are surprised must be restored to it, otherwise they have not the protection worthy of your Majesty, and of the ancient reputation of those places. But this being a point not lately settled by any determination, (that I know of, in case where the king’s chambers precisely, and under that name, came in question,) is of that importance as to deserve your Majesty’s declaration and assertion of that right of the crown by an act of State in Council, your Majesty’s coasts being now so much infested with foreign men-of-war, that there will be frequent use of such a decision” (a).

Whatever doubts there may be as to the extent of the territorial jurisdiction thus asserted, as entitled to the neutral immunity, there can be none as to the sense entertained by this eminent civilian respecting the right and the duty of the neutral sovereign to make restitution where his territory is violated.

Extent of the neutral jurisdiction along the coasts and within the bays and rivers.

When the maritime war commenced in Europe, in 1793, the American Government, which had determined to remain neutral, found it necessary to define the extent of the line of territorial protection claimed by the United States on their coasts, for the purpose of giving effect to their neutral rights and duties. It was stated on this occasion, that Governments and writers on public law had been much divided in opinion as to the distance from the sea-coast within which a neutral nation might reasonably claim a right to prohibit the exercise of hostilities. The character of the coast of the United States, remarkable in considerable parts of it

(z) “King’s Chambers” referred to parts of the sea contained within lines drawn between promontories along the

coast.

(a) *Life and Works of Sir L. Jenkins*, vol. ii. p. 727.



for admitting no vessel of size to pass near the shore, it was thought would entitle them in reason to as broad a margin of protected navigation as any nation whatever. The Government, however, did not propose, at that time, and without amicable communications with the foreign Powers interested in that navigation, to fix on the distance to which they might ultimately insist on the right of protection. President Washington gave instructions to the executive officers to consider it as restrained, for the present, to the distance of one sea league, or three geographical miles, from the sea-shores. This distance, it was supposed, could admit of no opposition, being recognised by treaties between the United States and some of the Powers with which they were connected in commercial intercourse, and not being more extensive than was claimed by any of them on their own coasts. As to the bays and rivers, they had always been considered as portions of the territory, both under the laws of the former colonial Government and of the present union, and their immunity from belligerent operations was sanctioned by the general law and usage of nations. The 25th Article of the treaty of 1794, between Great Britain and the United States, stipulated that "neither of the said parties shall permit the ships or goods belonging to the citizens or subjects of the other to be taken within cannon-shot of the coast, nor in any of the bays, ports, or rivers, of their territories, by ships of war, or others, having commissions from any prince, republic, or State whatever. But in case it should so happen, the party whose territorial rights shall thus have been violated, shall use his utmost endeavours to obtain from the offending party full and ample satisfaction for the vessel or vessels so taken, whether the same be vessels of war or merchant vessels." Previously to this treaty with Great Britain, the United States were bound by treaties with three of the belligerent nations (France, Prussia, and Holland) to protect and defend, "by all the means in their power," the vessels and effects of those nations in their ports or waters, or on the seas near their shores, and to recover and restore the same to the right owner when taken from them. But they were not bound to make compensation if all the means in their power were used, and failed in their effect. Though they had, when the war commenced, no similar treaty with Great Britain, it was the President's opinion that they should apply to that nation the same rule which, under this Article, was to govern the others above mentioned; and even extend it to captures made on the high seas, and brought into the American ports, if made by vessels which had been armed within them. In the constitutional arrangement of the different autho-



rities of the American Federal Union, doubts were at first entertained whether it belonged to the executive Government, or the judiciary department, to perform the duty of inquiring into captures made within the neutral territory, or by armed vessels originally equipped or the force of which had been augmented within the same, and of making restitution to the injured party. But it has been long since settled that this duty appropriately belongs to the federal tribunals acting as courts of admiralty and maritime jurisdiction (*b*).

Limitations of the neutral jurisdiction to restore in cases of illegal capture.

It has been judicially determined that this peculiar jurisdiction to inquire into the validity of captures made in violation of the neutral immunity will be exercised only for the purpose of restoring the specific property, when voluntarily brought within the territory, and does not extend to the infliction of vindictive damages, as in ordinary cases of maritime injuries. And it seems to be doubtful whether this jurisdiction will be exercised where the property has been once carried *infra præsidia* of the captor's country, and there regularly condemned in a competent Court of Prize. However this may be in cases where the property has come into the hands of a *bonâ fide* purchaser, without notice of the unlawfulness of the capture, it has been determined that the neutral court of admiralty will restore it to the original owner, where it is found in the hands of the captor himself, claiming under the sentence of condemnation. But the illegal equipment will not affect the validity of a capture, made after the cruise to which the outfit had been applied is actually terminated (*c*).

Prize Courts in neutral territory.

“A Prize Court may not be established by a belligerent on neutral territory or on a vessel in neutral waters” (*d*).

In 1799, during the war between Great Britain and France, a British vessel, the *Flad Oyen*, was seized by a French privateer, and taken into the port of Bergen, in Norway, where a French Consular Court purported to condemn her. She was then sold to a neutral purchaser, but was afterwards recaptured by the British. The original owner thereupon claimed restitution, on the ground that the transfer was invalid because the vessel had not been con-

(*b*) Mr. Jefferson's Letter to M. Genêt, Nov. 8, 1793; Waite, State Papers, vol. vi. p. 195. Opinion of the Attorney-General on the capture of the British ship *Grange*, May 14, 1793; *ibid.* vol. i. p. 75. Mr. Jefferson's Letter to Mr. Hammond, Sept. 5, 1793; *ibid.* vol. i. p. 165. Wheaton's Reports, vol. iv. p. 65, note (*a*).

(*c*) *The Amistad de Rues* (1820), 5 Wheaton, 335; *La Nereyda* (1823), 8 Wheaton, 108; *The Fanny* (1824), 9 Wheaton, 658; *The Arrogante Barcelones* (1822), 7 Wheaton, 519; *The Santissima Trinidad* (1822), 7 Wheaton, 283.

(*d*) Hague Convention (1907), No. XIII. Art. 4.

demned by a competent Prize Court. An order was made for restitution, subject to the payment of salvage to the recaptors. In the course of judgment, Sir W. Scott observed that the establishment of a Prize Tribunal in a neutral country was not only contrary to the usage of nations, but it was also inconsistent with general principles—for prize proceedings being always *in rem*, it was necessarily presumed that the body and substance of the thing in question was in the country of the belligerent captor (*e*).

The claim of France to set up Courts of Prize in the United States was discussed in *The Betsey* (*f*), a vessel captured by a French privateer and sent into Baltimore for adjudication. The Supreme Court held that no foreign Power could rightfully erect any Court of Judicature within the United States unless by force of a treaty, and that no foreign consul could adjudicate upon a prize (*g*). But now, by virtue of Article 4 of the Hague Convention, the prohibition to set up Prize Courts in neutral territory is absolute, and cannot be modified by treaty.

A sentence of condemnation will not be invalidated merely by the fact that it was pronounced in the courts of a co-belligerent or an ally (*h*).

Further, according to Anglo-American practice, a sentence of condemnation passed by the courts of the belligerent captor was considered valid, even though the prize was in a neutral port at the time judgment was pronounced (*i*). And the legitimacy of this practice is endorsed by the Hague Convention (*k*).

“Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries; and in particular they may not erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea” (*l*).

Neutral territory as base of operations.

It is obvious that this Article does not apply to such acts as—according to the other rules of neutrality—are infringements of law even when they are committed once. Certain acts are speci-

(*e*) *The Flad Oyen* (1799), 1 C. Rob. 135.

(*f*) (1794), 1 Curtis, 74; S. C., 3 Dallas, 6.

(*g*) We have already referred to the case of the French minister Genêt who attempted to establish Consular Prize Courts in the United States, *supra*, pp. 344, 644.

(*h*) Cf. *Oddy v. Bovill* (1802), 2 East, 473; *The Christopher* (1799), 2 C. Rob. 210.

(*i*) Cf. the British cases, *The Henrick and Maria*, 4 C. Rob. 43; *The Polka*, Spinks, 57; and the American cases, *Hudson v. Guestier* (1810), 4 Cranch, 293; *The Invincible* (1814), 2 Gall. 39.

(*k*) No. XIII. (1907), Art. 23, *infra*, p. 695.

(*l*) *Ibid.* Art. 5. Cf. the corresponding provision for land warfare, Hague Convention (1907), No. V. Art. 3.

fically prohibited; so that no question can arise with regard to them. There are various other acts which, committed, say, once or twice, may be comparatively harmless; but if repeated frequently by one belligerent may well be to the detriment of the other belligerent. The minimum number of repetitions constituting the offence cannot, of course, be determined. The essential criterion is continued use—that is, the continued use of a place makes it a base. “It is suggested that the words [base of operations] should be used to cover cases where acts, which neutrals need not prohibit when done to a slight extent or for a short time, have taken place on such a scale or for so long a time as to turn them into occurrences highly beneficial to the belligerent in pursuit of his warlike ends. For instance, a brief visit to a neutral port is quite allowable, but a lengthy stay for purposes of rest and refitment should be forbidden; or a prize may be taken in and kept for a short period, but if the port is filled with prizes and they are left in safety there for an indefinite time, it should be regarded as a base of operations” (*m*).

Supply  
of war  
material, &c.

“The supply, in any manner, directly or indirectly, of warships, supplies, or war material of any kind whatever, by a neutral Power to a belligerent Power, is forbidden” (*n*).

“A neutral Power is not bound to prevent the export or transit, on behalf of either belligerent, of arms, munitions of war, or, in general, of anything that could be of any use to an army or fleet” (*o*).

The prohibition of Article 6 is unconditional. Formerly, and almost to the end of the eighteenth century, both opinion and practice allowed a neutral State to furnish troops or ships to one of the belligerents, in fulfilment of treaty obligations, without affecting its neutrality. Thus, in 1788, during the war between Russia and Sweden, Denmark sent naval and military forces to Russia in pursuance of a previously concluded treaty, announced that she was still at peace with Sweden, and that the latter had no cause for complaint as the aid furnished to Russia did not exceed what had been agreed upon. Sweden, however, protesting and other Powers threatening to intervene, Denmark withdrew her forces and undertook, with the consent of Russia, to do nothing further in the conflict (*p*).

(*m*) Lawrence, *Principles of International Law* (1913), p. 619.

(*n*) Art. 6.

(*o*) Art. 7. This is an exact repetition of Art. 7 of the fifth Conven-

tion (1907).

(*p*) De Martens, *Causes Célèbres*, vol. iii. p. 478; *Annual Register* (1788), p. 292; Cobbett, *Cases*, vol. ii. p. 302.



In 1825, during the war between Spain and Mexico, Sweden offered to sell the former six warships, but the offer was refused. Three of the ships were then sold *bonâ fide* to local purchasers, who resold them to an English firm. Before the vessels were despatched, it was found that they had been bought for Mexico, whereupon Spain protested; and eventually the contract was rescinded (*q*).

During the American Civil War, Great Britain stopped the sale of her surplus warships, lest they might be bought, indirectly, by one of the belligerents (*r*).

In 1870, the United States Ordnance Department continued to sell arms and munitions of war to agents of the French Government after the war with Prussia had begun. The American Government sought to defend the action on the ground that it was the result of a national policy adopted before the war; but it is generally agreed that such a defence is untenable. The determining factor is the existence of hostilities, not a neutral State's previously adopted policy (*s*).

During the Russo-Japanese war, the Argentine Government withdrew its offer to sell warships to a certain agent, on discovering that he, acting ostensibly for Turkey, was in reality acting for one of the belligerents (*t*).

When arms, munitions of war, &c., are sold to a belligerent by private firms, their Government is not obliged to interfere with the sale. Thus, in the Russo-Japanese war, German manufacturers exported large quantities of arms and ammunition to the belligerents; and similarly in the recent Balkan wars. The question arose again in the Great War of 1914. Protests were made in certain quarters against American exports of war munitions to belligerents. In answer thereto, Mr. Bryan, the United States Secretary of State, made the following statement in January, 1915, to the Chairman of the Senate Committee on Foreign Relations: "There is no power in the Executive to prevent the sale of ammunition to belligerents. The duty of a neutral to restrict trade in munitions of war has never been imposed by international law or by municipal statute. It has never been the policy of this Government to prevent the shipment of arms or ammunition into belligerent territory, except in the case of neighbouring American Republics, and then only when civil strife prevailed." He added

(*q*) De Martens, *op. cit.* vol. v. p. 229; Cobbett, p. 303.

(*r*) Parl. Papers (1873), North America, No. 2, p. 104.

(*s*) Cf. Wharton, Digest, vol. iii. pp. 512 *seq.*; Moore, Digest, vol. vii. § 1309.

(*t*) Takahashi, p. 486.

that the Department of State did its utmost to secure equal treatment, in this respect, to all the belligerents (*u*).

Fitting out  
or arming  
vessels in  
neutral  
territory.

“ A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which has been adapted entirely or partly within the said jurisdiction for use in war ” (*x*).

This Article involves most important questions of neutrality, which bristle with difficulties; and the terms of the Article leave some of these difficulties unsolved. Thus, the expressions “ fitting out ” and “ arming ” are not defined. Does “ fitting out ” apply to partial equipment as well as to ordinarily full equipment? If so, when may partial equipment be said to exist, in contradistinction to non-equipment? Does “ arming ” refer to such a complete armament as puts the vessel in a position to engage in hostilities at once, or does it apply also to the placing of a few weapons on board? Again, the Article says “ *intended to cruise,* ” &c. How is the intent to be definitely determined? The Article, too, requires every Government to use the “ means at its disposal ” to prevent the arming, &c.; but the words “ means at its disposal ” are no clearer than that ominous expression “ so far as military exigencies permit ” (which we have so often seen in provisions relating to land warfare). It will be observed presently that this Article is practically a reproduction of the first rule of the Treaty of Washington (1871). In order to show the bearings of the Article on the international law of neutrality and on the legislative measures enacted by States for ensuring their neutral character, it is necessary to consider the subject at some length.

Neutrality  
Laws of the  
United States.

America has the credit of being the first country that by positive legislation sought to restrain its subjects within the strict limits of neutrality. It has been already shown (*y*) that, in 1793, France demanded from the United States certain exclusive privileges under the treaties of 1778, with respect to her privateers and ships of war, which the latter deemed inconsistent with the law of nations, and not warranted by the terms of the treaties. America was determined to remain neutral, and on the 22nd

(*u*) The Times, Jan. 26, 1915, p. 10. No. XIII. Art. 8.

(*x*) Hague Convention (1907), (*y*) See *supra*, p. 644.

April, 1793, a Proclamation of Neutrality was issued, warning American citizens carefully to avoid all acts and proceedings which might tend to contravene the neutral disposition of their country. Any citizen who committed a breach of the law of nations would not be protected by his Government (*z*). In spite of this a French agent, M. Guinet, landed at Charleston in April, commenced organizing a system of privateering, and endeavoured in various ways to stir up the inhabitants of the States to assist France (*a*). A French Prize Court was established at Charleston, and an English vessel, the *Grange*, was seized in the Delaware river. The British Minister in America, Mr. Hammond, remonstrated against these violations of neutrality, and on the 5th of June received an answer from Mr. Jefferson, admitting the justice of his remonstrance, and stating that measures would be taken to prevent such occurrences (*b*). A collection of rules, declaring the original equipping and arming of vessels in the United States, by either belligerent for warlike purposes, to be unlawful, was drawn up, and issued to the collectors of customs. Violations of neutrality, however, continued. In October a French Vice-Consul at Boston, M. Duplaine, obtained the rescue by force of a vessel detained by the Marshal. The United States withdrew his exequatur, but the grand jury of Philadelphia refused to find a true bill against him (*c*). It was therefore deemed necessary to legislate on the subject, and accordingly the Act of the 5th of June, 1794, was passed (*d*). This Act was substantially the same as the one afterwards passed in 1818, and the latter, notwithstanding all that has since happened, still remains the law of America (*e*). It will, however, be necessary to notice some of the leading American decisions on both the Acts, and on the general subject.

A prosecution for being concerned in fitting out and arming a privateer, was set on foot soon after the passing of the Act of 1794. *Les Jumeaux* was originally a British ship employed on the coast of Guinea. She entered Philadelphia in 1794 with a cargo of sugar and coffee, and at that time was owned entirely by French subjects. Originally she had ten portholes on each side, but only four altogether were open when she entered Philadelphia. While there her owners caused her to be repaired, re-opened her twenty ports, and fitted her up as a ship of war. Orders were

American cases.  
*U. S. v. Guinet (Les Jumeaux).*

(*z*) American State Papers, vol. i. p. 23.

(*a*) Rep. Neutrality Commission, 1868, p. 18.

(*b*) Jefferson, Works, vol. iii. p. 571.

(*c*) Rep. Neutrality Comm. 1868,

(*d*) United States Statutes at Large, Third Cong. Sess. I. ch. 50.

(*e*) United States Revised Statutes, §§ 5281—5291. See *supra*, p. 644. See Appendix A.



given by the United States' authorities that she should be dismantled of her extra armaments and reduced to the condition she was in when she first came. She thus quitted Philadelphia in her original condition, but lower down the river took on board some guns and a number of men. A pilot boat also attempted to convey some more war material to her, but was stopped by the local authorities. A militia force was then sent in pursuit of *Les Jumeaux*, but she avoided detention, partly by artifice and partly by threatening an armed resistance. One Guinet, who had been chiefly concerned in fitting her out, was then indicted for a breach of section 3 of the Act. The Judge ruled that the third section was meant to include all cases of vessels armed in American ports by one of the belligerent Powers, to cruise against another belligerent Power at peace with the United States. 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 peaceable use to the warlike purpose that constitutes the offence. Guinet was found guilty (f).

*Talbot v.  
Jansen.*

In 1795, one Ballard, a Virginian, obtained the assignment of a power to command a certain ship, given by the French Admiral in the United States, and authenticated by the French consul at Charleston. This ship, *L'ami de la Liberté*, was American owned, and was armed and equipped in the United States. Ballard renounced his Virginian citizenship, but was not naturalized elsewhere. He took command of *L'ami de la Liberté*, and sailing under the French flag, captured a Dutch brig the *Magdalena*, and brought her to Charleston for adjudication. The Court held that he was still an American citizen, and that the authority under which he sailed was invalid; that the capture of a vessel of a country at peace with the United States, made by a vessel fitted out in one of their ports, and commanded by one of their citizens, was illegal, and that if the captured vessel was brought within American jurisdiction, the District Courts, upon a libel for tortious seizure, might inquire into the facts, and decree restitution. Accordingly the ship was restored with damages (g). On the other hand, where a prize was made by a vessel which had left the United States with equipments partially adapted for war, but which were such as were frequently carried

*The Alfred.*

(f) *U. S. v. Guinet (Les Jumeaux)* (1795), 2 Dallas, 328.

(g) *Talbot v. Jansen (The Magdalena)* (1797), 1 Curtis, 128; S. C., 3 Dallas, 133.

by merchantmen, and where her full equipment had been completed in French territory, the Court declined to restore the prize. It was held to be no violation of neutrality to sell such a ship to a foreigner (*h*). The Court also refused to restore a prize captured by a French privateer, which had been simply repaired in an American port, and had not augmented her force there (*i*). But where a French privateer secretly increased her crew at New Orleans by taking on board several Americans, and then captured the *Alerta*, a Spanish brig, and sent her to New Orleans as a port of necessity, the Court restored the prize to her owner (*k*).

Whenever it was proved that a capture was made *jure belli* on the high seas, by a duly commissioned vessel of war which had in no way violated American neutrality, the Courts refused to interpose. "It is no part of the duty of a neutral nation," said Chief Justice Story, "to interpose upon the mere footing of the law of nations, to settle all the rights and wrongs which may grow out of a capture between belligerents. . . . The captors are amenable to their own Government exclusively for any excess or irregularity in their proceedings" (*l*). This also was held to extend to the acts of privateers done under their war powers (*m*). Nor would the title by which a foreign sovereign owned a ship of war be inquired into (*n*). But it was firmly settled that if captures were made in violation of American neutrality, the property might be restored (even if there had been no Foreign Enlistment Act) if brought within the territory of the Union (*o*). Even after a regular condemnation in a Prize Court of the captor's country, the Court restored the prize, because she was still owned and controlled by the original wrong-doer (*p*).

Captures made without violation of neutrality.

In order that a violation of neutrality should be committed, two elements were deemed necessary. In the first place the ship must have been wholly or in part equipped or manned, or she must have augmented her force within the jurisdiction of the United States. In the second place she must have been so equipped or manned with the intent that she should cruise against the commerce of a

What amounts to a violation of neutrality.

(*h*) *The Alfred* (*Moodie v. The Alfred*) (1796), 1 Curtis, 234; S. C., 3 Dallas, 307.

(*i*) *The Phœbe Ann* (*Moodie v. The Phœbe Ann*) (1796), 1 Curtis, 237; 3 Dallas, 319.

(*k*) *The Alerta & Cargo v. Blas*, 3 Curtis, 379.

(*l*) *La Amistad de Rues* (1820), 5 Wheaton, 385.

(*m*) *The Invincible* (1816), 1 Wheaton, 238.

(*n*) *The Exchange* (1812), 7 Cranch, 116. See *ante*, pp. 152 *et seq.*

(*o*) *The Gran Para* (1822), 7 Wheaton, 471; 5 Curtis, 302; *La Concepcion* (1821), 6 Wheaton, 235; *The Bello Corrunes* (1821), 6 Wheaton, 152; *The Estrella* (1819), 4 Wheaton, 298.

(*p*) *The Arrogante Barcelones* (1822), 7 Wheaton, 496; *The Nereyda* (1823), 8 Wheaton, 108.



State at peace with the United States. Unless both the fact and the intent existed together, there was no offence against the law. The simple fact of an armed vessel having been equipped in, and sent from the United States to a belligerent did not, of itself, necessarily constitute a breach of the Act, or of the law of nations (*q*). Thus, if a ship of war was built and fitted out in America, and was then *bonâ fide* sold, purely as a commercial speculation to a belligerent, there would be no intent that she should cruise against friendly commerce, and thus no breach of neutrality would be committed. Ships of war and arms are articles of commerce (*r*), and neutrals are entitled to continue their ordinary commerce with belligerents, subject to the risk of their goods being captured if they are contraband. No State prohibits its subjects from trading in contraband. It only leaves such goods to their fate, if either belligerent captures them on the way to the other. In 1828, the *Bolivar*, a vessel of 70 tons, sailed from Baltimore for St. Thomas, under the command of one Quincey, and with Armstrong, her owner, on board. At St. Thomas, Armstrong fitted her out as a privateer to cruise under the Buenos Ayres flag against Brazil. Quincey continued to command her and made some prizes. He then returned to America, and was prosecuted for being concerned in fitting out the *Bolivar*. The Court held it to be not necessary, in order to convict Quincey, that the jury should find that the *Bolivar* was armed, or in a condition to commit hostilities during the voyage from Baltimore to St. Thomas. But if the jury believed that the owner and equipper went to St. Thomas in search of funds, and without a present intention of employing her as a privateer, or even if they wished so to employ her, but the fulfilment of their wish depended on their being able to procure funds at St. Thomas for her equipment, the defendant Quincey was not guilty. "The offence," said the Court, "consists principally in the intention with which the preparations were made. These preparations, according to the very terms of the Act, must be made within the limits of the United States, and it is equally necessary that the intention with respect to the employment of the vessel should be formed before she leaves the United States. And this must be a fixed intention, not conditional or contingent, depending on some future arrangements. . . . The law does not prohibit armed vessels belonging to citizens of the United States from sailing

U. S. v.  
Quincey.

(*q*) *The Santissima Trinidad* (1822),  
7 Wheaton, 283.

(*r*) But as to ships of war, certain  
reservations are now necessary; see  
*supra*, pp. 666 *seq.*; *infra*, p. 676.



out of our ports; it only requires the owner to give security that such vessels should not be employed by them to commit hostilities against foreign Powers at peace with the United States" (s).

The American Act declares that "if any person shall, within the limits of the United States, fit out *and* arm, or attempt to fit out *and* arm, or procure to be fitted out *and* armed," any vessel to cruise against the commerce of a friendly State, he shall be guilty of a misdemeanour. In 1866, the *Meteor*, a vessel alleged to be for the Chilean service in the war between Chile and Spain, was libelled in the District Court. She had been originally built for the Federal Government, but the Civil War having ended, she was sold instead to Chile. She was built to carry eleven or twelve guns, but these had not been mounted, and she was when libelled an unarmed ship of war. The counsel for the claimant contended that as she had not been fitted out *and* armed in the United States, she must be released. But the Court declined to adopt this interpretation of the statute, and judgment was given against the ship. This decision was not reviewed by the Supreme Court, and it has since been much questioned (t).

Whether fitting out *and* arming are necessary to constitute the offence.

Story's pronouncement in *The Santissima Trinidad* (mentioned above) that the law of nations does not prohibit the sale of an armed vessel to a belligerent purchaser, and the doctrine of 'intent' embodied in the American Act of Neutrality and expounded in the cases just cited, are now no longer tenable (u). "In considering this question," says an American writer very aptly, "it should be remembered that, by the introduction of steam as the motive power of ships, and of iron and steel as the material of their construction, the conditions of maritime warfare have been very radically changed. What might have been a reasonable rule as applied in the time of sailing ships might now in the age of swift ironclads, be intolerably oppressive. In the cases of *Santissima Trinidad*, *U. S. v. Quincey*, and *The Meteor*, the Courts were dealing with small sailing vessels, which had been converted into privateers, the possession of which by one or the other belligerent Power made very little difference in the general result of the struggle, whereas the possession of an iron-clad ship might well turn the scale one way or the other, as indeed it did in the war between Chile and Peru in 1880—1881. This great

(s) *U. S. v. Quincey* (1832), 6 Peters, 445; 10 Curtis, 189. Rep. Neut. Comm. p. 29.

(t) *U. S. v. The Meteor* (1866), Scott, Cases, p. 711. Cf. Rep. of

Neutrality Comm. p. 37. And see Parl. Papers, 1873 (No. 2), p. 39.

(u) Cf. the first Rule of the Treaty of Washington, *infra*, p. 676, and Art. 8 of the thirteenth Convention of the Hague (1907), *supra*, p. 666.

power of inflicting injury upon one of the belligerents, it is fair to say, ought not to be permitted to neutral citizens, and the neutral nation is alone in the position to restrain them. In view of these facts, it is believed that the doctrine set up by the United States Neutrality Act and the Federal Courts, that the 'intent' of the owner or shipbuilder is the criterion by which his guilt or innocence is to be judged, is wholly inadequate; it would not for a moment stand the test of due diligence as applied by the Geneva Tribunal" (x).

The difficulty of distinguishing between the *bonâ fide* sale of a ship, and the organizing of a hostile expedition in her territory, has induced England to prohibit altogether the sale of such ships by her subjects to belligerents. This prohibition fully satisfies the requirements of Article 8 of the thirteenth Convention of the Hague (1907) (y).

Breaches of  
American  
Neutrality  
Law.

Notwithstanding the decisive terms of the American Neutrality Law, various filibustering expeditions were from time to time organized in the United States against Spain. In 1806, a certain Miranda fitted out an expedition in New York, and sailed against Caracas. He was met by two Spanish men-of-war, and was defeated, and took refuge at Grenada; ten of his followers were condemned to death as pirates. The American Government had taken no steps to prevent the expedition (z). In 1817, Don Luis de Onís, Spanish minister to the United States, began a series of complaints respecting the fitting out of American privateers to cruise against Spanish commerce. He referred to numerous instances of privateers issuing from Baltimore and New Orleans (a). On the 16th of January, he complained of a Spanish schooner that was captured off Balize at a little more than musket-shot from the land, by the *Jupiter*, a privateer fitted out in America. On the 10th of February, he referred to five other privateers that took Spanish prizes, and on several other occasions he addressed similar remonstrances to the American Government (b). In their replies to these communications, the United States Government expressed its readiness to make inquiries into the matter, and referred the Spanish minister to the law courts. The correspondence closes with the following statement by Don Luis, written on the 16th of November, 1818:—"Whatever may

(x) Snow, Cases, p. 437, note. See *infra*, p. 676.

(y) Foreign Enlistment Act, 1870, sect. 8.

(z) Wheaton, ed. Dana, p. 558. Rep. of Neutrality Comm. p. 25.

(a) Reasons of Sir A. Cockburn as to Geneva Award. Parl. Papers, 1873 (No. 2), p. 54.

(b) *Ibid.* p. 55. See also Appendix to British Case at Geneva, vol. iii. pp. 99-106.



be the foresight, wisdom, and justice conspicuous in the laws of the United States, it is universally notorious that a system of pillage and aggression has been organized in several parts of the Union against the vessels and property of the Spanish nation; and it is equally so that all the legal suits hitherto instituted by His Catholic Majesty's consuls, in the courts of their respective districts, for its prevention, or the recovery of the property, when brought into this country, have been and still are completely unavailing" (c). This letter was accompanied by a list of thirty privateers belonging to New Orleans, Charleston, Philadelphia, Baltimore, and New York, with a formidable list of prizes made by them. The proceedings in the law courts failed in most cases from the impossibility of procuring evidence. Cruising against Spanish commerce was so profitable that few people would come forward and testify to the violations of the law. Nevertheless it was enforced in the courts whenever evidence could be got, and numerous prizes taken by these privateers were restored to their owners (d). In the meantime Spanish commerce had suffered immensely. The dispute was finally adjusted by certain American claims on account of prizes made by French privateers, and condemned by French consuls in Spain, and other matters, being set off against the demands of Spain for reparation, in a treaty dated 22nd February, 1819 (e).

In 1849, Lopez, a Spanish adventurer, planned an attack on Cuba, with the object of annexing it to the United States. The President issued a proclamation calling upon every officer of the Government to use every effort in his power to arrest any person concerned in this expedition. Nevertheless, Lopez left New Orleans on the 7th of May, 1850, in a steamer, accompanied by two other vessels, with about 500 men on board. He landed at Cardenas in Cuba, but was driven off by the Spanish troops, and escaped back to the United States. He was then arrested and brought to trial, but as the judge refused to allow delay to procure evidence, he was discharged amid the cheers of a large crowd; he was again prosecuted at New Orleans, in July, 1850, and a true bill was found against him, but the Government failed to make out their case. On the 3rd of August, 1851, he again started from New Orleans, with an expedition of 400 men; this

Cuban  
expeditions.

(c) British Appendix, vol. iii. p. 131.

(d) Wheaton, ed. Dana, p. 558. *The Santa Maria*, 7 Wheaton, 490; *The Monte Allegre* (1822), 7 Wheaton, 520;

*U. S. v. Reyburn*, 6 Peters, 352.

(e) U. S. Statutes at Large, vol. viii. p. 258.



time he was overpowered by the Spaniards, and executed at Havana (*f*).

In 1869, Cuba again became the destination of hostile expeditions, organized in the Union. Mr. Fish, the American foreign secretary, admitted "with regret that an unlawful expedition did succeed in escaping from the United States, and landing on the shores of Cuba." In the following year, a notorious vessel, the *Hornet*, was permitted to leave New York for Cuba; she was seized several times before getting there by both British and American authorities, but finally managed to effect her purpose of landing an expedition in the island (*g*).

Enforcement  
of neutrality.

In 1896, however, shortly before the war which finally severed Cuba from Spain, the United States authorities were prompt to seize a steamer which had been armed and fitted out in American waters for the purpose of a hostile expedition to Cuba (*h*).

Fenian  
organizations  
in United  
States.

Further, to the United States must be imputed certain contraventions of neutrality—from the point of view of international law and municipal law alike—in regard to the hostile Irish organizations that were permitted to be established in American territory. In 1865 the 'Fenian Brotherhood' declared that they were "virtually at war" with England (*i*). They threatened to invade Canada, and soon afterwards sent over the frontier some 800 or 900 men, who were driven back by a Canadian detachment. In 1868, again, the Fenian leader, O'Neill, marched in review through Philadelphia with three regiments in uniform. In 1870 two expeditions crossed into Canada, but, being repulsed, fled back to American territory, where they were disarmed by the Union troops. Some of the leaders were fined and imprisoned, but were released two or three months after (*k*).

English neu-  
trality laws.

The history of the law of England on the subject must next be considered. In 1721, on the occasion of a complaint being made by the Swedish minister that certain ships of war had been built in England, and sold to the Czar, the judges were ordered to attend the House of Lords and deliver their opinions on the question, whether the King of England had power to prohibit the building of ships of war, or of great force, for foreigners, and they answered that the king had no power to prohibit the same (*l*). In 1819 the Foreign Enlistment Act was passed,

(*f*) Parl. Papers, 1873 (No. 2), pp. 62, 63. Rep. of Neutrality Comm. 1868, p. 34.

(*g*) British Counter-case at Geneva, p. 46.

(*h*) *The Three Friends* (1896), 166 U. S. Rep. 1.

(*i*) *The Irish American*, Feb. 11, 1865.

(*k*) Parl. Papers, N. America (1873), No. 2, p. 66.

(*l*) Fortescue's Reports, p. 388. Parl. Papers, N. America, No. 4 (1872), p. 146.

which has already been referred to (*m*). Up to the American Civil War, it had been occasionally invoked to prevent the enlistment and despatch of soldiers from the country as well as the equipment of ships, but the cases when it was put into force at all are very few (*n*).

In 1827, four vessels, under Count Saldanha, sailed from Plymouth, ostensibly for Brazil, but in reality to operate against Don Miguel in Terceira. A small force was sent in pursuit, and intercepted them off Port Praya. Count Saldanha remonstrated against being interfered with, but the British commander insisted upon conducting the expedition back to Europe. Another expedition that had sailed from London was afterwards similarly stopped (*o*).

The Terceira  
affair.

In 1835, the Foreign Enlistment Act was suspended, and British subjects were allowed to enlist in a Spanish Legion, under Sir De Lacy Evans, for the purpose of assisting the Queen of Spain. But this was done in pursuance of the Quadruple Alliance treaty, by which England agreed to assist the Queen of Spain (*p*). In 1846, three vessels preparing in British ports to sail against Ecuador were seized and condemned. In 1867, a vessel alleged to be fitted out for the Portuguese rebels was seized, but released.

A different class of cases arose in the American Civil War, and these are the only ones of any material importance, at the present time. In these the ground of complaint was the fitting out of armed vessels for the Confederates in British ports. The depredations on American commerce caused by Confederate cruisers, some of which had been fitted out in violation of British neutrality, caused great irritation in the Union. A very prolonged discussion was entered into, with the view of making England pay for the damage done by those vessels, and the matter was finally referred to arbitration by the treaty of Washington, 1871 (*q*). The causes of complaint put forward by the United States Government are thus summarised by Lord Chief Justice Cockburn (*r*).

Violations of  
British neu-  
trality during  
American  
Civil War.  
The Geneva  
Arbitration.

"1. That by reason of want of due diligence on the part of the British Government, vessels were allowed to be fitted out and equipped, in ports of the United Kingdom, in order to their being employed in making war against the United States, and having been so equipped, were allowed to quit such ports for that purpose.

Causes of  
complaint.

(*m*) See *ante*, p. 645.

(*n*) They are collected in a memorandum, by Lord Tenterden, to the Neutrality Laws Commission Report, 1868, pp. 38, 39, the substance of which is given above.

(*o*) See Phillimore, iii. § 166.

(*p*) See *ante*, p. 127.

(*q*) See Appendix C.

(*r*) Parl. Papers, 1873, N. America (No. 2), p. 7.

"2. That vessels, fitted out and equipped for the before-mentioned purpose, in contravention of the Foreign Enlistment Act, and being therefore liable to seizure under the Act, having gone forth from British ports, but having afterwards returned to them, were not seized as they ought to have been, but, having been allowed hospitality in such ports, were suffered to go forth again to resume their warfare against the commerce of the United States.

"3. That undue favour was shown in British ports to ships of war of the Confederate States, in respect of the time these ships were permitted to remain in such ports, or of the amount of coal with which they were permitted to be supplied.

"4. That vessels of the Confederate States were allowed to make British ports the base of naval operations against the ships and commerce of the United States."

Rules of the  
Treaty of  
Washington.

In order to assist the arbitrators in coming to a decision, three general rules were introduced into the treaty, and, with these rules before them, the arbitrators were directed to determine as to each vessel "whether Great Britain has, by any act or omission, failed to fulfil any of the duties set forth in such rules, or recognised by the principles of international law not inconsistent with such rules." The rules were as follows:—

"A neutral Government is bound—

"1st. 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 (s).

"2nd. 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.

"3rd. 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" (t).

The rules as  
regards inter-  
national law.

These rules are the weak point in the whole matter. It is stated in the treaty "that Her Majesty's Government cannot assent to

(s) Cf. Hague Convention (1907), No. XIII. Art. 8, *supra*, p. 666.

(t) Treaty of Washington, 1871, Art. vi. See Appendix C.



the foregoing rules as a statement of the 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 provision for the future, agrees that, in deciding the questions between the two countries arising out of those 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." Thus England agreed that her liabilities should be judged of by rules which she admits were not in force at the time the acts she is charged with were done. Another fault of the treaty lay in its containing no definition of "due diligence;" so that the arbitrators were thrown upon general principles to ascribe a meaning to the term.

The chief cases heard by the arbitrators were as follows:—

*The Alabama.*

The *Alabama*, known at first as No. 290, was built at Liverpool, and was launched on the 15th May, 1862. She was beyond doubt intended as a vessel of war. On the 23rd June, Mr. Adams, American minister in England, wrote to Lord Russell that she was about to depart, and enter the service of the Confederates. On the 30th of June, the Law Officers of the Crown advised, "that if sufficient evidence can be obtained to justify proceedings under the Foreign Enlistment Act, such proceedings should be taken as early as possible." Up to the 15th of July, the Commissioners of Customs were of opinion that there was not sufficient evidence produced to justify the seizure of the vessel. On the other hand, Mr. Collier (afterwards Lord Monkswell) advised on the 16th, that the vessel should be seized, and on the 23rd he gave another opinion to the same effect. Further evidence was then produced, and the opinion of the law officers was again asked, but owing to the illness of the Queen's Advocate, to whom the evidence was first sent, their opinion advising the detention of the vessel was not made known till the 31st July, and on the 29th the *Alabama* sailed unarmed from Liverpool. On the following day a tug left Liverpool with thirty or forty men on board, and these she transferred to the *Alabama* off Moelfra Bay. Two British vessels, the *Bahama* and the *Agrippina*, afterwards cleared from Liverpool and London with the armaments for the *Alabama*, and they joined her at the Azores, where she was fully equipped as a

vessel of war. It must be added that the British authorities had no knowledge at the time of the connection between these vessels and the *Alabama* (*u*).

Upon these facts the arbitrators unanimously decided that Great Britain "failed to use due diligence," and that "after the escape of the vessel, the measures taken for its pursuit and arrest were so imperfect as to lead to no result, and therefore cannot be considered sufficient to release Great Britain from the responsibility already incurred." And a further ground for the decision was, that the ship "was on several occasions freely admitted into the ports of colonies of Great Britain, instead of being proceeded against as it ought to have been" (*x*).

*The Florida.*

The facts relating to the *Florida* are similar. She was built at Liverpool as a ship of war under the name of the *Oreto*, and she left Liverpool unarmed. The authorities thought she was built for the Italian Government, and she cleared for Palermo and Jamaica in ballast. Representations as to her real destination were made to the Government by the American consul at Liverpool, and by Mr. Adams, but as these were unaccompanied by what was deemed sufficient evidence for her seizure, she was allowed to go free. Even her crew were not aware of her real destination, and on her arrival at Nassau, most of them insisted on being discharged. After considerable discussion, she was seized at the Bahamas, and proceedings were taken in the Vice-Admiralty Court for her condemnation. She was, however, discharged, the judge being of opinion that, although she had been fitted out in British territory, yet, as she had shipped no munitions of war in the colony, and as there was no evidence that she had been transferred to a belligerent, he could not condemn her. In this he was mistaken. Fitted out, equipped, or armed, within British dominions, in contravention of the statute, a vessel becomes at once forfeited by the effect of the statute, and becomes liable to be condemned by proceedings *in rem*, taken before any competent court within whose jurisdiction she may be (*y*). The *Florida* (or *Oreto*) ought therefore to have been condemned at the Bahamas. On being released, she proceeded to Green Cay, a desert island sixty miles south of Nassau. In the meantime, her armaments had been made at Liverpool, but they were conveyed by train to Hartlepool, whence they were shipped, and at the time it was unknown in England that these armaments

(*u*) See Argument of the United States. Parl. Papers, N. America, 1872 (No. 12), pp. 59—70, from which all the facts but the last have been taken.

(*x*) Parl. Papers, N. America, 1873 (No. 2), p. 3.

(*y*) Parl. Papers, N. America, 1873 (No. 2), p. 140.

were intended for the *Florida*. It was thought they were simply contraband of war; however, they were shipped on board the *Prince Alfred* at Hartlepool, and transferred to the *Florida* at Green Cay. At Nassau she had enlisted some men for her crew, but not having a full complement, she went to Cardenas, in Cuba, and endeavoured to enlist others there. This was prevented by the authorities, and she then sailed for the port of Mobile, which she contrived to enter by eluding the blockading cruisers. She remained at Mobile more than four months, and then issued as a Confederate ship of war; she was afterwards admitted into several British ports, and treated as a belligerent cruiser. With regard to this vessel, the tribunal, by a majority of four to one, decided that England had failed in her duties in not preventing the ship from leaving Liverpool, in allowing her to enlist men at Nassau, and to be armed at Green Cay, and in afterwards receiving her in British ports (z).

These two vessels, the *Alabama* and the *Florida*, were the only two vessels of war built in Great Britain for, and actually employed in, the service of the Confederates during the whole Civil War. Four others were intended to be built and equipped, but were arrested while in the course of construction. Four merchant vessels, though not adapted for warlike purposes, were converted into vessels of war by having guns put on board, but out of the jurisdiction of the British Government—two of them in Confederate ports—and this by reason of the impossibility of getting ships of war built owing to the active vigilance of the authorities (a). It is impossible, from want of space, to go into the details relating to the other ships; it was only as regards these two, the *Alabama* and the *Florida*, and their tenders, and partially as regards the *Shenandoah*, that the tribunal condemned England to pay the United States a sum of \$15,500,000 in gold, as indemnity for the ravages committed on American commerce. Numerous other claims were put in by the United States, such as damages for the cost of pursuing the Southern cruisers, for the prospective earnings of the ships destroyed, and for the double loss incurred by the owners of the ships and also by their insurers, but these were rejected by the tribunal.

Other vessels  
involved.

What are known as the indirect claims were dismissed by the arbitrators at the outset of the proceedings. They were for: (1) The enhanced rates of insurance in the United States, occasioned by the cruisers in question. (2) The transfer of the maritime

Indirect  
claims of the  
United States.

(z) Parl. Papers, N. America, 1873  
(No. 2), p. 3.

(a) Parl. Papers, N. America, 1873  
(No. 2), p. 106.



commerce of the United States to England. This was a very sore point, but on no possible ground could England have been called upon to pay damages under such a head. (3) The prolongation of the Civil War (b).

Certain questions of law in the Geneva Arbitration.

Some questions of law that were involved in the "*Alabama* claims" case may be noted. Firstly, with regard to the interpretation of the term 'due diligence,' the United States maintained that it implied a diligence proportionate to the dignity and ability of the Power called upon to exercise it, and commensurate with the emergency or the magnitude of the results of negligence. On the other hand, Great Britain contended that it meant "the measure of care which any Government was under an international obligation to use for a given purpose"; and that no distinction could be drawn between one Power and another in respect of dignity or ability. Failing a clear determination of the measure of diligence either by usage or by agreement, it must depend on the amount of care usually manifested by a civilized Government in matters relating to its own security and that of the governed. The Arbitral Court, however, held that the amount of diligence necessary is "in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfil the obligations of neutrality." Secondly, with regard to the relation between international law and national legislation, the United States urged that the obligation of a neutral State was prescribed primarily by international law, which must prevail over municipal law if there be a conflict between the two. Great Britain acknowledged the principle as a general rule, but contended that in considering the steps taken by a Government it is necessary to take into account the provisions and limitations imposed by municipal law, so long as they are not obviously unreasonable or inadequate. The Court, however, decided that municipal restrictions cannot be an excuse for failure to exercise due diligence. Thirdly, Great Britain held that vessels constructed or adapted for war in neutral territory and found under the neutral flag were in the position of contraband; and that when a belligerent has commissioned a vessel, she becomes invested with the status of a public warship, and so enjoys the various recognised immunities of warships. But the United States denied that the construction of warships in neutral territory amounted merely to a sale of contraband, and expressed the view that it constituted the preparation of an instrumentality of war; nor could an offending vessel be absolved from responsibility by

(b) Argument of the United States. Parl. Papers, N. America (No. 12), 1872, p. 165.

reason of its having been subsequently commissioned by a belligerent Power. The Court accepted the American contention; though the ruling is not regarded generally as a correct statement of the law. Lastly, the United States maintained that the granting of excessive hospitality to belligerent vessels in regard to coal supply and duration of stay was evidence that the neutral territory was used as a base of operations. But Great Britain held that to constitute a place a base of operations, there must be a continuous use, or a use as a point of departure as well as of return. The questions relating to the supply of fuel and provisions, to repairs and duration of stay are now regulated by the Hague Rules (c).

The controversy between Great Britain and the United States, resulting from the fitting out of certain Confederate cruisers in British ports, drew attention to some defects in the Foreign Enlistment Act of 1819. Accordingly, a Royal Commission was appointed in 1868 to inquire into the working of the Act. This Commission suggested several alterations in the law. They added in their report: "In making the foregoing recommendations, we have not felt ourselves bound to consider whether we were exceeding what could actually be required by international law, but we are of opinion that if those recommendations should be adopted, the municipal law of this realm available for the enforcement of neutrality will derive increased efficiency, and will, so far as we can see, have been brought into full conformity with your Majesty's international obligations" (d). In accordance with this report, a new Foreign Enlistment Act was passed in 1870 (e).

Very material changes were thus introduced, and the hands of the executive greatly strengthened. It is now an offence to build or cause to be built, or to equip or despatch, or to cause or allow to be despatched, any ship, with intent or knowledge, or having reasonable cause to believe that the same will be employed in the service of any foreign State at war with any friendly State (f). Thus, all question as to intent is now done away with. If the Secretary of State, or the chief executive authority in any place, is satisfied that there is reasonable and probable cause for believing

Royal Commission of 1868 on neutrality laws.

Foreign Enlistment Act, 1870.

(c) On the "Alabama claims" and the Geneva Arbitration, see Case of Great Britain (with Appendix); Parl. Papers, N. America (1872); Case of United States; Papers relating to the Treaty of Washington, 1872-3. For convenient summaries of the controversy, see (from the British point of view) Bernard, *The Neutrality of Great Britain during the American Civil War* (London, 1870), and (from

the American point of view) Cushing, *Treaty of Washington*; and of the arbitration proceedings, Moore, *International Arbitrations*, vol. i. 495 *seq.*; Cobbett, *Cases*, pp. 320 *seq.*

(d) Report of Neutrality Laws Commission, 1868, p. 7.

(e) 33 & 34 Vict. c. 90. See Appendix A.

(f) Section 8.



that a ship in Her Majesty's dominions is being built or equipped contrary to the Act, and is about to be taken beyond such dominions, they may seize and search the ship, and detain it until condemned or released by a court of law. The owner may apply to the Court of Admiralty for its release, but it is then incumbent on him to prove that the Act has not been contravened—a reversal of ordinary procedure which assumes a man innocent until he has been proved guilty (*g*). These are certainly great changes, but whether they are as great improvements is not so certain. The Act goes far beyond what international law requires. It creates a new crime—that of building—and makes British subjects liable to penalties for certain acts which are lawful by the law of nations, and by all other municipal laws. It places the shipbuilding trade of this country at a disadvantage, as compared with that of the rest of the world (*h*).

Cases under  
the Act—  
*The Gauntlet*.

The Act has been put in force several times since it was passed. During the Franco-German war, a French vessel of war captured a Prussian ship in the English Channel, and manned her with a prize crew. The prize was driven into the Downs by stress of weather, and while there, the French consul at Dover engaged a steam-tug to tow the prize to Dunkirk Roads. The tug did so, and on her return was proceeded against for a violation of the Act. The Privy Council (reversing the decision of the Admiralty Court) held, that towing the prize into French waters was despatching a ship within the meaning of section 8, and accordingly condemned the tug to the Crown (*i*).

*The International*.

In another case during the same war, an English company contracted with the French Government to lay down some telegraph lines on the French coast. They were to complete the communication between Dunkirk and Verdun. The company shipped the wires on to a specially constructed vessel, but when she was about to start the Secretary of State seized her. The ship was, however, released by the Admiralty Court, it being proved that the undertaking was of a purely commercial character, and that though France might partially use the lines for military purposes, this would not divest the transaction of its primary commercial character (*k*).

*The Salvador*.

It is an offence against the Act to supply a vessel to insurgents. Thus, a British vessel employed as a transport or store-ship in the service of the Cuban insurgents, who, though not recognised as

(*g*) Section 23.  
(*h*) Report of Neutrality Laws  
Comm. pp. 9 and 10.

(*i*) *The Gauntlet*, L. R. 4 P. C. 184.  
(*k*) *The International* (1871), L. R.  
3 A. & E. 321.



belligerents, had formed themselves into a body of people acting together, and undertaking and conducting hostilities, was condemned by the Privy Council, under the Act of 1819 (*l*).

In 1886, one Sandoval was indicted under the 8th and 11th sections of the Act. It appeared that Sandoval was a foreigner, but that while residing in England, he purchased at Sheffield two Krupp guns, and at Birmingham a quantity of ammunition, and that he then caused the guns and ammunition to be shipped on board a trading ship for Antwerp, where they arrived, and where at the same time arrived the *Justitia*, which had been purchased also in England by another person in the name of that other's valet. The *Justitia* was then loaded at Antwerp with the guns and ammunition. She took on board a number of generals and Sandoval, who asserted himself to be the commander, and sailed with "machinery for mines," and papers for Trinidad. Not being permitted to enter port at Trinidad, she sailed towards Grenada, and then the valet executed a transfer of the ship to one of the generals, whereupon the British flag was hauled down, and the Venezuelan flag hoisted, the guns were mounted, the boats swung out-board, and boats full of armed men taken in tow. The *Justitia*—re-named the *Liberata*—proceeded along the Venezuelan coast, had an engagement with a Venezuelan war-vessel, fired at some forts and a custom-house, and finally went to St. Domingo, where she was seized by the authorities. The object appeared to be to assist certain persons who were engaged in a rebellion against the Venezuelan Government. The indictment under sect. 8 was clearly not sustainable; but the jury found that Sandoval, when he purchased the arms and ammunition in England, knew and expressly intended that they should form part of a naval expedition which was being prepared to proceed against a foreign friendly State, and that the purpose intended at the time of the respective purchases was to assist in a hostile expedition against a foreign friendly State. Upon these findings, a verdict of guilty was directed against Sandoval, and judgment accordingly. An application for a new trial failed, and the prisoner was afterwards sentenced to fine and imprisonment (*m*).

In the case of *Reg. v. Jameson and others*, arising out of the notorious Raid, the Court held, on sect. 11 of the Foreign Enlistment Act, that if there be an unlawful preparation of an expedition by some person within Her Majesty's dominions, any British sub-

(*l*) *The Salvador* (1870), L. R. 3 P. C. 218. And see *Burton v. Pin-*  
*kerton*, L. R. 2 Ex. 340.

(*m*) *Reg. v. Sandoval*, 56 L. T. 526;  
16 Cox, C. C. 206; 3 T. L. R. 411,  
436, 498.

ject who assists in such preparation will be guilty of an offence even though he renders the assistance from a place outside Her Majesty's dominions (*n*). It will be remembered that Dr. Jameson, Sir John Willoughby, and others of the officers proceeded against were sentenced to varying terms of imprisonment for their invasion of the Transvaal territory.

Enforcing  
municipal law  
when in ex-  
cess of inter-  
national law.

There can be no doubt that the Act of 1870 is in excess of what international law requires as the duty of a neutral. Thus, the question arises whether a belligerent can claim, as of right, the putting in force of such a municipal law in his behalf, and make the omission to do so a ground of grievance. Lord Chief Justice Cockburn answers this as follows:—"When a Government makes its municipal law more stringent than the obligations of international law would require, it does so, not for the benefit of foreign States, but for its own protection, lest the acts of its subjects in overstepping the confines, oftentimes doubtful, of strict right, in transactions of which a few circumstances, more or less, may alter the character, should compromise its relations with other nations. . . . Now it is quite clear that the obligations of the neutral State spring out of, and are determined by, the principles and rules of international law, independently of the municipal law of the neutral. They would exist exactly the same, though the neutral State had no municipal law to enable it to enforce the duties of neutrality on its subjects. It would obviously afford no answer on the part of a neutral Government to a complaint of a belligerent of an infraction of neutrality that its municipal law was insufficient to enable it to ensure the observance of neutrality by its subjects; the reason being that international law, not the municipal law of the particular country, gives the only measure of international rights and obligations. While, therefore, on the one hand, the municipal law, if not co-extensive with the international law, will afford no excuse to the neutral, so neither on the other, if in excess of what international obligations exact, will it afford any right to the belligerent which international law would fail to give him" (*o*). Both belligerents must of course be treated equally in this respect. Partiality towards one will give the other a ground of complaint.

In 1883, during the tension produced between France and China by affairs in Tonquin, the German Government refused to allow three war vessels built at Stettin for the Chinese Govern-

(*n*) *Reg. v. Jameson*, (1896) 2 Q. B. 425.

(*o*) Reasons for dissenting from Geneva Award. Parl. Papers, N. America, 1873 (No. 2), p. 29.



ment to sail (*p*). In February, 1904, on the outbreak of hostilities between Russia and Japan, Germany, contrary to her previous practice, issued a proclamation of neutrality.

It is impossible to lay down any hard and fast line separating commercial transactions in munitions of war, and the organizing of hostile expeditions. International law is necessarily incapable of being defined and laid down with the precision attainable by municipal law. The question is one of intent with regard to the destination or use of any vessel involved. It is the duty therefore of a neutral Government to exercise due diligence in ascertaining the real character and purpose of the transaction. The essential elements of a hostile expedition are difficult to define. There must be, in the first place, a combination of men organized on neutral territory; secondly, there must be an arrangement for the use of armament; thirdly, there must be an intention to proceed against a friendly State (*q*). Bernard thus describes the nature of a hostile enterprise: "If at the time of its departure there be the means of doing any act of war—if those means, or any of them, have been procured and put together in the neutral port—and if there be the intention to use them (which may always be taken for granted when they are in the hands of the belligerents), the neutral port may be justly said to serve as a base or point of departure for a hostile expedition" (*r*).

Distinction  
between  
commercial  
and hostile  
operations.

In 1870, during the Franco-German war, a French steamer, the *Lafayette*, left New York with a large number of French conscripts on board, together with a cargo of munitions of war destined for France. The Prussian Government protested against the permitted departure of the vessel; but the United States Government declined to interfere on the ground that the conscripts did not constitute an organized force, and that the munitions of war were simply contraband, whose despatch by subjects a neutral Power is not bound to prevent.

In November, 1898, in a port of the United States, a body of men went on board a tug loaded with arms, and were taken by it thirty or forty miles and out to sea; they met a steamer outside the three-mile limit by prior arrangement, boarded her with the arms, opened the boxes and distributed the arms among themselves; they drilled to some extent, were apparently officered, and then, as preconcerted, disembarked to effect an armed landing on the coast of Cuba, then belonging to Spain, with which country

*Wiborg v.*  
*United States.*

(*p*) Annual Register, 1883, p. 366.

(*r*) M. Bernard, Neutrality of Great Britain, p. 399.

(*q*) Cf. H. Taylor, Treatise on International Law (1901), p. 679.



the United States were at peace. It was held that this constituted a military expedition or enterprise within the provisions of the Neutrality Act (s).

Due diligence  
necessary.

A Government is not responsible for every possible hostile act that may take place in its territory. So long as it takes all reasonable precautions to prevent hostile acts, and exercises due diligence in enforcing these precautions, a belligerent has no just ground of complaint, even if its neutrality is violated. The difficulty is to ascertain what constitutes "due diligence." "The maximum of precaution," says M. Tetens, "in this case, is to maintain and enforce the observance of neutrality in vessels and cargoes, with the same diligence and exactness as are exercised in inquiries and other proceedings relative to taxes, or imposts and customs. He who does as much to prevent a wrong meditated against another, as he does for his own protection, satisfies every just and reasonable expectation on the part of that other" (t). It is advisable during war for a neutral to make special regulations for his subjects, but this cannot be demanded by a belligerent as a matter of right. All he can demand is, that the neutral, by whatever means he thinks proper, should, *bonâ fide*, do his best to prevent violations of his neutrality.

Impartiality  
of neutral  
Power.  
Belligerent  
vessels in  
neutral ports.

"A neutral Power must apply to the two belligerents impartially the conditions, restrictions, or prohibitions issued by it in regard to the admission into its ports, roadsteads, or territorial waters, of belligerent warships or of their prizes.

Nevertheless, a neutral Power may forbid any particular belligerent vessel which has failed to conform to the orders and regulations made by it, or which has violated neutrality, to enter its ports and roadsteads" (u).

This Article does not, of course, interfere with the right of a neutral State to prohibit belligerent warships generally from entering its ports.

Right of  
asylum in  
neutral ports  
dependent on  
the consent  
of the neutral  
State.

An opinion is expressed by some earlier jurists, that belligerent cruisers not only are entitled to seek an asylum and hospitality in neutral ports, but have a right to bring in and sell their prizes within those ports. But there seems to be nothing in the established principles of the customary law of nations that can prevent the neutral State from withholding the exercise of this privilege

(s) *Wiborg v. United States* (1896), 163 U. S. Rep. 632.

(t) See Reddie, *Researches in Maritime and International Law*, vol. ii. p. 203. Cf. the arguments as to "due

diligence" advanced before the Geneva Arbitration Tribunal, *supra*, p. 680.

(u) Hague Convention (1907), No. XIII. Art. 9.

impartially from all the belligerent Powers; or even from granting it to one of them, and refusing it to others, where stipulated by treaties existing previous to the war. The usage of nations, as testified in their marine ordinances, sufficiently shows that this is a rightful exercise of the sovereign authority which every State possesses, to regulate the police of its own sea-ports, and to preserve the public peace within its own territory. But the absence of a positive prohibition implies a permission to enter the neutral ports for the purposes of asylum and hospitality (*x*). Thus, in *The Exchange v. McFadden* (1812), Chief Justice Marshall, delivering the judgment of the American Supreme Court, said that the jurisdiction of every nation within its own territory is of necessity exclusive and absolute, and is subject to no limitation save that imposed by itself. Hence it may for reasons of State close all or any of its ports against vessels of war generally, and for this purpose express notice is usually given. In default of such prohibition the ports of a friendly nation are considered to be open to the public ships of all Powers with which it is at peace (*y*).

On the outbreak of a maritime war, neutral States generally English rules. make some rules on this subject. During the American Civil War, England prohibited all ships of war and privateers of either party from using any port or waters subject to British jurisdiction, as a station or place of resort for any warlike purpose, or for obtaining any facilities of warlike equipment; and no vessel of war or privateer of one belligerent was to be permitted to leave any British port, from which any vessel of the other belligerent (whether a ship of war or a merchant vessel) should have previously departed, until twenty-four hours after the departure of the latter. Any ship of war or privateer of either belligerent entering British waters was to be required to depart within twenty-four hours, except in case of stress of weather, or of requiring repairs, or necessaries for the crew. As soon as she was repaired, or had obtained her necessary stores, she was to be required to depart forthwith. Nothing but provisions requisite for the subsistence of the crew, and so much coal as would carry the ship to the nearest port of her own country, or to some nearer destination, were to be supplied to ships of war or privateers; the coal only to be supplied once in three months to the same ship, unless this was relaxed by special permission (*z*). Similar rules were put in force

(*x*) Bynkershoek, *Quæst. Jur. Pub.* lib. i. cap. 15. *Vattel*, liv. iii. ch. 7, § 132. Valin, *Comm. sur l'Ordonn. de la Marine*, tom. ii. p. 272.

(*y*) *The Exchange v. McFadden* (1812), 7 Cranch, 116.

(*z*) Earl Russell to the Admiralty, &c. *London Gazette*, Dec. 15th, 1863.

during the Franco-German war, 1870-1 (*a*), in the Spanish-American war of 1898, and in the Russo-Japanese war of 1904. The rule in this latter case limited the supply of coal to "so much only as may be sufficient to carry such vessel to the nearest port of her own country, or to some nearer named *neutral* destination" (*b*). And the 1904 regulations marked a further advance over their predecessors in that they made it clear that the Foreign Enlistment Act extended to all the dominions of His Majesty, including the adjacent territorial waters, and that the rule compelling them to leave British waters within twenty-four hours was specifically applied to those vessels which were then in port, instead of only to those which might come into port after the issue of the proclamation (*c*). The hostilities between France and China in 1884-5 were conducted without any formal declaration of war. Complaints were made in Parliament that, although the French operations were chiefly injurious to British merchants, the French warships were suffered to use Hong Kong as, practically, their base of operations. Early in 1885, however, Great Britain decided to regard the French notification of the blockade of Formosa as equivalent to a declaration of war. Permission to refit was, consequently, denied to the *Triomphante* when she arrived at Hong Kong; but she was allowed, as were other ships in like circumstances, to take on board sufficient coal to carry her to the nearest French port, Saigon (*d*).

Rules of other countries.

The practices of other countries varied considerably. Thus, during the American Civil War France prohibited all ships of war or privateers of either party from remaining in her ports with prizes for more than twenty-four hours, except in case of imminent perils of the sea. No prize goods were permitted to be sold in French territory (*e*). Prussia remained content with ordering her subjects not to engage in the equipment of privateers, and to obey the general rules of international law (*f*). The Belgian rule commanded all privateers to depart immediately, unless prevented by absolute necessity. The Dutch regulation was the same. Neither country made any provision as regards ships of war (*g*). In the subsequent wars between Brazil and Paraguay, and Spain and Chile, Holland prohibited ships of war or privateers, with prizes,

(*a*) Lord Granville to Admiralty, &c. London Gazette, 19th July, 1870.

(*b*) London Gazette, Feb. 11th, 1904.

(*c*) See, for the whole proclamation, Appendix A.

(*d*) The Times, 29th Dec. 1884; Annual Register, 1885, p. 331. And

see an article in the *Revue de Droit International* (1903), p. 488, by Takahashi, "Hostilités entre la France et la Chine."

(*e*) Rep. Neutrality Laws Comm. 1868, p. 69.

(*f*) *Ibid.* p. 70.

(*g*) *Ibid.* p. 70.



from entering or refitting in her harbours, unless overtaken by evident necessity. Ships of war without prizes might, however, remain an unlimited time in Dutch harbours, and provide themselves with an unlimited supply of coal, the Government reserving to themselves the right of limiting their stay to twenty-four hours, should this be deemed advisable. When ships of both parties were in any harbour at the same time, one was not to be allowed to depart until twenty-four hours after the other (*h*). Japan adopted what was practically the British twenty-four hours' rule as far back as 1870 (*i*). In the Russo-Japanese war the Scandinavian countries closed some of their ports and inlets to both belligerents' warships, with the exception of hospital ships and vessels in distress. There was thus no uniform practice established, but the rule that when two hostile ships of war meet in a neutral port, the local authorities were to detain one till twenty-four hours after the departure of the other, was very general in practice. It was found to be a very reasonable rule; and with the almost universal use of steam on ships of war, the limit of twenty-four hours gave ample time for the vessel that started first to get out of reach of the other if desirous of doing so.

The rule of twenty-four hours' stay and that of twenty-four hours' interval now form part of the conventional law of nations which, as we shall see presently, has replaced the former varying usages by a uniform system. In the meantime, suffice it to say that, in regard to the reception or exclusion of belligerent warships on the part of neutral Powers, the essential point—exemplified in recent practice and now explicitly required by Article 9 of the thirteenth Convention of the Hague—is that whatever regulations are made shall be applied to the belligerents concerned with strict impartiality. Neutral impartiality.

“The neutrality of a Power is not affected by the mere passage through its territorial waters of warships or prizes belonging to belligerents” (*k*).

As to straits connecting two open seas, there is a widespread opinion that they ought never to be closed. The present Article left the question open, which depends therefore on the general law of nations.

“A neutral Power may allow belligerent warships to employ its licensed pilots” (*l*).

(*h*) *Ibid.* p. 63.

(*i*) Takahashi, in the *Revue de Droit International*, 1901, p. 264.

(*k*) No. XIII. (1907), Art. 10.

(*l*) Art. 11.

No obligation, of course, lies on the neutral State to supply pilots. It would seem, on principle, that neutral pilots employed by belligerent warships should confine their services to the neutral territorial waters.

Twenty-four  
hours' stay.

"In default of special provisions to the contrary in the legislation of a neutral Power, belligerent warships are forbidden to remain in the ports, roadsteads, or territorial waters of the said Power for more than twenty-four hours, except in the cases covered by the present convention" (*m*).

"If a Power which has been informed of the outbreak of hostilities learns that a belligerent warship is in one of its ports or roadsteads, or in its territorial waters, it must notify the said ship to depart within twenty-four hours or within the time prescribed by the local law" (*n*).

"A belligerent warship may not prolong its stay in a neutral port beyond the time permitted except on account of damage or stress of weather. It must depart as soon as the cause of the delay is at an end. The regulations as to the length of time which such vessels may remain in neutral ports, roadsteads, or waters, do not apply to warships devoted exclusively to religious, scientific, or philanthropic purposes" (*o*).

The "rule of twenty-four hours' stay" is known in international practice for about half a century. It was first adopted by Great Britain in 1862, in order to prevent an abuse of neutral hospitality; and subsequently it was enforced by the United States as well as by Great Britain. The rule was then adopted also by other maritime Powers, *e.g.*, Italy, Scandinavia, Holland, Denmark; but it was not at first formally recognised by France, Germany, and Russia. The Suez Canal Convention, 1888, and the Hay-Pauncefote Treaty, 1901, as to the Panama Canal made provision for a twenty-four hours' stay, save in case of distress. In 1904, on the outbreak of war between Russia and Japan, China issued neutrality regulations, including the twenty-four hours' rule subject to specified exceptions. At this time the *Mandjur*, a Russian warship, was stationed at Shanghai. Accordingly, Japan requested China to insist on the departure of the vessel, or to disarm and intern her. She was therefore dismantled and her crew were sent back to Russia, after giving an undertaking to take no part in the hostilities against Japan (*p*). China took similar measures, at the instance of Japan, in the case of Russian trans-

(*m*) Art. 12.  
(*n*) Art. 13.  
(*o*) Art. 14.

(*p*) Cf. Takahashi, pp. 418 *seq.*;  
Cobbett, Cases, p. 350.

ports and colliers that had taken refuge at Woosung (*q*). Germany, too, adopted the practice as against Russian warships entering Kiao-chow; thus, the *Novik*, being seaworthy, was required to leave within twenty-four hours, whilst the *Czarevitch* and other vessels, being unseaworthy, were dismantled and interned with their crews till the end of the war (*r*). France acted likewise in the case of the Russian cruiser *Diana* that sought asylum at Saigon.

It is to be noted that Article 12 draws no distinction between belligerent warships that are on the way to the scene of the war and those that seek refuge to escape capture. Moreover, the Article provides the limit of twenty-four hours only in case the legislation of the neutral State has not determined otherwise. Such legislation may therefore allow a longer stay to belligerent warships; but having regard to recent practice, it is probable that a sojourn of twenty-four hours will become the invariable rule.

“In default of special provisions to the contrary in the legislation of a neutral Power, the maximum number of warships belonging to a belligerent which may be in one of the ports or roadsteads of that Power simultaneously shall be three” (*s*).

Number of belligerent warships in neutral ports.

“When warships belonging to both belligerents are present simultaneously in a neutral port or roadstead, a period of not less than twenty-four hours must elapse between the departure of the ship belonging to one belligerent and the departure of the ship belonging to the other.

The rule of twenty-four hours' interval.

The order of departure is determined by the order of arrival, unless the ship that arrived first is so circumstanced that an extension of its stay is permissible.

A belligerent warship may not leave a neutral port or roadstead until twenty-four hours after the departure of a merchant ship flying the flag of its adversary” (*t*).

This rule of twenty-four hours' interval dates from the middle of the eighteenth century. Like the rule of twenty-four hours' stay, it was adopted by Great Britain in the American Civil War—for example, in the case of the *Tuscarora* and the *Nashville*—and was incorporated in the Suez Canal Convention (1888), as well as in the Hay-Pauncefote Treaty (1901) between Great Britain and the United States relative to the Panama Canal. It is to be observed that the interval is not limited by the Article to twenty-four hours. It is only the minimum amount that is fixed. The

(*q*) *Ibid.* pp. 435 *seq.*

(*s*) Art. 15.

(*r*) *Ibid.* pp. 447 *seq.* As to internment, see *infra*, Art. 24.

(*t*) Art. 16.



neutral Power may therefore allow a longer period according to the circumstances of each case, provided impartial treatment is meted out to both belligerents.

Repairs in  
neutral ports.

“ In neutral ports and roadsteads belligerent warships may carry out only such repairs as are absolutely necessary to render them seaworthy, and may not add in any manner whatever to their fighting force. The local authorities of the neutral Power shall decide what repairs are necessary, and these must be carried out with the least possible delay ” (*u*).

This Article draws no distinction between unseaworthiness caused by fighting and that brought about by other means, *e.g.*, ‘acts of God.’ It constitutes, in a sense, an exception to the rule that neutrals may not assist belligerent ships of war in carrying on their warlike operations. Although such ships of war may not purchase arms or ammunition, or recruit men, in the neutral port, yet they may be repaired and provisioned in it. This is in reality assisting the belligerent; for the cruiser in fact refits herself for war by repairing her engines, quite as much as by repairing her gun-carriages. But she is allowed to do the one and not the other (*v*). The reason for permitting her to be refitted seems to be, that unless this were allowed she might be unable to leave the neutral port. It would be inhuman to compel her to go to sea without provisions, or in an unseaworthy state; yet the neutral State, in permitting her to enter its harbour, does not bargain that she shall remain there for a prolonged or for an indefinite period.

During the Russo-Japanese war, two Russian warships, the *Askold* and the *Grozovoi*, having suffered in an engagement, proceeded to the port of Shanghai, August 13, 1904. Here they exceeded the length of time fixed by the local regulations, but claimed a longer stay in order to effect repairs. Japan protested against using a neutral port as an asylum after defeat and carrying out repairs for warlike purposes, and therefore called upon China to give them a limited time for necessary repairs or to disarm and intern them if they remained thereafter. As these demands were not satisfactorily fulfilled, Japan despatched an ultimatum to China, requiring the immediate disarmament of the vessels, the cessation of military repairs, and the internment of the vessels and crews. These requirements were eventually complied with (*x*).

In the same war, a Russian auxiliary cruiser, the *Lena*, entered San Francisco harbour in order to repair her engines and boilers.

(*u*) Art. 17.

p. 400.

(*v*) Bernard, *Neutrality of England*,

(*x*) Takahashi, pp. 429 *seq.*

The American naval authorities inspected the vessel and found that the repairs would take six weeks and would restore her fighting power. Accordingly, it was decided to allow the repairs subject to the vessel's disarmament and internment till the end of the war (*y*).

Again, the Russian cruisers, *Aurora*, *Oleg*, and *Zametchug*, having put into Manila, after the battle of Tsushima, requested a prolonged stay for repairing injuries suffered in an engagement. Permission was refused, and the vessels were detained till the conclusion of the war (*z*).

" Belligerent warships may not make use of neutral ports, roadsteads, or territorial waters for replenishing or increasing their supplies of war material or their armament, or for completing their crews " (*a*).

Increase of armaments, &c.

This Article is substantially a reproduction of the latter part of the second rule in the Treaty of Washington (*b*).

" Belligerent warships may only revictual in neutral ports or roadsteads to bring up their supplies to the peace standard.

Supplying provisions and fuel.

Similarly these vessels may only take sufficient fuel to enable them to reach the nearest port in their own country. They may, however, fill up their bunkers built to carry fuel, in neutral countries which have adopted this method of determining the amount of fuel to be supplied.

If, in accordance with the law of the neutral Power, the ships are not supplied with coal within twenty-four hours of their arrival, the duration of their permitted stay is extended by twenty-four hours " (*c*).

" Belligerent warships which have taken fuel in a port belonging to a neutral Power may not replenish their supply in a port of the same Power within the succeeding three months " (*d*).

Formerly a neutral Power was not required by the law of nations to impose restrictions on belligerent warships with regard to the purchase of provisions, coal, and other supplies other than arms and munitions of war. So long as the neutral supplied both parties equally, neither had any right to complain (*e*).

A new departure was made by Great Britain during the American Civil War, when, as we have seen, the belligerent warships were permitted to receive only provisions necessary for the

(*y*) *Ibid.* p. 455.

(*z*) Takahashi, p. 452; Hershey, Russo-Japanese War, pp. 209 *seq.*

(*a*) Art. 18.

(*b*) See *supra*, p. 676.

(*c*) Art. 19.

(*d*) Art. 20.

(*e*) Cf. Ortolan, *Diplomatie de la Mer*, tom. ii. p. 283. British Counter-case at Geneva; Parl. Papers, N. America (1872), No. 4, p. 13.

subsistence of the crew, and such an amount of coal as would carry them to the nearest port of their own country or to some nearer destination; and they were prohibited from obtaining, without special permission, a further supply from any British port within three months. Other Powers adopted this practice, in some cases with certain modifications. In the Russo-Japanese war the British regulations were made more stringent, whilst the French rules allowed much latitude. The Dutch regulations, with regard to the use of the ports of the Netherlands Indies, prohibited, *inter alia*, a stay longer than twenty-four hours, as well as the taking of more provisions or fuel than was necessary to carry the vessel to the nearest port of her country, no further supply being allowed within three months (*f*). Accordingly, when the *Terek*, a Russian cruiser, entered the port of Batavia in June, 1905, she was permitted to remain the length of time fixed and ship coal. The amount taken in the twenty-four hours was not enough for navigating the vessel, and as an extended stay was refused, and the commander declined to leave the port with so little coal, she was disarmed and detained till the end of the war (*g*).

At the Hague Conference there was much difference of opinion on the subject of fuel supply to belligerent warships in neutral ports. Great Britain, backed by the United States, Japan, and other Powers, advocated the practice that had been adopted by several States for half a century, whereby (as we have seen) so much fuel should be allowed as would take the vessel to the nearest port of her own country, or "some nearer named neutral destination." But France, Germany, and Russia urged that belligerent vessels should be allowed to ship a normal peace supply. "The result," says an able American international jurist, "was a compromise which cannot be regarded as satisfactory. The supply of coal in any quantity in neutral waters to a modern battle fleet or warship engaged on an errand of destruction would seem to be a violation of the fundamental principles of neutrality. But the discussion of this question is usually coloured by a sense of national interest. Thus, the main source of the Continental opposition to the limitation or prohibition of the supply of coal to belligerent warships in neutral ports lies in the fact that most of these States are poorly supplied with coaling stations as compared with Great Britain. But, whatever the motive, there can

(*f*) For the regulations of various (Foreign Relations), 58th Congress, States, see U. S. House Documents. 3rd Session, 1904—5, pp. 14 *seq.*

(*g*) Takahashi, p. 457.



be no doubt that British practice in this matter approaches most nearly the ideal or theoretical requirements" (h).

"A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions. It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew" (i).

Prizes in  
neutral ports.

"A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21" (k).

"A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a Prize Court. It may have the prize taken to another of its ports.

If the prize is convoyed by a warship, the prize crew may go on board the convoying ship.

If the prize is not under convoy, the prize crew are left at liberty" (l).

According to the customary law of nations a neutral State was permitted, though not obliged, to admit the prizes taken by belligerents in its ports, and keep them there until they were condemned and sold. In the earlier part of the nineteenth century there was not infrequently, in this respect, considerable abuse of the rights and obligations of neutrality. To remedy this condition of things, neutral States made from time to time restrictive regulations, which were by no means uniform. A definite policy of exclusion was then adopted by Great Britain. During the American Civil War a captor, who brought his prizes into British waters, was to be requested to depart and remove such prizes immediately. A vessel *bonâ fide* converted into a ship of war was, however, not to be deemed a prize. In case of stress of weather, or other extreme and unavoidable necessity, the necessary time for removing the prize was to be allowed. If the prize was not removed by the prescribed time, or if the capture was made in violation of British jurisdiction, the prize was to be detained until Her Majesty's pleasure should be made known. Cargoes were to be subject to the same rules as prizes (m). A

Prizes  
brought into  
British ports.

(h) Hershey, *Essentials of International Public Law* (1912), p. 473 note.

(k) Art. 22.

(l) Art. 23.

(i) Hague Convention (1907), No. XIII. Art. 21.

(m) Circular to Governors of Colonies, 2nd June, 1864.

subsequent order provided that no ship of war of either belligerent should be allowed to remain in a British port for the purpose of being dismantled or sold (*n*).

During the Franco-German war of 1870—1, armed ships of either party were interdicted from carrying prizes made by them into the ports, harbours, roadsteads, or waters of the United Kingdom, or any of Her Majesty's colonies or possessions abroad. A similar rule was made in 1898 and 1904 (*o*).

The British practice of prohibiting the entry of belligerent prizes, except in case of distress, is followed by several States, *e.g.*, Italy, Japan. Other Powers, such as France, Spain, Brazil, retain the earlier rule of twenty-four hours' stay, which was embodied, too, in the Suez Canal Convention (1888), and the Hay-Pauncefote Treaty in regard to the Panama Canal (1901). Article 23 of the thirteenth Convention leaves it to the discretion of a neutral Power as to whether prizes may remain in its ports pending adjudication. It was thought at the Hague Conference that the application of this Article would obviate or minimize the destruction of prizes. Whether this object be ever realised or not, there is no doubt that the provision is not only contrary to the previous predominating practice, but is also objectionable on principle (*p*).

Prizes fitted  
out as ships  
of war.

Prizes are frequently armed and fitted out as vessels of war. After condemnation there is no doubt that the captors may so dispose of the prize; but if this is done before condemnation, although it infringes the owner's rights, it does not seem a settled point what view of the matter neutrals should take, as to admitting the ship into their ports. The neutral may inquire into the antecedents of the ship, and if she proves to be an uncondemned prize may detain her, if orders have been given that prizes are not to enter the neutral ports (*q*), but it is uncertain whether the omission of this inquiry is a violation of neutrality, and will give any ground of complaint to the other belligerent. In 1863, the United States merchant-ship *Conrad* was captured by the *Alabama*. Her name was changed to the *Tuscaloosa*, and an officer and ten men, with two rifle twelve-pounder guns, were put on board, but her cargo of wool was not unshipped. She was then taken to the Cape of Good Hope, and the captain of the

*The Tuscaloosa*

(*n*) London Gazette, 9th Sept. 1864.

(*o*) Lord Granville to Admiralty, &c. London Gazette, 19th July, 1870. Hertslet, Commercial Treaties, xxi. p. 834. Lord Lansdowne to Admiralty. London Gazette, Feb. 10th, 1904.

(*p*) Cf. Higgins, The Hague Conferences, pp. 478 *seq.*

(*q*) Opinion of Law Officers of the Crown. British Appendix to case at Geneva, vol. ii. p. 323.

*Alabama* requested that she should be admitted into Simon's Bay as a tender of his vessel—in other words, as a ship of war. The United States Consul protested against her admission on the ground that she had not been duly condemned, and that, being a prize, she was debarred from entering British ports under the neutrality regulations. The Attorney-General of the Colony, however, gave it as his opinion that she had been sufficiently set forth as a vessel of war to justify the local authorities in admitting her as such, and that her real character could only be determined in the courts of the captor's country. She was, therefore, allowed to enter the port and obtain provisions. On the 26th December, 1863, the *Tuscaloosa* again put into Simon's Bay, and was this time seized by the local authorities. This, however, was considered unjustifiable by the home Government. Whatever the character of the ship might have been during her first visit, she was treated as a ship of war, and was, therefore, entitled to expect the same treatment again, unless she received due warning that a different course would be pursued. Accordingly, orders were sent out to release and deliver her up to some Confederate officer, but in point of fact she was detained by the local authorities till the conclusion of the war, and then delivered up to the United States (r).

"If, notwithstanding the notification of the neutral Power, a belligerent warship does not leave a port where it is not entitled to remain, the neutral Power is entitled to take such measures as it considers necessary to render the ship incapable of putting to sea so long as the war lasts, and the commanding officer of the ship must facilitate the execution of such measures.

Internment  
of belligerent  
vessels.

When a belligerent ship is detained by a neutral Power, the officers and crew are likewise detained.

The officers and crew so detained may be left in the ship or kept either on another vessel or on land, and may be subjected to such restrictions as it may appear necessary to impose upon them. A sufficient number of men must, however, be always left on board for looking after the vessel.

The officers may be left at liberty on giving their word not to quit the neutral territory without permission" (s).

Various instances of internment have already been given which followed substantially these rules, though the cases in question arose before the Hague Convention was established.

(r) Parl. Papers, 1873, N. America (No. 2), pp. 201—204.

(s) Hague Convention (1907), No. XIII. Art. 24. Cf. (as to the

duty of internment in land warfare) Arts. 11—13 of the fifth Convention (1907), *supra*, p. 648.



Due diligence.

"A neutral Power is bound to exercise such vigilance as the means at its disposal allow to prevent any violation of the provisions of the above Articles occurring in its ports or roadsteads, or in its waters" (*t*).

We have already referred to the question of due diligence in connection with the third rule of the Treaty of Washington and with the national neutrality legislation.

Exercise of neutral rights not unfriendly act.

"The exercise by a neutral Power of the rights laid down in the present Convention can under no circumstances be considered as an unfriendly act by one or other belligerent who has accepted the Articles relating thereto" (*tt*).

Communication of municipal provisions.

"The contracting Powers shall communicate to each other in due course all statutes, orders, and other provisions regulating in their respective countries the position of belligerent warships in their ports and waters, by means of a communication addressed to the Government of the Netherlands, and forwarded immediately by that Government to the other contracting Powers" (*u*).

Article 28 contains the usual proviso that the rules of the Convention apply only to the signatory parties, and then only if all the belligerents in a particular war are parties to the Convention.

It must be admitted that this thirteenth Convention concerning the rights and obligations attaching to the status of neutrality in maritime war marks a distinctly progressive stage in the modern development of international law. Some of the most conspicuous defects we have already pointed out, *e.g.*, in Articles 12, 19, 23. But the chief drawback is that, whilst the rights of neutral Powers are definitely affirmed, their obligations are not sufficiently decisive, inasmuch as the fulfilment of them rests too much on discretionary power. However, the Great War of 1914-1915 has shown that with but one exception all the neutral maritime Powers of the world—though not many were left neutral—sought to perform the obligations imposed on them by international law (*x*).

NEUTRAL COMMERCE AND BELLIGERENT RIGHTS.

Having considered the law of neutrality as between State and State, we have now to deal with the law of neutrality as between States and individuals. This brings us to the questions of neutral commerce in relation to belligerent rights, contraband, unneutral service, blockade, and visit and search.

Neutral vessels on the high seas.

The unlawfulness of belligerent captures, made within the terri-

(*t*) Art. 25.

(*tt*) Art. 26.

(*u*) Art. 27.

(*x*) Cf. Phillipson, *Int. Law and the Great War*, *passim*, especially chapters xvi. *seq.*

torial jurisdiction of a neutral State, is incontestably established on principle, usage, and convention. Does this immunity of the neutral territory from the exercise of acts of hostility within its limits, extend to the vessels of the nation on the high seas, and without the jurisdiction of any other State?

We have already seen, that both the public and private vessels of every independent nation on the high seas, and without the territorial limits of any other State, are subject to the municipal jurisdiction of the State to which they belong (*y*). This jurisdiction is exclusive, only so far as respects offences against the municipal laws of the State to which the vessel belongs. It excludes the exercise of the jurisdiction of every other State under its municipal laws, but it does not exclude the exercise of the jurisdiction of other nations, as to crimes under international law; such as piracy, and other offences, which all nations have an equal right to judge and to punish. Does it, then, exclude the exercise of the belligerent right of capturing enemy's property?

This right of capture is confessedly such a right as may be exercised within the territory of the belligerent State, within the enemy's territory, or in a place belonging to no one; in short, in any place except the territory of a neutral State. Is the vessel of a neutral nation on the high seas such a place?

A distinction has been here made between the public and the private vessels of a nation. In respect to its public vessels, it is universally admitted, that neither the right of visit and search, of capture, nor any other belligerent right, can be exercised on board such a vessel on the high seas. A public vessel, belonging to an independent sovereign, is exempt from every species of visit and search, even within the territorial jurisdiction of another State; *à fortiori*, must it be exempt from the exercise of belligerent rights on the ocean, which belongs exclusively to no one nation (*z*).

Distinction  
between  
public and  
private  
vessels.

In respect to private vessels, it has been said the case is different. They form no part of the neutral territory, and, when within the territory of another State, are not exempt from the local jurisdiction. That portion of the ocean which is temporarily occupied by them forms no part of the neutral territory; nor does the vessel itself, which is a moveable thing, the property of private individuals, form any part of the territory of that Power to whose subjects it belongs. The jurisdiction which that Power may lawfully exercise over the vessel on the high seas, is a jurisdiction over the persons and property of its citizens; it is not a territorial juris-

(*y*) *Vide ante*, Pt. II. ch. 2, pp. 163  
*seq.*

(*z*) *Vide ante*, Pt. II. ch. 2, pp. 170  
*seq.*

diction. Being upon the ocean, it is a place where no particular nation has jurisdiction; and where, consequently, all nations may equally exercise their international rights (*a*).

Earlier usage of nations as to enemy's goods in neutral vessels.

Under the earlier usage and practice of belligerent nations, enemy goods in neutral vessels were subjected to capture and condemnation as prize of war (*b*). This constant and universal usage was only interrupted by treaty stipulations, forming a temporary conventional law between the parties thereto (*c*).

Enemy goods on neutral vessels.

The regulations and practice of certain maritime nations at different periods not only considered the goods of an enemy, laden in the ships of a friend, liable to capture, but doomed to confiscation the neutral vessel on board of which these goods were laden. This practice was sought to be justified upon a supposed analogy with that provision of the Roman law which involved the vehicle of prohibited commodities in the confiscation pronounced against the prohibited goods themselves (*d*).

Thus, by the marine ordinance of Louis XIV., of 1681, all vessels laden with enemy's goods were declared lawful prize of war. The contrary rule had been adopted by the preceding prize ordinances of France, and was again revived by the 'règlement' of 1744, by which it was declared, that "in case there should be found on board of neutral vessels, of whatever nation, goods or effects belonging to his Majesty's enemies, the goods or effects shall be good prize, and the vessel shall be restored." Valin, in his commentary upon the ordinance, admits that the more rigid rule, which continued to prevail in the French prize tribunals from 1681 to 1744, was peculiar to the jurisprudence of France and Spain; but that the usage of other nations was only to confiscate the goods of the enemy (*e*).

Goods of a friend on board the ships of an enemy.

Although by the general usage of nations, independently of treaty stipulations, the goods of an enemy, found on board the ships of a friend, were liable to capture and condemnation, yet

(*a*) Rutherford, *Inst.* vol. ii. b. ii. ch. 9, § 19. Azuni, *Diritto Maritimo*, Pt. II. ch. 3, Art. 2. Letter of American Envoys at Paris to M. de Talleyrand, January, 1798. Waite, *American State Papers*, vol. iv. p. 34.

(*b*) As to enemy goods under a neutral flag, see *supra*, p. 569. We have already referred to the Silesian Loan controversy (1752), where the Prussian argument, that the capture of enemy goods on neutral vessels was contrary to the law of nations, was easily disposed of by the British reply.

(*c*) Consolato del Mare, cap. 273. Wheaton, *Hist. Law of Nations*,

pp. 65, 115—119, 200—206. Albericus Gentilis, *Hisp. Advoc. lib. i. cap. 27*. Grotius, *De Jur. Bel. ac Pac. lib. iii. cap. 6, §§ 6, 26; cap. 1, § 5, Note 6*. Bynkershoek, *Quæst. Jur. Pub. lib. i. cap. 14*. Vattel, *Droit des Gens, liv. iii. ch. 7, § 115*. Heineccius, *De Nav. ob vect. cap. 2, § 9*. Loccenius, *De Jure Marit. lib. ii. cap. 4, § 12*. Azuni, *Diritto Marit. Pt. II. ch. 3, Arts. 1, 2*.

(*d*) Barbeyrac, *Note to Grotius, lib. iii. cap. 6, § 6, Note 1*.

(*e*) Valin, *Comm. liv. iii. tit. 9; Des Prises, Art. 7*. Wheaton, *Hist. Law of Nations, p. 111—114*.



the converse rule, which subjected to confiscation the goods of a friend, on board the vessels of an enemy, is manifestly contrary to reason and justice. It may, indeed, afford, as Grotius has stated, a presumption that the goods are enemy property; but it is such a presumption as will readily yield to contrary proof, and not of that class of presumptions which the civilians call 'presumptiones juris et de jure,' and which are conclusive upon the party.

But however unreasonable and unjust this maxim may be, it was incorporated into the prize codes of certain nations, and enforced by them at different periods. Thus, by the French ordinances of 1538, 1543, and 1584, the goods of a friend, laden on board the ships of an enemy, were declared good and lawful prize. The contrary was provided by the subsequent declaration of 1650; but by the marine ordinance of Louis XIV., of 1681, the former rule was again established. Valin and Pothier are able to find no better argument in support of this rule, than that those who place their goods on board enemy vessels thereby favour the commerce of the enemy, and by this act are considered in law as submitting themselves to abide the fate of the vessel; and Valin asks, "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?" To which Pothier himself furnishes the proper answer, that if the king's subjects place their goods on board enemy vessels they contravene the law which interdicts to them all commercial intercourse with the enemy, and deserve to lose their property for this violation of the law (f).

The fallacy of the argument by which this rule is attempted to be supported, consists in assuming, what requires to be proved, that, by the act of placing his goods on board an enemy vessel, the neutral submits himself to abide the fate of the vessel; for it cannot be pretended that the goods are subjected to capture and confiscation *ex re*, since their character of neutral property exempts them from this liability. Nor can it be shown that they are thus liable *ex delicto*, unless it be first proved that the act of placing them on board is an offence against the law of nations. It is therefore with reason that Bynkershoek concludes that this rule, where merely established by the prize ordinances of a belligerent Power, cannot be defended on sound principles. Where, indeed, it is made by special compact the equivalent for the converse maxim, that 'free ships make free goods,' this relaxation of belli-

(f) Valin, Comm. liv. iii. tit. 9; Des Prises, Art. 7. Pothier, Traité de Propriété, No. 96.

gerent pretensions may be fairly coupled with a corresponding concession by the neutral, that 'enemy ships should make enemy goods.' These two maxims have been, in fact, commonly thus coupled in the various treaties on the subject, with a view to simplify the judicial inquiries into the proprietary interest of the ship and cargo, by resolving them into the mere question of the national character of the ship.

The two maxims, of 'free ships free goods' and 'enemy ships enemy goods,' not necessarily connected.

The two maxims are not, however, inseparable. The primitive law, independently of international compact, rests on the simple principle, that war gives a right to capture the goods of an enemy, but gives no right to capture the goods of a friend. The right to capture enemy property has no limit but of the *place* where the goods are found, which, if neutral, will protect them from capture. We have already seen that a neutral vessel on the high seas is not such a place. But neutral property should be exempt from capture, except where the conduct of the neutral gives to the belligerent a right to treat his property as enemy property, *e.g.*, in case of contraband trading, breach of blockade, &c. The neutral flag should constitute no protection to enemy property, and the enemy flag should impart no hostile character to neutral property. States, however, have changed this simple and natural principle of the law of nations by mutual compact, according as they believed it to be for their interest; but the one maxim, that 'free ships make free goods,' does not necessarily imply the converse proposition, that 'enemy ships make enemy goods.' The stipulation, that neutral bottoms shall make neutral goods, is a concession made by the belligerent to the neutral, and gives to the neutral flag a capacity not given to it by the primitive law of nations. On the other hand, the stipulation subjecting neutral property, found in the vessel of an enemy, to confiscation as prize of war, is a concession made by the neutral to the belligerent, and takes from the neutral a privilege he possessed under the pre-existing law of nations; but neither reason nor usage renders the two concessions so indissoluble, that the one cannot exist without the other.

It was upon these grounds that the Supreme Court of the United States determined that the Treaty of 1795, between them and Spain, which stipulated that free ships should make free goods, did not necessarily imply the converse proposition, that enemy ships should make enemy goods, the treaty being silent as to the latter; and that, consequently, the goods of a Spanish subject, found on board the vessel of an enemy of the United States, were not liable to confiscation as prize of war. And although it was

alleged, that the prize law of Spain would subject the property of American citizens to condemnation, when found on board the vessels of her enemy, the court refused to condemn Spanish property found on board a vessel of their enemy, on the principle of reciprocity; because the American Government had not manifested its will to retaliate upon Spain; and until this will was manifested by some legislative act, the court was bound by the general law of nations constituting a part of the law of the land (*g*).

The law established by treaties, in respect to the rule now in question, fluctuated at different periods, according to the fluctuating policy and interests of the different maritime States of Europe. It was much more flexible than the consuetudinary law; but there was a great preponderance of treaties in favour of the maxim, 'free ships free goods,' sometimes, but not always, connected with the correlative maxim, 'enemy ships enemy goods'; so that it may be said that for about two centuries there was a constant tendency to establish, by compact, the principle that the neutrality of the ship should exempt the cargo, even if enemy property, from capture and confiscation as prize of war. The capitulation granted by the Ottoman Porte to Henry IV. of France, in 1604, has commonly been supposed to form the earliest example of a relaxation of the primitive rule of the maritime law of nations, as recognised by the *Consolato del Mare*, by which the goods of an enemy, found on board the ships of a friend, were liable to capture and confiscation as prize of war. But a more careful examination of this instrument will show, that it was not a reciprocal compact between France and Turkey, intended to establish the more liberal maxim of 'free ships free goods'; but was a gratuitous concession, on the part of the Sultan, of a special privilege, by which the goods of French subjects placed on board the vessels of his enemies, and the goods of his enemies placed on board French vessels, were both exempted from capture by Turkish cruisers (*h*).

Conventional  
law as to  
'free ships  
free goods.'

It became, at an early period, an object of interest with Holland, a great commercial and navigating country, whose permanent policy was essentially pacific, to obtain a relaxation of the severe rules which had been previously observed in maritime warfare. The States-General of the United Provinces having complained of the provisions in the French ordinance of

Treaties of  
Holland on  
this subject.

(*g*) *The Nereide* (1815), 9 Cranch, 388.

(*h*) Flassan, *Histoire de la Diplomatie Française*, tom. ii. p. 226.



Henry II., 1538, a treaty of commerce was concluded between France and the Republic, in 1646, by which the operation of the ordinance, so far as respected the capture and confiscation of neutral vessels for carrying enemy property, was suspended; but it was then found impossible to obtain any relaxation as to the liability to capture of enemy property in neutral vessels. This concession the United Provinces obtained from Spain by the Treaty of 1650; from France by the treaty of alliance of 1662; and by the commercial treaty signed at the same time with the peace at Nimiguen in 1678, confirmed by the treaty of Ryswick in 1697. The same stipulation was continued in the treaty of the Pyrenees between France and Spain in 1659. The rule of 'free ships free goods' was coupled, in these treaties, with its correlative maxim, 'enemy ships enemy goods.' The same concession was obtained by Holland from England, in 1668 and 1674, as the price of an alliance between the two countries against the ambitious designs of Louis XIV. These treaties gave rise, in the war which commenced in 1756 between France and Great Britain, to a remarkable controversy between the British and Dutch Governments, in which it was contended, on the one side, that Great Britain had violated the rights of neutral commerce, and on the other, that the States-General had not fulfilled the guaranty which constituted the equivalent for the concession made to the neutral flag, in derogation of the pre-existing law of nations (*i*).

Portuguese  
treaty.

A treaty of commerce and navigation was concluded between England and Portugal in 1654, by which the principle of 'free ships free goods,' coupled with the correlative maxim of 'enemy ships enemy goods,' was adopted between the contracting parties. This stipulation continued to form the conventional law between the two nations, also closely connected by political alliance, until the revision of this treaty in 1810, when the stipulation in question was omitted, and was not renewed.

Union of the  
two maxims  
in treaties.

The principle that the character of the vessel should determine that of the cargo was adopted by the treaties of Utrecht of 1713, subsequently confirmed by those of 1721 and 1739, between Great

(*i*) Dumont, Corps Diplomatique, tom. vi. pt. i. p. 342. Flassan, Histoire de la Diplomatie Française, tom. iii. p. 451. A pamphlet was published on the occasion of this controversy between the British and Dutch Governments, by the elder Lord Liverpool (then Mr. Jenkinson), entitled, "A Discourse on the Conduct

of Great Britain in respect to Neutral Nations during the present War," which contains a very full and instructive discussion of the question of neutral navigation, both as resting on the primitive law of nations and on treaties. London, 8vo. 1757. 2nd ed. 1794; 3rd ed. 1801.

Britain and Spain, by the treaty of Aix-la-Chapelle, in 1748, and of Paris in 1763, between Great Britain, France, and Spain (*k*).

Such was the state of the consuetudinary and conventional law prevailing among the principal maritime Powers of Europe, when the declaration of independence by the British North American colonies, now constituting the United States, gave rise to a maritime war between Great Britain and France. With a view to conciliate those Powers that remained neutral in this war, the cabinet of Versailles issued, on the 26th of July, 1778, an ordinance or instruction to the French cruisers, prohibiting the capture of neutral vessels, even when bound to or from enemy ports, unless laden in whole or in part with contraband articles destined for the enemy's use; reserving the right to revoke this concession, unless the enemy should adopt a reciprocal measure within six months. The British Government, far from adopting any such measure, issued in March, 1780, an order in council suspending the special stipulations respecting neutral commerce and navigation contained in the treaty of alliance of 1674 between Great Britain and the United Provinces, on the alleged ground that the States-General had refused to fulfil the reciprocal conditions of the treaty. Immediately after this order in council, the Empress Catharine II. of Russia communicated to the different belligerent and neutral Powers the famous declaration of neutrality, the principles of which were acceded to by France, Spain, and the United States of America, as belligerent; and by Denmark, Sweden, Prussia, Holland, the Emperor of Germany, Portugal, and Naples, as neutral Powers. By this declaration, which afterwards became the basis of the armed neutrality of the Baltic Powers, the rule that free ships make free goods was adopted, without the previously associated maxim that enemy ships should make enemy goods. The British Government answered this declaration by appealing to the "principles generally acknowledged as the law of nations, being the only law between Powers where no treaties subsist"; and to the "tenor of its different engagements with other Powers, where those engagements had altered the primitive law by mutual stipulations, according to the will and convenience of the contracting parties." Circumstances rendered it convenient for the British Government to dissemble its resentment towards Russia, and the other northern Powers, and the war was terminated without any formal adjustment of this

Armed  
Neutrality  
of 1780.

(*k*) Wheaton, *Hist. Law of Nations*, pp. 120—125.

dispute between Great Britain, and the other members of the armed neutrality (*l*).

Treaties uniting the maxims not renewed.

By the treaties of peace concluded at Versailles in 1783, between Great Britain, France, and Spain, the treaties of Utrecht were once more revived and confirmed. This confirmation was again reiterated in the commercial treaty of 1786, between Great Britain and France, by which the two kindred maxims were once more associated. In the negotiations at Lisle in 1797, it was proposed by the British plenipotentiary, Lord Malmesbury, to renew all the former treaties between the two countries confirmatory of those of Utrecht. This proposition was objected to by the French ministers, for several reasons foreign to the present subject; to which Lord Malmesbury replied that these treaties were become the law of nations, and that infinite confusion would result from their not being renewed. It is probable, however, that his lordship meant to refer to the territorial arrangements rather than to the commercial stipulations contained in these treaties. Be this as it may, the fact is, that they were not renewed, either by the treaty of Amiens in 1802, or by that of Paris in 1814.

Practice during the French Revolution.

During the protracted wars of the French Revolution all the belligerent Powers began by discarding in practice not only the principles of the armed neutrality, but even the generally received maxims of international law, by which the rights of neutral commerce in time of war had been previously regulated. "Russia," says Von Martens, "made common cause with Great Britain and with Prussia, to induce Denmark and Sweden to renounce all intercourse with France, and especially to prohibit their carrying goods to that country. The incompatibility of this pretension with the principles established by Russia in 1780, was veiled by the pretext, that in a war like that against revolutionary France, the rights of neutrality did not come in question." France, on her part, revived the severity of her ancient prize code, by decreeing not only the capture and condemnation of the goods of her enemies found on board neutral vessels, but even of the vessels themselves laden with goods of British growth, produce, and manufacture.

Armed Neutrality of 1800.

But in the further progress of the war, the principles which had formed the basis of the Armed Neutrality of the northern Powers in 1780, were revived by a new maritime confederacy between

(*l*) Flassan, *Diplomatie Française*, tom. vii. pp. 183, 273. Annual Register, vol. xxiii. p. 205, State Papers, pp. 345—356; vol. xxiv. p. 300. Wheaton, *Hist. Law of Nations*, pp. 294—305.



Russia, Denmark, and Sweden, formed in 1800, to which Prussia acceded. This league was soon dissolved by the naval power of Great Britain and the death of the Emperor Paul; and the principle now in question was expressly relinquished by Russia in the convention signed at St. Petersburg in 1801, between that Power and the British Government, and subsequently acceded to by Denmark and Sweden. In 1807, in consequence of the stipulations contained in the treaty of Tilsit between Russia and France, a declaration was issued by the Russian Court, in which the principles of the armed neutrality were proclaimed anew, and the convention of 1801 was annulled by the Emperor Alexander. In 1812, a treaty of alliance against France was signed by Great Britain and Russia; but no convention respecting the freedom of neutral commerce and navigation was concluded between these two Powers (*m*).

The maritime law of nations that regulated the intercourse of the European States was adopted by the United States during the war of their revolution. The American Courts of Prize then acted upon the generally received principles of European public law, that enemy property in neutral vessels was liable to, whilst neutral property in an enemy's vessel was exempt from, capture and confiscation; until Congress issued an ordinance recognising the maxims of the armed neutrality of 1780, on condition that they should be reciprocally acknowledged by the other belligerent Powers. In the instructions given by Congress, in 1784, to their ministers appointed to treat with the different European Courts, the same principles were proposed as the basis of negotiation by which the independence of the United States was to be recognised. During the wars of the French Revolution, the United States, being neutral, admitted that the immunity of their flag did not extend to cover enemy property, as a principle founded in the customary law and established usage of nations, though they sought every opportunity of substituting for it the opposite maxim of 'free ships free goods' by conventional arrangements with such nations as were disposed to adopt that amendment of the law. In the course of the correspondence which took place between the minister of the French Republic and the Government of the United States, the latter affirmed that it could not be doubted that, by the general law of nations, the goods of a friend found in the vessel of an enemy were free, and the goods of an enemy found in the vessel of a friend were lawful prize. It was true that several

The international law of Europe adopted by America, and modified by treaty.

(*m*) Wheaton, Hist. Law of Nations, pp. 397—401.

nations, desirous of avoiding the inconvenience of having their vessels stopped at sea, overhauled, carried into port, and detained, under pretence of having enemy goods on board, had in many instances introduced by special treaties the principle that enemy ships should make enemy goods, and friendly ships friendly goods—a principle much less embarrassing to commerce, and equal to all parties in point of gain and loss; but this was altogether the effect of particular treaties, controlling in special cases the general principle of the law of nations, and therefore taking effect between such nations only as had so agreed to control it. England had generally determined to adhere to the rigorous principle, having in no instance, so far as was recollected, agreed to the modification of letting the property of the goods follow that of the vessel, except in the single one of her treaties with France. The United States had adopted this modification in their treaties with France, with the United Netherlands, and with Prussia; and therefore, as to those Powers, American vessels covered the goods of their enemies, and the United States lost their goods when in the vessels of the enemies of those Powers. With Great Britain, Spain, Portugal, and Austria, the United States had then no treaties; and therefore had nothing to oppose them in acting according to the general law of nations, that enemy goods were lawful prize though found in the ships of a friend (*n*).

Conflict in provisions of treaties with England and with France.

By the treaty of 1794 between the United States and Great Britain, Article 17, it was stipulated 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 that part of the cargo only which consisted of enemy property, or contraband for the enemy's use, should be made prize, and the vessel be at liberty to proceed with the remainder of her cargo. In the treaty of 1778, between France and the United States, the rule of 'free ships free goods' had been stipulated; and, as we have already seen, France complained that her goods were taken out of American vessels without resistance by the United States, who, it was alleged, had abandoned by their treaty with Great Britain their antecedent engagements to France, recognising the principles of the armed neutrality.

To these complaints the American Government replied that when the treaty of 1778 was concluded, the armed neutrality had not been formed, and consequently the state of things on which

(*n*) Mr. Jefferson's Letter to M. Genêt, July 24, 1793. Waite, American State Papers, vol. i. p. 134. See also President Jefferson's Letter to

Mr. R. R. Livingston, American Minister at Paris, Sept. 9, 1801. Jefferson, Memoirs, vol. iii. p. 489.



that treaty operated was regulated by the pre-existing law of nations, independently of the principles of the armed neutrality. By that law, free ships did not make free goods, nor enemy ships enemy goods. The stipulation, therefore, in the treaty of 1778 formed an exception to a general rule, which retained its obligation in all cases where not changed by compact. Had the treaty of 1794 between the United States and Great Britain not been formed, or had it entirely omitted any stipulation on the subject, the belligerent right would still have existed. The treaty did not concede a new right, but only mitigated the practical exercise of a right already acknowledged to exist. The desire of establishing universally the principle, that neutral ships should make neutral goods, was felt by no nation more strongly than by the United States. It was an object which they kept in view, and would pursue by such means as their judgment might dictate. But the wish to establish a principle was essentially different from an assumption that it is already established. However solicitous America might be to pursue all proper means tending to obtain the concession of this principle by any or all of the maritime Powers of Europe, she had never conceived the idea of obtaining that consent by force. The United States would only arm to defend their own rights: neither their policy nor their interests permitted them to arm in order to compel a surrender of the rights of others (*o*).

The principle of 'free ships free goods' had been stipulated by the treaty of 1785, Article 12, between the United States and Prussia, without the correlative maxim of 'enemy ships enemy goods. It was as follows: "If one of the contracting parties should be engaged in war with any other Power, the free intercourse and commerce of the subjects or citizens of the party remaining neuter with the belligerent Powers shall not be interrupted. On the contrary, in that case, as in full peace, the vessels of the neutral party may navigate freely to and from the ports and on the coasts of the belligerent parties, free vessels making free goods, insomuch that all things shall be adjudged free which shall be on board any vessel belonging to the neutral party, although such things belong to an enemy of the other; and the same freedom shall be extended to persons who shall be on board a free vessel, although they should be enemies to the other party, unless they be soldiers in actual service of such enemy."

Negotiation  
between the  
American  
and Prussian  
Governments.

(*o*) Letter of the American Envoys at Paris, Messrs. Marshall, Pinkney, and Gerry, to M. de Talleyrand, Jan. 17, 1798. Waite, State Papers, vol. iv. pp. 38—47.



American proposal to omit the rule of free ships free goods.

The above treaty having expired, by its own limitation, in 1796, a negotiation was commenced by the American and Prussian Governments for its renewal. But it was proposed by the former that the Article, recognising the principle of 'free ships free goods'—though a most desirable one—should be abandoned, because it was not universally admitted or respected among maritime nations, and that the ordinary rule of the law of nations should be substituted, whereby enemy property on neutral vessels was liable to capture, whilst neutral property on enemy vessels was exempt (*p*). As the view of the Prussian Government differed as to the ordinary law of nations, the United States suggested that the Article in question should be merely omitted from the new treaty and not replaced by another provision, and pointed out that they would be always ready to adopt the most liberal principles in favour of neutral commerce in time of war, if there were a reasonable expectation of seeing them faithfully recognised by others. Eventually, a treaty was concluded between the two Powers (July 11, 1799), the twelfth Article being as follows: "Experience having proved that the principle adopted in the twelfth Article of the treaty of 1785, according to which 'free ships make free goods,' has not been sufficiently respected during the last two wars, and especially in that which still continues, the two contracting parties propose, after the return of a general peace, to agree, either separately between themselves, or jointly with other Powers alike interested, to concert with the great maritime Powers of Europe such arrangements and such permanent principles, as may serve to consolidate the liberty and the safety of the neutral navigation and commerce in future wars. And if, in the interval, either of the contracting parties should be engaged in war, to which the other should remain neutral, the ships of war and privateers of the belligerent Power shall conduct themselves towards the merchant vessels of the neutral Power as favourably as the course of the war then existing may permit; observing the principles and rules of the law of nations generally acknowledged" (*q*). This Article was re-introduced in the treaty of 1828 between the parties.

Rule in American Prize Courts.

During the war which commenced between the United States and Great Britain in 1812, the Prize Courts of the former uniformly enforced the generally acknowledged rule of international law, that enemy's goods in neutral vessels are liable to capture and

(*p*) Mr. Secretary Pickering to Mr. John Quincy Adams, Minister of the U. S. at Berlin, July 15, 1797; July

17, 1797; Mr. Adams to the Prussian negotiators, Oct. 29, 1798.

(*q*) American State Papers, fol. ed. vol. ii. pp. 251—269.

confiscation, except as to such Powers with whom the American Government had stipulated by subsisting treaties the contrary rule, that free ships should make free goods.

In their earliest negotiations with the newly established republics of South America, the United States proposed the establishment of the principle of 'free ships free goods,' as between all the Powers of the North and South American continents. It was declared that the rule of public law—that the property of an enemy is liable to capture in the vessels of a friend—has no foundation in natural right, and, though it be the established usage of nations, rests entirely on the abuse of force. No neutral nation, it was said, was bound to submit to the usage; and though the neutral may have yielded at one time to the practice, it did not follow that the right to vindicate by force the security of the neutral flag at another time was thereby permanently sacrificed. But the neutral claim to cover enemy property was conceded to be subject to this qualification: that a belligerent may justly refuse to neutrals the benefit of this principle, unless admitted also by the enemy for the protection of the same neutral flag. It was accordingly stipulated, in the treaty between the United States and the Republic of Colombia, that the rule of 'free ships free goods' should be understood "as applying to those Powers only who recognise this principle; but if either of the two contracting parties shall be at war with a third, and the other neutral, the flag of the neutral shall cover the property of enemies whose Governments acknowledge the same principle, and not of others." The same restriction of the rule had been previously incorporated into the treaty of 1819, between the United States and Spain, and has been subsequently inserted in their different treaties with the other South American Republics (r).

Treaties between the United States and the South American republics.

It has been decided in the Prize Courts, both of the United States and of Great Britain, that the privilege of the neutral flag of protecting enemy property, whether stipulated by treaty or established by municipal ordinances, however comprehensive may be the terms in which it may be expressed, cannot be interpreted to extend to the fraudulent use of that flag to cover enemy property in the ship, as well as the cargo (s). Thus during the war of the Revolution (between Great Britain on the one side,

Covering enemy goods in neutral ships by false papers.

(r) Mr. Secretary Adams's Letter to Mr. Anderson, American minister to the Republic of Colombia, 27th of May, 1823. For the practice of the Prize Court, as to the allowance or refusal of freight on enemies' goods taken on board neutral ships, and on neutral

goods found on board an enemy ship, see Wheaton's Rep. vol. ii. Appendix, Note I. pp. 54—56; and especially Sir W. Scott's judgment in *The Fortuna* (1802), 4 C. Rob. 278.

(s) *The Citade de Lisboa* (1806), 6 C. Rob. 358.



and the United States and France on the other), the United States, recognising the principles of the armed neutrality of 1780—including the rule of ‘free ships free goods’—exempted by an ordinance of Congress all neutral vessels from capture, except such as were employed in carrying contraband goods, or soldiers, to the enemy. It was held by the Federal Court of Appeals in prize causes that this exemption did not extend to a vessel which had forfeited her privilege by grossly unneutral conduct in taking a decided part with the enemy, by combining with his subjects to wrest out of the hands of the United States, and of France, their ally, the advantages they had acquired over Great Britain by the rights of war in the conquest of Dominica. By the capitulation of that island, all commercial intercourse with Great Britain had been prohibited. In the case in question, the vessel had been purchased in London, by neutrals, who supplied her with false and colourable papers, and assumed on themselves the ownership of the cargo for a voyage from London to Dominica. Had she been employed in a fair commerce, such as was consistent with the rights of neutrality, her cargo, though the property of an enemy, could not be seized as prize of war; because Congress had said, by their ordinance, that the rights of neutrality should extend protection to such effects and goods of an enemy. But if the neutrality were violated, Congress had not said that such a violated neutrality would give such protection. Nor could they have said so, without confounding all the distinctions of right and wrong; and Congress did not mean, in their ordinance, to ascertain in what cases the rights of neutrality should be forfeited, to the exclusion of all other cases; for the instances not mentioned were as flagrant as the cases particularised (*t*).

By the treaty of 1654, between England and Portugal, it was stipulated (Article 23), “That all goods and merchandise of the said Republic or King, or of their people or subjects, found on board the ships of the enemies of either, shall be made prize, together with the ships, and confiscated. But all the goods and merchandise of the enemies of either on board the ships of either, or of their people or subjects, shall remain free and untouched.”

Rule of  
enemy ships  
enemy goods  
not applicable  
when the  
goods are  
shipped  
before war.

Under this stipulation, thus coupling the two opposite maxims of ‘free ships free goods,’ and ‘enemy ships enemy goods,’ it was determined by the British Prize Courts, that the former provision of this Article, which subjected to condemnation the goods of either nation found on board the ships of the enemy of the other

(*t*) *The Erstern (Darby v. The Erstern)* (1782), 2 Dallas, 34.



contracting party, could not be fairly applied to the case of property shipped before the contemplation of war. Sir W. Scott (Lord Stowell) observed, in delivering his judgment in this case, that it did not follow, that because Spanish property put on board a Portuguese ship would be protected in the event of the interruption of war, therefore Portuguese property on board a Spanish ship should become instantly confiscable on the breaking out of hostilities with Spain; that, in one case, the conduct of the parties would not have been different, if the event of hostilities had been known. The cargo was entitled to the protection of the ship, generally, by this stipulation of the treaty, even if shipped in open war; and *à fortiori*, if shipped under circumstances still more favourable to the neutrality of the transaction. In the other case, there might be reason to suppose, that the treaty referred only to goods shipped on board an enemy's vessel, in an avowed hostile character; and that the neutral merchant would have acted differently, if he had been apprised of the character of the vessel at the time when the goods were put on board (*u*).

The same principle has been frequently incorporated into treaties between various nations, by which the principle of 'free ships free goods' is associated with that of 'enemy ships enemy goods.' The treaties of Utrecht expressly recognise it, and it has been also incorporated into the different treaties between the United States and the South American Republics, with this qualification, "that it shall always be understood, that the neutral property found on board such enemy's vessels shall be held and considered as enemy's property, and as such shall be liable to detention and confiscation, except such property as was put on board such vessel before the declaration of war, or even afterwards, if it were done without the knowledge of it; but the contracting parties agree that two months having elapsed after the declaration, their citizens shall not plead ignorance thereof" (*x*).

The two maxims in later treaties.

It is clear from the above account, that with respect to the treatment of neutral commerce in time of war the practices of belligerents were for a long time divergent, and the practice of each belligerent varied at different times according to considerations of policy and interest. On the outbreak of the Crimean war it was evident to the allies, Great Britain and France, that it was

The Declaration of Paris, 1856

(*u*) *The Marianna* (1805), 5 C. Rob. 28.

(*x*) Treaty of 1828, between the United States and Colombia, Art. 13. By the Treaty of 1831, between the United States and Mexico; by that of

1834, with Chile, Art. 13, the term of four months is established for the same purpose; and by that of 1842, with Ecuador, Art. 16, the term of six months.

essential to adopt, on their part, uniform maritime practice. We have already seen that they agreed to discontinue privateering, and to use in their naval hostilities against Russia only public warships (*y*). They agreed, too, that they would not seize enemy goods in neutral ships or neutral goods in enemy ships; thus each waived formerly asserted rights. On the conclusion of the war these relaxations of maritime practice, together with other principles, were embodied in the Declaration of Paris, 1856. Article 2 says: "The neutral flag covers enemy's goods, with the exception of contraband of war." Article 3: "Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag." The original parties to this international Convention, and the later accessions, have already been pointed out (*z*). There is no doubt that the principles affirmed in the Declaration now constitute part of general international law, and are even binding on those States that were not signatories and have not formally notified their adhesion to it.

**CONTRABAND  
OF WAR.**

The general freedom of neutral commerce with the respective belligerent Powers is subject to certain specific exceptions. Among these is the trade with the enemy in certain articles called contraband of war (*a*).

**Meaning of  
contraband.**

Contraband of war may be said to comprise such articles as are regarded by the belligerents as being intrinsically objectionable, on the ground that they will be of assistance to the enemy in the prosecution of hostilities. "The notion of contraband connotes two elements: it concerns objects of a certain kind and with a certain destination. Cannons, for instance, are carried in a neutral vessel. Are they contraband? That depends: if they are destined for a neutral Government, no; if destined for an enemy Government, yes. The trade in certain articles is by no means generally forbidden during war; it is the trade with the enemy in these articles which is illicit, and against which the belligerent to whose detriment it is carried on may protect himself by the measures allowed by international law" (*b*). The essential elements are thus usefulness in war and hostile destination. Here it is necessary to draw a distinction between articles regarded as

(*y*) Cf. *supra*, p. 547.

(*z*) *Ibid.*

(*a*) The Popes prohibited trade with infidels in certain articles, *e.g.*, weapons and munitions of war—"merces banno interdictae"—trade in

such forbidden articles was said to be "contra bannum," hence the word.

(*b*) Report on the Declaration of London (which constitutes part of the agreement of the London Naval Conference, 1908—9); see Parl. Papers, Miscell. No. 4 (1909), pp. 33 *seq.*

'absolute' contraband, and those regarded as 'conditional,' 'relative,' or 'occasional' contraband. The former class includes such things as are specially adapted and used for warlike purposes, and are therefore confiscable if found on their way to any part of the enemy territory. The latter class includes other articles useful in peace as well as for war, and are subject to seizure if intercepted on their way to the enemy forces. A third class of articles is usually made, comprising only those things that are adapted only for purposes of peaceful occupation and peaceful conditions. But whilst there has generally been agreement as to such a threefold classification, there has never been a consensus of opinion with regard to the contents or denotation of these classes. Indeed, there is no subject of international law that has provoked so much controversy as the question of contraband has aroused during the last two or three centuries. With regard to one class of things the difficulty has not been so great. The almost unanimous authority of writers, of prize ordinances, and of treaties, agrees to enumerate among absolute contraband all warlike instruments, or materials by their own nature fit to be used in war. Beyond these, there is some difficulty in reconciling the conflicting authorities derived from the opinions of public jurists, the fluctuating usage among nations, and the texts of various conventions that had been designed to give that usage the fixed form of positive law.

Grotius, in considering this subject, makes a distinction 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 war and in peace ('*res ancipitis usûs*'). The first he agrees with all other text writers in prohibiting neutrals from carrying to the enemy, as well as in permitting the second to be so carried; the third class, such as money, provisions, ships, and naval stores, he sometimes prohibits, and at others permits, according to the existing circumstances of the war (*c*).

Classification  
of Grotius.

Vattel makes somewhat of a similar distinction, though he includes timber and naval stores among those articles which are particularly useful for the purposes of war, and are always liable to capture as contraband; and considers provisions as such only under certain circumstances, "when there are hopes of reducing the enemy by famine" (*d*).

Position of  
Vattel.

Bynkershoek strenuously contends against admitting into the list of contraband articles those things which are of promiscuous use in peace and in war. He considers the limitation assigned by

Of Bynker-  
shoek.

(*c*) Grotius, *De Jur. Bel. ac Pac.*  
lib. iii. cap. 1, § v. 1, 2, 3.

(*d*) Vattel, *Droit des Gens*, liv. iii.  
ch. 7, § 112.



Grotius to the right of intercepting them, confining it to the case of necessity, and under the obligation of restitution or indemnification, as insufficient to justify the exercise of the right itself. He concludes that the materials out of which contraband articles may be formed are not themselves contraband; because if all the materials may be prohibited, out of which something may be fabricated that is fit for war, the catalogue of contraband goods will be almost interminable, since there is hardly any kind of material out of which something, at least, fit for war may not be fabricated. The interdiction of so many articles would amount to a total interdiction of commerce, and might as well be so expressed. He qualifies this general position by stating that it may sometimes happen that materials for building ships are prohibited, "if the enemy is in great need of them, and cannot well carry on the war without them." On this ground he justifies the edict of the States-General of 1657 against the Portuguese, and that of 1652 against the English, as exceptions to the general rule that materials for ship-building are not contraband. He also states that "provisions are often excepted" from the general freedom of neutral commerce "when the enemies are besieged by our friends, or are otherwise pressed by famine" (e).

Valin and Pothier both concur in declaring that provisions ('munitions de bouche') are not contraband by the prize law of France, or the common law of nations, unless in the single case where they are destined to a besieged or blockaded place (f).

Naval stores,  
how far  
contraband.

Valin, in his commentary upon the marine ordinance of Louis XIV., by which only munitions of war were declared to be contraband, says:—"In the war of 1700, pitch and tar were comprehended in the list of contraband, because the enemy treated them as such, except when found on board Swedish ships, these articles being of the growth and produce of their country. In the treaty of commerce concluded with the King of Denmark, by France, the 23rd of August, 1742, pitch and tar were also declared contraband, together with resin, sail-cloth, hemp and cordage, masts, and ship-timber. Thus, as to this matter there is no fault to be found with the conduct of the English, except where it contravenes particular treaties; for in law these things are now contraband, and have been so since the beginning of the present century, which was not the case formerly, as it appears by ancient treaties, and particularly that of St. Germain, concluded with

(e) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 10.

(f) Valin, Comment. sur l'Ordon. liv. iii. tit. 9; Des Prises, Art. 11. Pothier, Traité de Propriété, No. 104.

England in 1677; the fourth Article of which expressly provides that the trade in all these articles shall remain free, as well as in everything necessary to human nourishment, with the exception of places besieged or blockaded" (g).

In the famous case of the Swedish convoy, determined in the English Court of Admiralty, in 1799, Sir W. Scott (Lord Stowell) says: "That tar, pitch, and hemp, going to the enemy's use, are liable to be seized as contraband in their own nature, cannot, 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 making that treaty," (that is, the treaty of 1661, between Great Britain and Sweden, which was still in force when he was pronouncing this judgment) "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 contrebande aujourd'hui, et depuis le commencement de ce siècle, ce qui n'étoit pas autrefois néanmoins;'—and Vattel, the best recent writer upon these matters, explicitly admits amongst positive contraband, 'les bois, et tout ce qui sert à la construction at à l'armement de vaisseaux de guerre.' Upon this principle was founded the modern explanatory Article of the Danish treaty, entered into in 1780, on the part of Great Britain by a noble lord (Mansfield) then Secretary of State, whose attention had been peculiarly turned to subjects of this nature. I am, therefore, of opinion, that, although it might be shown that the nature of these commodities had been subject to some controversy in the time of Whitlock, when the fundamental treaty was constructed, and therefore a discreet silence concerning them was observed in the composition of that treaty, and of the latter treaty derived from it, yet that the exposition which the later judgment and practice of Europe had given upon this subject would, in some degree, affect and supply what the treaties had been content to leave on that indefinite and disputable footing, on which the notions then more generally prevailing in Europe had placed it" (h).

Judgment of Lord Stowell as to naval stores.

It seems difficult to read the treaties of 1656 and 1661, between Great Britain and Sweden, as fairly admitting the interpretation placed upon them in the above-cited judgment. These treaties, together with those subsequently concluded between the same

Criticism on this decision.

(g) Valin, Comm. sur l'Ordon. liv. iii. tit. 9; Des Prises, Art. 11. (h) *The Maria* (1799), 1 C. Rob. 372.

Powers in 1664 and 1665, all enumerate coined money, provisions, and munitions of war as contraband between the contracting parties; and the 'discreet silence' referred to by Lord Stowell is sufficiently supplied by the treaties of 1664 and 1665, which expressly declared that, "where one of the parties shall find itself at war, commerce and navigation shall be free for the subjects of that Power which shall not have taken any part in it with the enemies of the other; and that they shall, consequently, be at liberty to carry to them directly all the articles which are not specially excepted by the 11th Article of the treaty concluded at London in 1661, nor by virtue of this same Article expressly declared prohibited or contraband, or which are not enemy's property." The following Article is still more explicit: "And to the end that it may be known to all those who shall read these presents, what are the goods especially excepted and prohibited, or regarded as contraband, it has appeared fit to enumerate them here according to the aforesaid 11th Article of the Treaty of London. These goods specially designated are the following," &c. Here follows the enumeration, as in the 11th Article, which makes no mention of naval stores (*i*).

Views of Sir  
L. Jenkins.

This view seems to be confirmed by the opinion given in 1674, by Sir Leoline Jenkins, to King Charles II., in the case of a cargo of naval stores, the produce of Sweden, belonging to an English subject, taken on board a Swedish vessel, and carried into Ostend by a Spanish privateer. "There is not any pretence to make the pitch and tar belonging to your Majesty's subjects to be contraband; these commodities not being enumerated in the 24th 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. The single objection that seems to lie against the petitioner in this case is, that this tar and pitch is found laden, not in an English, but a Swedish bottom, as by the proofs and documents on board it doth appear; and, consequently, that the benefit of those Articles in the Spanish Treaty cannot be claimed here, since they are in favour of our trade in those commodities that shall be found laden in our own, not in foreign bottoms; but it is not probable that Sweden hath suffered or allowed, in any treaty of theirs with Spain, that their own native commodities, pitch and tar, should be reputed contraband. These goods, therefore, if they be not made unfree by being found in an unfree bottom, cannot be judged by any other

(*i*) Schlegel, Examen de la Sentence Anglaise, le 11 Juin, 1799, dans prononcée par le tribunal d'Amirauté l'affaire du convoi Suédois, p. 125.



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. So that, upon the whole, your Majesty's gracious intercession for, and protection to, the petitioner in his claim, will be founded, not upon the equity and the true meaning of your Majesty's treaty with Spain, but upon the general law and practice of all nations" (j).

By the treaty of navigation and commerce of Utrecht, between Great Britain and France, renewed and confirmed by the Treaty of Aix-la-Chapelle, in 1748, by the Treaty of Paris, in 1763, by that of Versailles, in 1783, and by the commercial treaty between France and Great Britain, of 1786, the list of contraband is strictly confined to munitions of war; and naval stores, provisions, and all other goods which have not been worked into the form of any instrument or furniture for warlike use, by land or by sea, are expressly excluded from this list.

The subject of the contraband character of naval stores continued a vexed question between Great Britain and the Baltic Powers, throughout the whole of the eighteenth century. Various relaxations of the extreme belligerent pretensions on this subject had been conceded in favour of the commerce, in articles the peculiar growth and productions of these States, either by permitting them to be freely carried to the enemy's ports, or by mitigating the original penalty of confiscation, on their seizure, to the milder right of preventing the goods being carried to the enemy, and applying them to the use of the belligerent, on making a pecuniary compensation to the neutral owner. This controversy was at last terminated by the convention between Great Britain and Russia, concluded in 1801, to which Denmark and Sweden subsequently acceded. By the 3rd Article of this treaty it is 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 11th Article of the 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, fire-locks, flints, matches, powder, saltpetre, sulphur, helmets, pikes, swords, sword-belts, saddles, and bridles; excepting, however, the

Anglo-French treaties as to naval stores.

England and the Baltic Powers.

Treaty between Great Britain and Russia, 1801.

(j) Life and Correspondence of Sir L. Jenkins, vol. ii. p. 751.

quantity of the said articles which may be necessary for the defence of the ship and of 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. It is also agreed, that what is stipulated in the present Article shall not be to the prejudice of the particular stipulations of one or the other crown with other Powers, by which objects of a similar kind should be reserved, provided, or permitted."

The object of this convention is declared, in its preamble, to be the settlement of the differences between the contracting parties, which had grown out of the armed neutrality, by "an invariable determination of their principles upon the rights of neutrality, in their application to their respective monarchies"; which object was accomplished by the northern Powers yielding the rule of 'free ships free goods,' whilst Great Britain conceded the points asserted by them as to contraband, blockades, and the coasting and colonial trade. The 8th Article of the treaty also said: "The principles and measures adopted by the present act shall be alike applicable to all the maritime wars in which one of the two Powers may be engaged, whilst the other remains neutral. These stipulations shall consequently be regarded as permanent, and shall serve for a constant rule to the contracting Powers in matters of commerce and navigation."

Anglo-Swedish  
treaty of 1803.

The list of contraband contained in the convention between Great Britain and Russia, to which Sweden acceded, differed, in some respects, from that contained in the 11th Article of the treaty of 1661, between Great Britain and Sweden. In order to prevent a recurrence of the disputes which had arisen relative to that Article, a convention was concluded at London between these two Powers on the 25th of July, 1803, by which the list of contraband contained in the convention between Great Britain and Russia was augmented, with the addition of the articles of coined money, horses, and the necessary equipments of cavalry, ships of war, and all manufactured articles serving immediately for their equipment, all which articles were subjected to confiscation. It was further stipulated that all naval stores, the produce of either country, should be subject to the right of pre-emption by the belligerent party, upon condition of paying an indemnity of ten per cent. upon the invoice price or current value, with demurrage and expenses. If bound to a neutral port, and detained upon

suspicion of being bound to an enemy's port, the vessels detained were to receive an indemnity, unless the belligerent Government chose to exercise the right of pre-emption; in which case the owners were to be entitled to receive the price which the goods would have sold for at their destined port, with demurrage and expenses (*k*).

The doctrine of the British Prize Courts as to provisions and naval stores becoming contraband, independently of special treaty stipulations, is laid down very fully by Sir W. Scott in the case of *The Jonge Margaretha*. He there states that the catalogue of contraband had varied very much, and sometimes in such a manner as to make it difficult to assign the reason of the variations, owing to particular circumstances, the history of which had not accompanied the history of the decisions. "In 1673, when many unwarrantable rules were laid down by public authority respecting contraband, it was expressly asserted, by a person of great knowledge and experience in the English Admiralty, that, by its practice, corn, wine, and oil were liable to be deemed contraband. In much later times, many sorts of provisions—such as butter, salted fish, and rice—have been condemned as contraband. The modern established rule was, that generally they are not contraband, but may become so under circumstances arising out of the peculiar situation of the war, or the condition of the parties engaged in it. Among the causes which tend to prevent provisions from being treated as contraband, one is, that they are of the growth of the country which exports them. Another circumstance, to which some indulgence by the practice of nations is shown, is when the articles are in their native and unmanufactured state. Thus iron is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband. Hemp is more favourably considered than cordage; and wheat is not considered so noxious a commodity as any of the final preparations of it for human use. But the most important distinction is, whether the articles are destined for the ordinary uses of life or for military use. The nature and quality of the port to which the articles were going is a test of the matter of fact to which the distinction is to be applied. If the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. On the contrary, if the great predominant character of a port be that of a port of naval equipment, it

Provisions and naval stores, when contraband independently of treaty.

(*k*) Martens, Recueil, tome vii. pp. 150—281.



shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for, it being impossible to ascertain the final application of an article 'ancipitis usûs,' it is not an injurious rule which deduces both ways 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" (l).

Articles of promiscuous use becoming contraband, when destined to a port of naval equipment.

The distinction, under which articles of promiscuous use were considered as contraband, when destined to a port of naval equipment, appears to have been subsequently abandoned by Sir W. Scott. In the case of *The Charlotte*, he states that "the character of the port is immaterial; since naval stores, if they are to be considered as contraband, are so without reference to the nature of the port, and equally, whether bound to a mercantile port only, or to a port of naval and military equipment. The consequence of the supply may be nearly the same in either case. If sent to a mercantile port, they may then be applied to immediate use in the equipment of privateers, or they may be conveyed from the mercantile to the naval port, and there become subservient to every purpose to which they could have been applied if going directly to a port of naval equipment" (m).

Provisions becoming contraband under certain circumstances of war.

The doctrine of the English Courts of Admiralty, as to provisions becoming contraband under certain circumstances of war, was adopted by the British Government in the instructions given to their cruisers on the 8th June, 1793, directing them to stop all vessels laden wholly or in part with corn, flour, or meal, bound to any port in France, and to send them into a British port, to be purchased by Government, or to be released, on condition that the master should give security to dispose of his cargo in the ports of some country in amity with his Britannic Majesty. This order was justified, on the ground that, by the modern law of nations, all provisions are to be considered contraband, and, as such, liable to confiscation, wherever the depriving an enemy of these supplies is one of the means intended to be employed for reducing him to terms. The actual situation of France (it was said) was noto-

(l) *The Jonge Margaretha* (1799), 1 C. Rob. 192. This judgment was followed by the American Courts in

*The Commercen* (1816), 1 Wheat. 382; see *infra*, p. 755.

(m) *The Charlotte* (1804), 5 C. Rob. 305.

riously such as to lead to the employing this mode of distressing her by the joint operations of the different Powers engaged in the war; and the reasoning which the text-writers applied to all cases of this sort, was more applicable to the present case, in which the distress resulted from the unusual mode of war adopted by the enemy himself, in having armed almost the whole labouring class of the French nation, for the purpose of commencing and supporting hostilities against almost all European Governments; but this reasoning was most of all applicable to a trade, which was in a great measure carried on by the then actual rulers of France, and was no longer to be regarded as a mercantile speculation of individuals, but as an immediate operation of the very persons who had declared war, and were then carrying it on against Great Britain (*n*).

This reasoning was resisted by the neutral Powers, Sweden, Denmark, and especially the United States. The American Government insisted, that when two nations go to war, other nations, who choose to remain at peace, retain their natural right to pursue their agriculture, manufactures, and other ordinary vocations; to carry the produce of their industry for exchange to all countries, belligerent or neutral, as usual; to go and come freely, without injury or molestation; in short, that the war among others should be, for neutral nations, as if it did not exist. The only restriction to this general freedom of commerce, which has been submitted to by nations at peace, was that of not furnishing to either party implements merely of war, nor any thing whatever to a place blockaded by its enemy. These implements of war had been so often enumerated in treaties under the name of contraband, as to leave little question about them at that day. It was sufficient to say that corn, flour, and meal, were not of the class of contraband, and consequently remained articles of free commerce. The state of war then existing between Great Britain and France furnished no legitimate right to either of these belligerent Powers to interrupt the agriculture of the United States, or the peaceable exchange of their produce with all nations. If any nation whatever had the right to shut against their produce all the ports of the earth except her own, and those of her friends, she might shut these also, and thus prevent altogether the export of that produce (*o*).

Doctrine of  
the neutral  
Powers.

Provisions.

(*n*) Mr. Hammond's Letter to Mr. Jefferson, 12th September, 1793. Waite, American State Papers, vol. i. p. 398.

(*o*) Mr. Jefferson's Letter to Mr. T. Pinkney, 7th September, 1793. Waite, State Papers, vol. i. p. 393.



Anglo-American  
treaty of 1794.  
Contraband  
articles.

In the treaty subsequently concluded between Great Britain and the United States, on the 19th November, 1794, it was stipulated (Article 18), that under the denomination contraband should be comprised all arms and implements serving for the purposes of war, "and also timber for ship-building, tar or rosin, copper in sheets, sails, hemp, and cordage, and generally whatever may serve directly to the equipment of vessels, unwrought iron and fir planks only excepted." The Article then goes on to provide, 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; and the captors, or, in their default, the Government under whose authority they act, shall pay to the masters or owners of such vessels the full value of all such articles, with a reasonable mercantile profit thereon, together with the freight, and also the demurrage incident to such detention."

British Order  
of April,  
1795, as to  
provisions.

The instructions of June, 1793, had been revoked previous to the signature of this treaty; but, before its ratification, the British Government issued, in April, 1795, an Order in Council, instructing its cruisers to stop and detain all vessels, laden wholly or in part with corn, flour, meal, and other articles of provisions, and bound to any port in France, and to send them to such ports as might be most convenient, in order that such corn, &c., might be purchased on behalf of the Government.

Legality of  
this order  
questioned.

This last order was subsequently revoked, and the question of its legality became the subject of discussion before the mixed commission, constituted under the treaty to decide upon the claims of American citizens, by reason of irregular or illegal captures and condemnations of their vessels and other property, under the authority of the British Government. The Order in Council was justified upon two grounds: firstly, that it was made when there was a prospect of reducing the enemy to terms by famine, and that, in such a state of things, provisions bound to the ports of the enemy became so far contraband, as to justify Great Britain in seizing them upon the terms of paying the invoice price, with a reasonable mercantile profit thereon, together with freight and demurrage; secondly, the order was justified by necessity, the British nation being at that time threatened with a scarcity of the articles directed to be seized.



The first of these positions was based not only upon the general law of nations, but upon the above-quoted Article of the treaty between Great Britain and America. The evidence adduced of the former was principally the following passage of Vattel: "Commodities particularly useful in war, and the carrying 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" (*p*). Opinion of Vattel upon it.

In answer to this authority, it was stated that it might be sufficient to say that it was, at best, equivocal and indefinite, as it did not designate what the junctures are in which it might be held, that "there are hopes of reducing the enemy by famine"; that it was entirely consistent with it to affirm, that these hopes must be built upon an obvious and palpable chance of effecting the enemy's reduction by this obnoxious mode of warfare, and that no such chance is by the law of nations admitted to exist, except in certain defined cases, such as the actual siege, blockade, or investment of particular places. This answer would be rendered still more satisfactory, by comparing the above-quoted passage with the more precise opinions of other leading writers on international law, by which might be discovered what Vattel does not profess to explain—the combination of circumstances to which his principle is applicable, or is intended to be applied.

But there was no necessity for relying wholly on this answer, since Vattel would himself furnish a pretty accurate commentary on the vague text which he had given. The only instance put by this writer, which came within the range of his general principle, was that which he, as well as Grotius, had taken from Plutarch. "Demetrius," as Grotius expressed it, "held Attica by the sword. He had taken the town of Rhamnus, designing a famine in Athens, and had almost accomplished his design, when a vessel laden with provisions attempted to relieve the city." Vattel speaks of this as of a case in which provisions were contraband (section 17), and although he did not make use of this example for the declared purpose of rendering more specific the passage above cited, yet, as he mentions none other to which it can relate, it is strong evidence to show that he did not mean to carry the doctrine of special contraband farther than that example would warrant.

It was also to be observed that, in section 113, he states expressly that all contraband goods (including, of course, those becoming so

by reason of the junctures of which he had been speaking at the end of section 112) are to be confiscated. But nobody pretended that Great Britain could rightfully have confiscated the cargoes taken under the order of 1795; and yet if the seizures made under that order fell within the opinion expressed by Vattel, the confiscation of the cargoes seized would have been justifiable. It had long been settled that all contraband goods are subject to forfeiture by the law of nations, whether they are so in their own nature, or become so by existing circumstances; and even in early times, when this rule was not so well established, we find that those nations who sought an exemption from forfeiture, never claimed it upon grounds peculiar to any description of contraband, but upon general reasons, embracing all cases of contraband whatsoever. As it was admitted, then, that the cargoes in question were not subject to forfeiture as contraband, it was manifest that the juncture which gave birth to the Order in Council could not have been such a one as Vattel had in view; or, in other words, that the cargoes were not become contraband at all within the true meaning of his principle, or within any principle known to the general law of nations.

Opinion of  
Grotius.

The authority of Grotius was also adduced as countenancing this position. He divides commodities into three classes, the first of which he declares to be plainly contraband; the second plainly not so; and as to the third, he says:—"In tertio illo genere usûs ancipitis, distinguendus erit belli status. Nam si tueri me non possum nisi quæ mittuntur interceptiam, necessitas, ut alibi exposuimus, jus dabit, sed sub onere restitutionis, nisi causa alia accedat" (In the third class, viz., commodities of ambiguous use, the circumstances of the war will be taken into account. For if I cannot protect myself save by intercepting what is sent, necessity—as elsewhere explained—gives me the right to intercept it, but under the obligation of restitution, unless there be cause to the contrary). This "causa alia" is afterwards explained by an example, "ut si oppidum obsessum tenebam, si portus clausos, et jam deditio aut pax expectabatur" (e.g., besieging a town, blockading a port, and if a surrender or peace was expected) (q).

This opinion of Grotius, as to the third class of goods, did not appear to proceed at all upon the notion of contraband, but simply upon that of a pure necessity on the part of the capturing belligerent. He does not consider the right of seizure as a means of effecting the reduction of the enemy, but as the indispensable

means of our own defence. He does not state the seizure upon any supposed illegal conduct in the neutral, in attempting to carry articles of the third class (among which provisions are included), not bound to a port besieged or blockaded, to be lawful, when made with the mere view of annoying or reducing the enemy, but solely when made with a view to our own preservation or defence, under the pressure of that imperious and unequivocal necessity, which breaks down the distinctions of property, and upon certain conditions, revives the original right of using things as if they were in common.

This necessity he explains at large in his second book (cap. ii. sect. 6), and, in the above-recited passage, he refers expressly to that explanation. In sections 7, 8, and 9, he lays down the conditions annexed to this right of necessity: (1) it shall not be exercised until all other possible means have been used; (2) nor if the right owner is under a like necessity; and (3) restitution shall be made as soon as practicable. In his third book (cap. xvii. sect. 1), recapitulating what he had before said on this subject, Grotius further explains this doctrine of necessity, and most explicitly confirms the construction placed upon the above-cited texts. And Rutherford, in commenting on Grotius (lib. iii. cap. 1, sect. 5), also explains what he there says of the right of seizing provisions upon the ground of necessity; and supposes his meaning to be that the seizure would not be justifiable in that view, "unless the exigency of affairs is such, that we cannot possibly do without them" (*r*).

Bynkershoek also confines the right of seizing goods, not generally contraband of war (and provisions among the rest), to the above-mentioned cases (*s*).

Opinion of  
Bynkershoek.

It appeared, then, that so far as the authority of text-writers could influence the question, the Order in Council of 1795 could not be based upon any just notion of contraband; nor could it, in that view, be justified by the reason of the thing or the approved usage of nations.

If the mere hope, however apparently well founded, of annoying or reducing an enemy, by intercepting the commerce of neutrals in articles of provision (which, in themselves, are no more contraband than ordinary merchandise), to ports not besieged or blockaded, would authorize that interruption, it would follow that a belligerent might at any time prevent, without a siege or blockade, all trade whatsoever with its enemy; since there is at all times

General  
principles.

(*r*) Rutherford, Inst. vol. ii. b. ii. ch. 9, § 19.

(*s*) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9.



reason to believe that a nation, having little or no shipping of its own, might be so materially distressed by preventing all other nations from trading with it, that such prevention might be a powerful instrument in bringing it to terms. The principle is so wide in its nature, that it is, in this respect, incapable of any boundary. There is no solid distinction, in this view of the principle, between provisions and a thousand other articles. Men must be clothed as well as fed; and even the privation of the conveniences of life is severely felt by those to whom habit has rendered them necessary. A nation, in proportion as it can be debarred its accustomed commercial intercourse with other States, must be enfeebled and impoverished; and if it is allowable to a belligerent to violate the freedom of neutral commerce, in respect to any one article not contraband *in se*, upon the expectation of annoying the enemy, or bringing him to terms by a seizure of that article, and preventing it reaching his ports, why not, upon the same expectation of annoyance, cut off as far as possible by captures all communication with the enemy, and thus strike at once effectually at his power and resources?

Anglo-  
American  
treaty of 1794.

As to the 18th Article of the Treaty of 1794, between the United States and Great Britain, it manifestly intended to leave the question where it found it; the two contracting parties, not being able to agree upon a definition of the cases in which provisions and other articles, not generally contraband, might be regarded as such (the American Government insisting on confining it to articles destined to a place actually besieged, blockaded, or invested, whilst the British Government maintained that it ought to be extended to all cases where there is an expectation of reducing the enemy by famine), concurred in stipulating, 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 should be completely indemnified in the manner provided for in the Article. When the law of nations existing at the time the case arises pronounces the articles contraband, they may for that reason be seized; when otherwise, they may not be seized. Each party was thus left as free as the other to decide whether the law of nations, in the given case, pronounced them contraband or not, and neither was obliged to be governed by the opinion of the other. If one party, on a false pretext of being authorized by the law of nations, made a seizure, the other was at full liberty to contest it, to appeal to that law, and, if he thought fit, to resort to reprisals and war.

Justification  
of the Order

As to the second ground upon which the Order in Council was

justified, viz., necessity, Great Britain being, as alleged at the time of issuing it, threatened with a scarcity of those articles directed to be seized, it was answered that it would not be denied that extreme necessity might justify such a measure. It was only important to ascertain whether that necessity then existed, and upon what terms the right it communicated might be carried into exercise.

on the ground  
of necessity.

Grotius, and the other text-writers on the subject, concurred in stating that the necessity must be real and pressing; and that even then it does not confer a right of appropriating the goods of others, until all other practicable means of relief have been tried and found inadequate. It was not to be doubted that there were other practicable means of averting the calamity apprehended by Great Britain. The offer of an advantageous market in the different ports of the kingdom, was an obvious expedient for drawing into them the produce of other nations. Merchants do not require to be forced into a profitable commerce; they will send their cargoes where interest invites; and if this inducement is held out to them in time, it will always produce the effect intended. But so long as Great Britain offered less for the necessaries of life than could have been obtained from her enemy, was it not to be expected that neutral vessels should seek the ports of that enemy, and pass by her own? Could it be said that, under the mere apprehension (not under the actual experience) of scarcity, she was authorized to have recourse to the forcible means of seizing provisions belonging to neutrals, without attempting those means of supply which were consistent with the rights of others, and which were not incompatible with the exigency? After this Order has been issued and carried into execution, the British Government did what it should have done before; it offered a bounty upon the importation of the articles of which it was in want. The consequence was that neutrals came with these articles, until at length the market was found to be overstocked. The same arrangement, had it been made at an earlier period, would have rendered wholly useless the order of 1795.

Upon these grounds, a full indemnity was allowed by the commissioners, under the seventh Article of the Treaty of 1794, to the owners of the vessels and cargoes seized under the Orders in Council, as well for the loss of a market as for the other consequences of their detention (*t*).

Decision  
respecting the  
Order.

(*t*) Proceedings of the Board of Commissioners under the seventh article of the Treaty of 1794. MS. Opinion of Mr. W. Pinkney, case of *The Neptune*.



What goods  
are contra-  
band.

For more than a century after this period, the question as to what is, and what is not, contraband, could not be answered with precision. Before the notable achievement of the London Naval Conference of 1908-1909 (which will be referred to presently), no complete list of goods which were to be always deemed contraband had been drawn up. In 1896 the Institut de Droit International prepared a set of rules with the object of obtaining uniformity in international practice. These rules, after condemning the British doctrine of conditional contraband, proceeded to declare—somewhat inconsistently with this condemnation—that articles adaptable equally for purposes of war and peace, which were bound for an enemy port, might be seized by a belligerent on payment of indemnity (*u*). That which is contraband under certain circumstances may not be so under others. When an article is of doubtful use, the determining factor was whether it was intended, or would probably be applied, to military purposes. In England and America, the court before which the goods were brought inquired into all the circumstances of the case, such as the destination of the ship, the purposes to which the goods seemed intended to be applied, the character of the war, and so on, and condemned or released them upon the evidence (*x*). If, however, there were any treaty stipulations on the subject, or if the State before whose courts the goods were brought, issued any definite list of contraband goods (which became the general practice), the decision would, of course, be regulated accordingly. “The liability to capture,” says Halleck, “can only be determined by the rules of international law, as interpreted and applied by the tribunals of the belligerent State, to the operations of whose cruisers the neutral merchant is exposed” (*y*).

Anglo-  
American  
practice.

The following goods have been held to be contraband under all circumstances by the English Prize Court, and are enumerated as such in the Admiralty Manual of Prize Law: arms of all kinds, and 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, saltpetre and brimstone; also guncotton; military equipments and clothing, and military stores (*z*). Naval stores,

(*u*) *Annuaire de l'Institut de Droit International* (1896), p. 231.

p. 359. Parl. Debates, 26th May, 1861.

(*x*) Wheaton, ed. Dana, Note 226. Calvo, vol. ii. § 1114. Kent, ed. Abdy,

(*y*) Halleck, ch. xxiv. § 19.

(*z*) Holland, Admiralty Manual of Prize Law, 1888.



such as masts (*a*), spars, rudders, and ship timber (*b*), hemp (*c*), cordage, sailcloth (*d*), pitch and tar (*e*), and copper fit for sheathing vessels (*f*). Marine engines, and the component parts thereof, including screw-propellers, paddle-wheels, cylinders, cranks, shafts, boilers, tubes for boilers, boiler plates, and fire-bars; marine cement, and the materials used in the manufacture of it, as blue lias and portland cement; iron in any of the following forms: anchors, rivet-iron, angle-iron, round bars of from three-quarters to five-eighths of an inch in diameter, rivets, strips of iron, sheet plate-iron exceeding one-quarter of an inch, and low-moor and bowling plates (*g*).

The following articles have been held to be contraband when the circumstances showed that they were probably intended to be applied to warlike purposes. Provisions and liquors fit for the consumption of army or navy (*h*), money, telegraphic materials—such as wire, porous cups, platina, sulphuric acid, and zinc (*i*); materials for the construction of a railway—as iron bars, sleepers (*k*); coal, hay, horses, rosin (*l*), tallow (*m*), and timber (*n*).

The Proclamation of the President of the United States (13th June, 1865), removing the restrictions on trade with the Southern States, declared only the following articles to be contraband:—arms, ammunition, all articles from which ammunition is made, and gray uniforms and cloth (*o*). The Declaration of Paris, while permitting the seizure of contraband, in no way defines it. The instructions to French naval officers during the war with Germany in 1870-71, enumerate as contraband: cannon, small-arms, swords and bayonets, projectiles, powder, saltpetre, sulphur, military accoutrements, and everything made for use in war (*p*). Mr. Field, in his International Code, says, "Private property of any person whomsoever, and public property of a neutral nation are contraband of war, when consisting of articles manufactured for

(*a*) *The Charlotte* (1804), 5 C. Rob. 305; *The Stadt Embden* (1798), 1 C. Rob. 27.

(*b*) *The Twende Brodre* (1801), 4 C. Rob. 33.

(*c*) *The Apollo* (1802), 4 C. Rob. 161; *The Evert* (1803), 4 C. Rob. 354; *The Gesellschaft Michael* (1802), 4 C. Rob. 94.

(*d*) *The Neptunus* (1800), 3 C. Rob. 108.

(*e*) *The Jonge Tobias* (1799), 1 C. Rob. 329; *The Twes Juffrowen* (1802), 4 C. Rob. 242.

(*f*) *The Charlotte*, 5 C. Rob. 305.

(*g*) Holland, *loc. cit.* Field, International Code (2nd ed.), p. 550.

(*h*) *The Haabet* (1800), 2 C. Rob. 182; *The Jonge Margaretha* (1799), 1 C. Rob. 191; *The Ranger* (1805), 6 C. Rob. 125.

(*i*) Parl. Papers, N. America, 1863 (No. 14), p. 5.

(*k*) Field, Inter. Code (2nd ed.), p. 550.

(*l*) *The Nostra Signora de Begona* (1804), 5 C. Rob. 98.

(*m*) *The Neptunus*, 3 C. Rob. 108.

(*n*) *The Twende Brodre* (1801), 4 C. Rob. 37.

(*o*) Hertslet, Treaties, vol. xii. p. 946.

(*p*) See Barboux, Jurisp. du Conseil des Prises, 1870-71, Appendix, Art. 8.

and primarily used for military purposes in time of war; and actually destined for the use of the hostile nation in war, but not otherwise" (q). On the outbreak of the war between Spain and the United States in 1898, the former country declared the following articles to be contraband of war:—cannon, quickfiring guns, shells, rifles of all patterns, cutting and thrusting weapons and arms of precision, bullets, bombs, grenades, fulminates, capsules, fusees, powder, sulphur, dynamite, explosives of all kind, as well as uniforms, straps, pack-saddles, equipment for artillery and cavalry, marine engines, and in general all appliances used in war.

Classification  
of contraband  
goods.

*The Peterhoff.*

The subject of contraband was discussed before the Supreme Court of America, in a case arising out of the shipment of contraband goods from England to Matamoras during the Civil War. Matamoras is situated on the Mexican side of the Rio Grande, and was consequently a neutral port. The Court said: "The classification of goods as contraband or not contraband has much perplexed text writers 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. (1) Articles manufactured and primarily or ordinarily used for military purposes in time of war. (2) Articles which may be and are used for purposes of war or peace according to circumstances. (3) Articles exclusively used for peaceful purposes. 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 blockade or siege" (r).

Ulterior  
destination of  
the goods.

A point arose in this case, upon which the courts of England and America have arrived at different conclusions. Matamoras, as has been said, was a Mexican and neutral port. At the time the ship was captured, the United States had declared all the Confederate ports blockaded, and a squadron cruised off the mouth of the Rio Grande to intercept the trade with Galveston, a place on the opposite side of the river to Matamoras, and in Confederate territory. The question then arose whether the whole river was

(q) Field, International Code, § 859.

(r) *The Peterhoff* (1866), 5 Wallace, 58. During the Spanish-American war of 1898, a firm of Liverpool merchants applying to the United

States Government for a definition of contraband, were referred to this dictum of Chief Justice Chase. See *The Times*, Feb. 17th, 1904.



blockaded, or whether the blockade only applied to the Confederate side of it. The Supreme Court held that a blockade is not to be extended by construction, and that as the United States authorities had not expressly declared the whole river blocked (whether they had power to do so or not was another question), the Mexican side must be considered open to the commerce of neutrals. But with regard to the contraband on board the ship, the judgment proceeded as follows:—"Contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. The latter is liable to capture only when a violation of blockade is intended; the former when destined to the hostile country, or to the actual military or naval use of the enemy, whether blockaded or not. The trade of neutrals with belligerents in articles not contraband is absolutely free, unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit at sea. Hence, while articles, not contraband, might be sent to Matamoras and beyond to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character destined, in fact, to a State in rebellion, or for the use of the rebel military forces, were liable to capture though primarily destined to Matamoras" (s).

On the other hand, the Court of Common Pleas, in a case arising in England out of the same voyage of the ship, came to the conclusion that contraband goods belonging to a neutral are not liable to seizure, unless in the actual prosecution of a voyage to an enemy's port. Nor is the rule affected by the fact that the shipper knows they are intended ultimately to reach an enemy's port (t).

*Hobbs v. Henning.*

(s) *The Peterhoff* (1866), 5 Wallace, 59. As far back as 1854, in the case of *The Frau Anna Howina*, the French Prize Court had condemned, during the Crimean war, part of the cargo of a Hanoverian ship captured off Cape Rocca, on a voyage from Lisbon to Hamburg, and containing saltpetre, which was described in the manifest and bills of lading simply as goods. The ultimate destination of the saltpetre was adjudged to be Russia, and the court laid down the principle that "La contrebande de guerre est saisissable sans pavillon neutre quand elle appartient à l'ennemi ou quand elle est dirigée vers les territoires, les armées ou les flottes de l'ennemi": Calvo, *Droit International*, 4th ed., vol. v. § 2767. See also the case of *The Doelwyk* (1896), decided by the

Italian Prize Courts during the war between Italy and Abyssinia; Archives Diplomatiques (Jan. 1897), p. 81. The judgment is set out in *Ruys v. Royal Exchange Assurance Company*, 2 Com. Cas. 207; L. R. (1897), 2 Q. B. 135. And see on the whole subject an Article by E. L. de Hart, in the *Law Quarterly Review*, vol. xvii. p. 193.

(t) *Hobbs v. Henning* (1865), 17 C. B. N. S. 791. But Mr. Justice Willes, a few years later, in delivering the judgment of the Court of Common Pleas in *Seymour v. The London and Provincial Marine Insurance Company*, 41 L. J. N. S. C. P. 192, another case arising out of the same voyage of the *Peterhoff*, held that the criterion of contraband was "the intention that the goods should in the course of the same transaction go on to the Con-



This decision was based on the language used by Lord Stowell in *The Imina (u)*, that goods going to a neutral port cannot come under the description of contraband.

*The Bundes-  
rath.*

Early in the South African war (December, 1899, and January, 1900), the German mail steamer, *Bundesrath*, and other vessels (the *Herzog* and the *General*) belonging to the German East African line, were seized by English men-of-war and detained, pending search, on suspicion of carrying contraband of war, and of containing among their passengers men who were on their way to join the Boer armies. The German Government demanded the immediate release of the vessels, and claimed through Count Hatzfeld that there was no justification for taking proceedings before a Prize Court because "according to the recognised principles of international law no question of contraband of war arises in trade between neutral ports." The destination of these vessels was Lorenzo Marques, a port belonging to Portugal, and consequently neutral, but it was notorious that reinforcements both of men and material were constantly passing through it to the South African Republics, which possessed no sea-board of their own. In fact it presented a very close analogy to the position of Matamoras. Lord Salisbury upheld the proceedings of the naval officers, and refused to admit that the destination of the vessel was conclusive as to the destination of the goods on board, a principle, he said, "which cannot apply to contraband of war on board of a neutral vessel if such contraband was at the time of seizure consigned or intended to be delivered to an agent of the enemy at a neutral port or, in fact, destined for the enemy's country." The vessels were accordingly searched in circumstances of considerable difficulty owing to the way in which the cargo was stowed, but nothing was found of an absolutely contraband nature; and though there was reason to believe that among the passengers on board were a number of trained artillerymen, German and Flemish, the evidence as to their destination was not sufficient to justify further action. The vessels were accordingly released without waiting for the decision of a Prize Court, and a liberal sum of money was paid by the British Government as compensation to the steamship company. The incident gave rise to some heated language in the Reichstag, and Count von Bülow made a long speech on the 19th of January, in which he took credit for a complete diplomatic victory; but it is remarkable that he made no allusion to the

federate States," and that the profits should be obtained on delivery there.

It seems difficult to reconcile this with *Hobbs v. Henning*.

(*u*) (1800), 3 C. Rob. 167.

original German contention that a neutral vessel was entitled to convey without hindrance contraband of war to an enemy so long as the port at which it was intended to land was a neutral port (*x*).

It has already been pointed out that trade in contraband is not a breach of neutrality, and is not contrary to international law (*xx*). In every war neutral merchants have traded in contraband, but with the risk of having the goods condemned if captured by the enemy (*y*). And in every war belligerents have protested against such trading, especially when it assumed large proportions. In 1793, during the war between Great Britain and France, the former Power complaining of the sale of munitions of war by manufacturers in the United States to the French Government, Jefferson, the American Secretary of State, replied, conformably to the law of nations: "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 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 disarrangement in 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 their way to the ports of their enemies. To this penalty our citizens are warned that they will be abandoned" (*z*). But the trade must be confined to subjects; the Government itself must not participate in it (*a*). We have already seen that these principles are now embodied in the Hague code (*b*).

A ship, theoretically considered, may or may not be contraband. If on its way to a belligerent port for the purpose of being sold to the belligerent, it will be contraband if it is adapted, or readily adaptable, for warlike use; equally so, doubtless, if it be adapted for the transportation of troops, or even perhaps of military material. As most ships may in some way be applied to such purposes, they are pretty sure to be condemned as contraband. Thus, where the captain had orders to sell if he could find a good

Contraband trade no breach of neutrality.

Ships as contraband.

(*x*) Parl. Papers, Africa, 1900 (No. 1).

(*xx*) See *supra*, pp. 664, 665.

(*y*) See Letters of Historicus, Contraband. Parl. Papers, N. America, 1873 (No. 2), p. 19; Turkey, 1878 (No. 1), p. 46.

(*z*) Amer. State Papers, I. 69, 147;

Jefferson, Works, vol. iii. p. 558; Moore, Digest, vol. vii. p. 955. For a similar American statement during the Great War, 1914, see *supra*, p. 665.

(*a*) See *supra*, p. 664.

(*b*) 5th Convention (1907), Art. 7; 13th Convention (1907), Art. 7.



purchaser, but otherwise to seek freight, the ship was condemned (c).

Coals and  
machinery.

The immense importance of coals and machinery in the naval operations of the present day has given rise to endless discussions as to whether they are contraband or not. Writers of the school of M. Hautefeuille refuse to consider such commodities as contraband (d), and the French Government acted on this opinion during the war with Germany (e), while Count Bismarck remonstrated with Great Britain for permitting the export of coal to France (f). Lord Chief Justice Cockburn says, "Coal, too, though in its nature 'incipit usus,' yet when intended to contribute to the motive power of a vessel, must, I think, as well as machinery, be placed in the same category as masts and sails, which have always been placed among articles of contraband" (g). But it is classed, as we have already seen, in the British Admiralty Manual among articles which are only contraband conditionally upon destination.

Food.  
Blockade of  
Formosa.

On the 20th February, 1885, the French Government gave notice, through the usual diplomatic channels, that it intended to treat rice bound for the open Chinese ports as contraband of war, on the ground that the stoppage of large supplies which were being forwarded to the northern ports of China would materially affect the Government at Peking. The Queen's ambassador at Peking having refused to recognise this right, the British Government explained that it would not forcibly resist the seizure of rice, but that it protested against rice being treated generally as contraband irrespective of its final destination, and that the legality of any seizure must be determined in the first instance by the French Prize Courts, subject to ulterior diplomatic action. The conclusion of peace, however, shortly afterwards prevented the question being further raised (h). The American minister at Berlin, in a despatch to Mr. Bayard, drew attention to the Anglo-French discussion, and pointed out that the real principle involved went to the extent that everything, the want of which might increase the distress of the civil population of the belligerent country, might be declared contraband of war. The damage to neutral trade might amount

(c) See American Law Review, vol. v. p. 371. *The Brutus* (1804), 5 C. Rob. 331, n.

(d) Hautefeuille, *Droits et Devoirs des Nations Neutres*, vol. ii. p. 143.

(e) Archives Diplomatiques, 1871--72, Pt. I. p. 269.

(f) 2 Halleck (Baker), 238, n.

(g) Parl. Papers, N. America, 1873

(No. 2), p. 15. Jurist, 1859, vol. v. Pt. II. p. 203. See further Wharton, Digest, § 369.

(h) Parl. Papers (1884--5), France, No. 1. In the same war the French refused to allow neutral mails to be landed at Formosa: Annual Register, 1885, p. 231.



to destruction, and the advantages intended to be secured to neutrals by the declaration of 1856 would be practically nullified (*i*).

In the Russo-Japanese war, 1904, Japan's declaration of her contraband policy followed generally the lines marked out by the Anglo-American practice (*k*). Thus in *The Aphrodite*, a cargo of Cardiff coal, known to be used for naval purposes, was seized on its way to Vladivostock, a Russian naval base, and was condemned. The vessel shared the same fate, because the whole cargo was contraband, and a false destination had been given (*l*). In another case, *The Scotsman*, rice consigned to the same port and destined for the use of the Russian forces was condemned; condemnation was passed also on the vessel, owing to the contraband nature of the whole cargo, and to the master's connivance (*m*). Again, in *The Tacoma*, salt beef consigned to the Russo-Chinese Bank at Vladivostock was condemned, because the bank in question was closely connected with the Russian Government; the vessel was confiscated, too, because of connivance and false declaration of destination (*n*).

Contraband  
in the Russo-  
Japanese war

Russia, however, announced a much more drastic policy. A list of contraband was issued, which included not only all articles used in or intended for warfare, but also coal, rice, provisions, horses, beasts of burden, raw cotton; and no distinction was drawn between absolute and conditional contraband. Great Britain and the United States therefore protested against such indiscriminate treatment of commodities. The American Secretary of State urged that the test of contraband was warlike nature, use, and destination, and that to disregard this test was to set aside the inveterate distinction between contraband and non-contraband trading (*o*). Russia eventually gave way as to the articles usually considered conditional contraband, but retained coal in the class of absolute contraband. In 1904 the Russian Prize Court condemned the *Allanton* for having carried coal to Japan—she was captured on her return voyage—but the condemnation was unjustifiable, as the vessel had commenced her outward voyage before coal had been declared contraband, and as she was not taken *in delicto* (*p*). The Russian Appeal Court at St. Petersburg reversed the decree of condemnation, but held the seizure to have been legitimate (*q*). Soon afterwards another British steamer,

(*i*) Wharton, Digest, § 370, p. 433.

(*k*) Takahashi, pp. 491 *seq.*

(*l*) *Ibid.* p. 651.

(*m*) *Ibid.* p. 691.

(*n*) *Ibid.* p. 701.

(*o*) Parl. Papers (1905), Russia,

No. 1; Hershey, Russo-Japanese War, pp. 160 *seq.*; Cobbett, pp. 432 *seq.*

(*p*) See now Art. 38, Declaration of London, *infra*, p. 750.

(*q*) See Hershey, *ibid.* p. 171.

the *Knight Commander*, bound from New York to Kobe and Yokohama with a cargo of provisions, machinery, and railway material, was captured by a Russian cruiser on the ground that she carried contraband, and sunk on the ground that it was not possible to take her to Vladivostock, the nearest Russian port (*r*). The British Government protested against the destruction, and obtained a promise that no more neutral vessels would be destroyed. A German vessel, the *Arabia*, carrying flour and railway material from the United States to Japan, was seized and condemned by Russia; but the American Government protesting, the sentence was reversed by a higher court and the vessel and cargo were released, as there was no proof that the goods were intended for the use of the Japanese Government (*s*).

The question of contraband at the Hague Conference, 1907.

The experience in the Russo-Japanese war—and in all previous wars—showed the necessity to arrive at an international agreement with regard to contraband of war. Accordingly, the question was taken up by the second Hague Conference (1907). Great Britain submitted a proposal to abolish entirely the capture of contraband. (No doubt she felt that in case of war the blockading power of her navy would prevent neutral States from augmenting the military resources of her adversary.) But this proposal met with very little favour. After much discussion, a list of absolute contraband articles was drawn up; but the Conference failed to agree on a list of conditional contraband, so that no conventional result was reached.

The Declaration of London, 1909.

The London Naval Conference of 1908—1909 then took up the subject, and after a good deal of discussion and compromise between the representatives of the opposing schools of naval doctrine an agreement was eventually arrived at, which is set out in twenty-three Articles of the Declaration of London (*t*). The greater part of the rules laid down represent the long-established Anglo-American practice; and where departures are made there-

(*r*) Hershey, p. 156.

(*s*) *Ibid.* p. 174.

(*t*) It has already been pointed out that the Declaration of London was not ratified by Great Britain, so that it cannot, in its entirety, be regarded as part of international law, though a great portion of it consists of customary rules of the law of nations which are, of course, binding on States irrespectively of the Declaration. As we shall see presently, the Declaration

of London was subjected to much modification during the Great War of 1914, on account of recent developments and changes with regard to instruments, appliances, and materials of warfare, and for other reasons. There is no doubt that the main substance of the Declaration, together with such alterations as were suggested by the experience of this war, will in the near future be incorporated in an international Convention.

from, they are usually in favour of neutral countries. The provisions are as follows:—

“ The following articles may, without notice, be treated as contraband of war, under the name of absolute contraband: (1) Arms of all kinds, including arms for sporting purposes, and their distinctive component parts. (2) Projectiles, charges, and cartridges of all kinds, and their distinctive component parts. (3) Powder and explosives specially prepared for use in war. (4) Gun-mountings, limber boxes, limbers, military waggons, field forges, and their distinctive component parts. (5) Clothing and equipment of a distinctively military character. (6) All kinds of harness of a distinctively military character. (7) Saddle, draught, and pack animals suitable for use in war. (8) Articles of camp equipment, and their distinctive component parts. (9) Armour plates. (10) Warships, including boats, and their distinctive component parts of such a nature that they can be used only on a vessel of war. (11) Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea ” (u).

“ Articles and materials exclusively used for war may be added to the list of absolute contraband by means of a declaration, which must be notified. Such notification must be addressed to the Governments of other Powers, or to their representatives accredited to the Power making the declaration. A notification made after the outbreak of hostilities is addressed only to neutral Powers ” (x).

The official Report, which serves as an authoritative commentary on the Declaration of London, observes in reference to this provision: “ Certain discoveries or inventions might make the list in Article 22 insufficient. An addition may be made to it on condition that it concerns articles *exclusively used for war*. This addition must be notified to the other Powers, which will take the necessary measures to inform their subjects of it. In theory, the notification may be made in time of peace or of war.” The declaration of such additions “ is only operative for the Power which makes it, in the sense that the article added will be contraband only for it, as a belligerent; other States may, of course, make a similar declaration. . . . If a Power claimed to add to the list of absolute contraband articles not exclusively used for war, it might expose itself to diplomatic remonstrances, because

(u) Declaration of London (1909), Art. 22.

(x) Art. 23.



it would be disregarding an accepted rule. Besides, there would be an eventual resort to the International Prize Court (*y*). . . . It had been suggested that, in the interest of neutral trade, a period should elapse between the notification and its enforcement. But that would be very damaging to the belligerent, whose object is precisely to protect himself, since, during that period, the trade in articles which he thinks dangerous would be free and the effect of his measures a failure. Account has been taken, in another form, of the considerations of equity which have been adduced (see Article 43)" (*z*).

Conditional  
contraband.

"The following articles, susceptible of use in war as well as for purposes of peace, may, without notice, be treated as contraband of war, under the name of conditional contraband:—(1) Foodstuffs. (2) Forage and grain, suitable for feeding animals. (3) Clothing, fabrics for clothing, and boots and shoes, suitable for use in war. (4) Gold and silver in coin or bullion; paper money. (5) Vehicles of all kinds available for use in war, and their component parts. (6) Vessels, craft, and boats of all kinds; floating docks, parts of docks and their component parts. (7) Railway material, both fixed and rolling stock, and material for telegraphs, wireless telegraphs, and telephones. (8) Balloons and flying machines and their distinctive component parts, together with accessories and articles recognisable as intended for use in connection with balloons and flying machines. (9) Fuel; lubricants. (10) Powder and explosives not specially prepared for use in war. (11) Barbed wire and implements for fixing and cutting the same. (12) Horse-shoes and shoeing materials. (13) Harness and saddlery. (14) Field glasses, telescopes, chronometers, and all kinds of nautical instruments" (*a*).

The articles enumerated in this list are 'conditional' contraband; *i.e.*, they are contraband in the full sense of the term (*viz.*, absolute) only if they are destined to the hostile army or fleet, or to the enemy Government (unless in the latter case it is clear they are not susceptible for use in the war). The Report points out that 'foodstuffs' include all products, solid or liquid, that are necessary or useful for the sustenance of man; 'paper money' refers only to inconvertible paper money, *e.g.*, banknotes, and does not include bills of exchange and cheques; engines and boilers are included in No. (6); 'railway material' includes fixed

(*y*) See *supra*, p. 616, as to the International Prize Court, which has no existence yet.

(*z*) Report on the Declaration of London, Parl. Papers, Miscell. No. 4

(1909), pp. 33 *seq.* The original French text is in Parl. Papers, Miscell. No. 5 (1909), pp. 342—377.

(*a*) Art. 24.

material (*e.g.*, rails, sleepers, turntables, parts designed for the construction of bridges) and rolling stock (*e.g.*, locomotives and cars) (*b*).

“Articles susceptible of use in war as well as for purposes of peace, other than those enumerated in Articles 22 and 24, may be added to the list of conditional contraband by means of a declaration, which must be notified in the manner provided for in the second paragraph of Article 23” (*c*). Notification of additions.

“If a Power waives, so far as it is concerned, the right to treat as contraband of war an article comprised in any of the classes enumerated in Articles 22 and 24, it shall announce its intention by a declaration notified in the manner provided for in the second paragraph of Article 23” (*d*). Waiver of right.

Every State is thus empowered to declare, either in time of peace or of war, that so far as it is concerned, it will regard any article or articles in the absolute contraband class as being conditional contraband, and any article or articles in either class as being entirely free.

“Articles which are not susceptible of use in war may not be declared contraband of war” (*e*). The free list.

“The following articles may not be declared contraband of war:—(1) Raw cotton, wool, silk, jute, flax, hemp, and other raw materials of the textile industries, and yarns of the same. (2) Oil seeds and nuts; copra. (3) Rubber, resins, gums, and lacs; hops. (4) Raw hides, horns, bones, and ivory. (5) Natural and artificial manures, including nitrates and phosphates for agricultural purposes. (6) Metallic ores. (7) Earths, clays, lime, chalk, stone, including marble, bricks, slates, and tiles. (8) Chinaware and glass. (9) Paper and paper-making materials. (10) Soap, paint, and colours, including articles exclusively used in their manufacture, and varnish. (11) Bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia, and sulphate of copper. (12) Agricultural, mining, textile, and printing machinery. (13) Precious and semi-precious stones, pearls, mother-of-pearl, and coral. (14) Clocks and watches, other than chronometers. (15) Fashion and fancy goods. (16) Feathers of all kinds, hairs, and bristles. (17) Articles of household furniture and decoration; office furniture and requisites” (*f*).

The Report points out that this list is by no means exhaustive. It contains specific examples of a class which is generalized by

(*b*) Parl. Papers, Miscell. No. 4

(1909).

(*c*) Art. 25.

(*d*) Art. 26.

(*e*) Art. 27.

(*f*) Art. 28.

the previous Article 27; so that commodities not mentioned in the list are equally free if they are not susceptible of use in war.

“Likewise the following may not be treated as contraband of war:—(1) Articles serving exclusively for the care of the sick and wounded. They may, however, in case of urgent military necessity and subject to the payment of compensation, be requisitioned, if their destination is that specified in Article 30. (2) Articles intended for the use of the vessel in which they are found, as well as those intended for the use of her crew and passengers during the voyage” (*g*).

With regard to this Article the Report observes: “This does not refer to hospital ships, which enjoy special immunity under the Hague Convention of the 18th October, 1907 (*h*), but to ordinary merchant vessels, whose cargo includes articles of the kind mentioned. . . . It must, however, be observed that this right of requisition may not be exercised in all cases. The articles in question must have the destination specified in Article 30, that is to say, an enemy destination. Otherwise, the ordinary law prevails; a belligerent could not have the right of requisition as regards neutral vessels on the high seas. Articles intended for the use of the vessel, which might in themselves and by their nature be contraband of war, may not be so treated—as, for instance, arms intended for the defence of the vessel against pirates or for making signals. The same is true of articles intended for the use of the crew and passengers during the voyage; the crew here include all persons in the service of the vessel in general” (*i*).

Doctrine of  
'continuous  
voyage.'

The outbreak of war has always necessarily curtailed the usual operations of trade, and, as a natural consequence, merchants have continually endeavoured to avoid the operation of the laws of war, and to carry on trade in goods liable to capture with as little risk as possible. One of the chief artifices has been to send goods destined for a belligerent, to some conveniently situated neutral port first, with the intention of afterwards forwarding them to their ultimate destination. To sustain the rights of belligerents when this is done, Prize Courts have adopted what is called the principle of “continuous voyage.” This has been explained by Lord Stowell as follows. He says: “It is an inherent and settled principle in cases in which the same question can have come under discussion, that the mere touching at any port without importing

(*g*) Art. 29.

(*h*) Cf. Hague Convention, No. X. (1907), Art. 7; see *supra*, p. 554.

(*i*) Parl. Papers, Miscell. No. 4

(1909). For changes made in the Great War, see Pulling, *Man. of Emerg. Legis.* (1914-5).



the cargo into the common stock of the country, will not alter the nature of the voyage, which continues the same in all respects, and must be considered as a voyage to the country to which the vessel is actually going for the purpose of delivering the cargo at the ultimate port" (*k*). But in Lord Stowell's time, and down to the American Civil War, this doctrine had only been applied to cases covered by the rule of 1756 (which prohibited neutrals from engaging in a belligerent's coasting or colonial trade closed to them in time of peace), or where an underhand trade was attempted to be carried on by subjects of one belligerent with the enemy (*l*).

During the Civil War the American Supreme Court, availing itself of Lord Stowell's pronouncement, applied the principle of continuous voyage to blockade running and the conveyance of contraband, and thus created an important innovation in the law of prize. In the case of *The Bermuda*, which was captured on a voyage from England to Nassau, the Court said, "Neutral trade is entitled to protection in our courts. Neutrals in their own country may sell to belligerents whatever belligerents choose to buy. The principal exceptions to this rule are, that neutrals must not sell to one belligerent what they refuse to sell to the other, and must not furnish soldiers or sailors to either; nor prepare, nor suffer to be prepared within their territory, armed ships or military or naval expeditions against either. So, too, except goods contraband of war, or conveyed with intent to violate a blockade, neutrals may transport to belligerents whatever belligerents may agree to take. And so, again, neutrals may convey in neutral ships from one neutral port to another, any goods, whether contraband of war or not, if intended for actual delivery at the port of destination, and to become part of the common stock of the country or of the port. . . . But if it is intended to affirm (as was argued by counsel) that a neutral ship may take on a contraband cargo ostensibly for a neutral port, but destined in reality for a belligerent port, either by the same ship or by another, without becoming liable, from the commencement to the end of the voyage, to seizure, in order to the confiscation of the cargo, we do not agree to it. . . . 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

(*k*) *The Maria* (1805), 5 C. Rob. 368. And see *The Matchless*, 1 Hagg. Ad. 106; *The Jonge Pieter* (1801), 4 C. Rob. 83; *The William* (1806), 5 C. Rob. 385.

(*l*) Bernard, *Neutrality of Great Britain*, p. 311. *The Ebenezer* (1806), 6 C. Rob. 250; *The Thomyris*, Edw. 17.

of transportation of the cargo. The interposition of a neutral port, between neutral departure and belligerent destination, has always been a favourite resort of contraband carriers and blockade runners. But it never avails them when the ultimate destination is ascertained. A transportation from one point to another remains continuous so long as intent remains unchanged, no matter what stoppages or transshipments intervene" (*m*). Thus a vessel sailing from a neutral port, or a cargo sent from such a port, with intent to violate a blockade, was held liable to condemnation from the very outset of the voyage, no matter to what intermediate ports the ship might go, provided the ulterior intent was ascertained (*n*).

*The Springbok.*

The case of *The Springbok* is perhaps the strongest illustration of these principles. She was on a voyage from London to Nassau, with a mixed cargo, consisting partly of contraband goods. While on the high seas and before arriving at Nassau, she was captured by a United States cruiser and taken to New York. The District Court condemned both ship and cargo as prize (*o*), but the Supreme Court reversed the decree as regards the ship, there being no sufficient proof that the destination of the cargo to a blockaded port was known to her owners (*p*). Strong efforts were made to induce the British Government to intervene on behalf of the shippers, and considerable correspondence ensued, but finally, after a careful perusal of the "elaborate and able judgment" of the judge in the District Court, Earl Russell declined to interfere, holding that the evidence "goes far to establish that the cargo of the *Springbok*, containing a considerable portion of contraband, was never really and *bonâ fide* destined for Nassau, but was either destined merely to call there, or to be immediately transhipped after its arrival there without breaking bulk and without any previous incorporation into the common stock of that colony, and then to proceed to its real destination, being a blockaded port" (*q*).

Difference between carriage by land and carriage by sea.

In these cases, when the ultimate destination was some Confederate seaport, there was no doubt that the ship and goods could be captured on their way from the interposed neutral port to the blockaded port. The innovation consisted in making the liability

(*m*) *The Bermuda* (1865), 3 Wallace, 551.

(*n*) *The Circassian* (1864), 2 Wallace, 135; *The Stephen Hart* (1863), 3 Wallace, 559; *The Springbok* (1866), 5 Wallace, 1.

(*o*) *The Springbok* (1866), Blatchford, Prize Cases, 349; 5 Wallace, 1.

(*p*) *The Springbok* (1866), 5 Wallace, 1. The decision in this case

aroused a great deal of controversy; it was in several quarters subjected to much criticism; see *Revue de Droit International* (1875), p. 241; *Quarterly Law Review* (Nov. 1877); *Calvo*, *Droit Int.* vol. ii. § 1120; *Moore*, *Digest*, vol. vii. § 1261.

(*q*) Earl Russell to Lord Lyons, Feb. 20th, 1864. *Parl. Papers, Misc.* (No. 1), (1900) Cd. 34.

extend to the journey from the point of departure to the interposed port. A distinction, however, was made when the goods were finally to reach the belligerent by land. Thus the traffic between neutral States and Matamoras in Mexico (except in contraband) was held not to be any violation of the blockade, even if there were an attempt to supply Texas through Matamoras. In this case the goods could only reach the Confederates by land, and a blockade by sea cannot give a belligerent any right to capture goods conveyed over land. The result was, that while the blockade lasted, neutral goods destined to reach the Confederates entirely by sea, whether in the same ship or another, were liable to seizure during the whole voyage, whereas if the last part of the journey was to be performed from a neutral place over land, the goods were not liable at all. If contraband, the goods were held liable, whatever means of transport were adopted (*r*). Though these new rules were regarded at this period of the American Civil War as only the law of the United States, yet the action of Lord Salisbury with regard to the seizure of the *Bundesrath* and the *Herzog* and the *General*, during the Anglo-Boer war (1900) (*s*), was an indication that so far as contraband is concerned the British Government was inclined to accept the principles followed by the Courts of the United States. An examination of the printed correspondence relating to the cases of *The Springbok* and *The Peterhoff* shows that the Government of that day distinctly refused to make any diplomatic protest or enter any objection against the decision of the United States Prize Court (*t*).

Till 1909 there was divergence of opinion and practice with regard to the doctrine of 'continuous voyage.' In that year the representatives of the maritime States assembled at the London Naval Conference arrived at a compromise on the question with regard to its application to contraband: the applicability of the doctrine was allowed in the case of absolute contraband, but repudiated in the case of conditional contraband (with one exception) and in that of blockade. The following are the Articles relative to 'continuous voyage' and destination:—

"Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the

The Declaration of London on 'continuous voyage.'

Destination of absolute contraband.

(*r*) *The Peterhoff* (1866), 5 Wallace, 35. And see *The Frau Margaretha* (1805), 6 C. Rob. 92, and *The Zelden Rust* (1805), 6 C. Rob. 93.

(*s*) See *supra*, p. 734.

(*t*) Parl. Papers, Miscell. (No. 1),

(1900) Cd. 34. For a strongly adverse criticism of the American doctrine of continuous voyage, see Hall, *International Law* (5th ed.), p. 668. And see also a paper by Sir Travers Twiss, *Quarterly Law Review* (Nov. 1877).



carriage of the goods is direct or entails transshipment or a subsequent transport by land" (*u*).

The two essential elements involved in the notion of contraband are the character of the articles concerned and their destination. The preceding provisions have dealt with the first point. The second is closely connected with the doctrine of 'continuous voyage.' With regard to the latter, the Memorandum drawn up by the British Government for the use of its delegates at the London Naval Conference says: "When an adventure includes the carriage of goods to a neutral port, and thence to an ulterior destination, the doctrine of 'continuous voyage' consists in treating for certain purposes the whole journey as one transportation, with the consequences which would have attached had there been no interposition of the neutral port. The doctrine is only applicable when the whole transportation is made in pursuance of a single mercantile transaction preconceived from the outset. Thus it will not be applied where the evidence goes no further than to show that the goods were sent to the neutral port in the hopes of finding a market there for delivery elsewhere" (*x*).

The official Report thus comments on the destination of absolute contraband: "The articles included in the list in Article 22 are absolute contraband when they are destined for territory belonging to or occupied by the enemy, or for his armed military or naval forces. These articles are liable to capture as soon as a final destination of this kind can be shown by the captor to exist. It is not, therefore, the destination of the vessel which is decisive, but that of the goods. It makes no difference if these goods are on board a vessel which is to discharge them in a neutral port; as soon as the captor is able to show that they are to be forwarded from there by land or sea to an enemy country, that is enough to justify the capture and subsequent condemnation of the cargo. The very principle of continuous voyage, as regards absolute contraband, is thus established by Article 30. The journey made by the goods is regarded as a whole" (*y*).

Proof of  
destination of  
absolute  
contraband.

"Proof of the destination specified in Article 30 is complete in the following cases:—

(1) When the goods are documented for discharge in an enemy port, or for delivery to the armed forces of the enemy.

(2) When the vessel is to call at enemy ports only, or when she is to touch at an enemy port or join the armed forces of the enemy.

(*u*) Declar. of London (1909), Papers, Miscell. No. 4 (1909), p. 7.  
Art. 30.

(*y*) Parl. Papers, Miscell. No. 4  
(1909).

(*x*) British Memorandum, Parl. (1909).

before reaching the neutral port for which the goods in question are documented" (z).

It is for the captor to prove, as we see from Article 30, that the absolute contraband goods intercepted have a hostile destination. But Article 31 lays down that in certain cases proof of the destination is conclusive, that is, the presumption is final and irrebuttable. These cases are explained by the Report:—

"*First case.*—The goods are *documented* for discharge in an enemy port, that is to say, according to the ship's papers referring to those goods they are to be discharged there. In this case there is a real admission, on the part of the interested parties themselves, of enemy destination.

"*Second case.*—The vessel is to touch at enemy ports only; or she is to touch at an enemy port before reaching the neutral port for which the goods are documented; so that although these goods, according to the ship's papers referring to them, are to be discharged in a neutral port, the vessel carrying them is to touch at an enemy port before arriving at that neutral port. They will be liable to capture, and the possibility of proving that their neutral destination is real and in accordance with the intention of the parties interested is not admitted. The fact that, before reaching that destination, the vessel will touch at an enemy port, would occasion too great a risk for the belligerent whose cruiser visits the vessel. Even without assuming intentional fraud, there might be a strong temptation for the master of the merchant vessel to discharge the contraband, for which he would obtain a good price, or there might be a temptation for the local authorities to requisition the goods.

"The same case arises where the vessel is to join the armed forces of the enemy before arriving at the neutral port.

"For the sake of simplicity, the provision speaks only of an *enemy port*; it is understood that a *port occupied by the enemy* must be regarded as an enemy port, as follows from the general rule in Article 30" (a).

"Where a vessel is carrying absolute contraband, her papers are conclusive proof as to the voyage on which she is engaged, unless she is found clearly out of the course indicated by her papers and unable to give adequate reasons to justify such deviation" (b).

That is, if the vessel is encountered in such circumstances as point to the untrustworthy nature of the statements, such state-

(z) Art. 31.

(b) Declar. of London, Art. 32. Cf.

(a) Parl. Papers, Miscell. No. 4 Art. 35.

(1909).

ments will not be accepted by the captor as final proof of the voyage.

Destination  
of conditional  
contraband

“Conditional contraband is liable to capture if it is shown to be destined for the use of the armed forces or of a Government department of the enemy State, unless in this latter case the circumstances show that the goods cannot in fact be used for the purposes of the war in progress. This latter exception does not apply to a consignment coming under Article 24 (4)” (c).

“The destination referred to in Article 33 is presumed to exist if the goods are consigned to enemy authorities, or to a trader established in the enemy country who, as a matter of common knowledge, supplies articles of this kind to the enemy. A similar presumption arises if the goods are consigned to a fortified place belonging to the enemy, or other place serving as a base for the armed forces of the enemy. No such presumption, however, arises in the case of a merchant vessel bound for one of these places if it is sought to prove that she herself is contraband. In cases where the above presumptions do not arise, the destination is presumed to be innocent. The presumptions set up by this Article may be rebutted” (d).

“Conditional contraband is not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port.

The ship’s papers are conclusive proof both as to the voyage of the vessel and the port of discharge of the goods, unless she is found clearly out of the course indicated by her papers and is unable to give adequate reasons to justify such deviation” (e).

“Notwithstanding the provisions of Article 35, conditional contraband, if shown to have the destination referred to in Article 33, is liable to capture in cases where the enemy country has no sea-board” (f).

With regard to the above rules the Report adds by way of explanatory comment: “The rules for conditional contraband differ from those laid down for absolute contraband in two respects—(1) there is no question of destination for the enemy in general, but of destination for the use of his armed forces or Government departments; (2) the doctrine of continuous voyage is excluded. Articles 33 and 34 refer to the first, and Article 35 to the second principle” (ff).

(c) Art. 33.

(d) Art. 34.

(e) Art. 35.

(f) Art. 36.

(ff) In *The Kim* and other vessels (1915, 32 T. L. R. 10), the Prize Court



As to conditional contraband destined for the armed forces, the liability to capture is obvious; similarly, if destined for the central civil authorities of the enemy State (that is, excluding local and municipal authorities). So, too, conditional contraband articles destined for the use of the civil administration of the enemy's colony, when the colony is far from the theatre of war and in no way participates in hostilities, would be exempt; because the enemy could scarcely draw on the resources of such colonial civil administration for the needs of the war. But gold, silver, or paper money would not be exempt, because money can be very easily transmitted.

With regard to the presumption of destination in the case of conditional contraband (as stated in Article 34), it will not apply to the merchant vessel herself, unless there is direct proof of her destination for the use of the armed forces or authorities of the enemy State. If there is no presumption of hostile destination, the destination is presumed to be innocent; so that it is for the captor to prove the illicit nature of the goods intercepted by him. All presumptions, whether in favour of the captor or against him, are rebuttable.

Where the statements in the ship's papers are inconsistent with the actual facts, such as unjustifiable deviation, the papers cease to be evidence; so that the belligerent cruiser will have to decide according to the particular circumstances of the case. Similarly, when search shows the papers to contain false statements. But the false statements, in order to give the belligerent the right to capture the vessel, must be material and substantial: a single false entry, for example, does not necessarily nullify the evidential force of the papers as a whole (*g*).

The case contemplated in Article 36 is obviously rare, but it has occurred in previous wars, *e.g.*, the Anglo-Boer war, when the German vessels, the *Bundesrath*, *Herzog*, and *General* were arrested by British cruisers on suspicion of carrying contraband from German ports to the Portuguese port of Lorenzo Marques, and ultimately destined for the enemy territory. The vessels were afterwards released, as it was found that they had no munitions of war or provisions destined for the enemy Government and intended for military use. In the diplomatic discussion that followed, the British Government urged that its action was justified by the novel circumstance of the war, which was waged with an

modified the doctrine of continuous transport, so as to make conditional contraband goods liable to capture and confiscation when their actual and real

ultimate destination is of an enemy character and they are intended for the use of the enemy forces.

(*g*) Report on the Declaration, *ibid.*

inland State whose only communication with the sea was over a few miles of railway to a neutral port, and contended that the view as expressed by Bluntschli was applicable to the case: "If ship or goods are sent to the destination of a neutral port only the better to come to the aid of the enemy, there will be contraband of war, and confiscation will be justified" (*h*). Eventually an arrangement was arrived at, and compensation was paid for the detention of the vessels (*i*).

Place of capture.

"A vessel carrying goods liable to capture as absolute or conditional contraband may be captured on the high seas or in the territorial waters of the belligerents throughout the whole of her voyage, even if she is to touch at a port of call before reaching the hostile destination" (*k*).

Time of capture.

"A vessel may not be captured on the ground that she has carried contraband on a previous occasion if such carriage is in point of fact at an end" (*l*).

That is, the vessel is not liable to capture on the return voyage; in other words, the successful accomplishment of the enterprise purges the vessel of her offence against the belligerent. In *The Imina* (*m*), Sir W. Scott said that to render the vessel liable to capture, she must be taken *in delicto*. "Under the present understanding of the law of nations," he observed, "you cannot generally take the proceeds in the return voyage. From the moment of quitting port on a hostile destination, indeed, the offence is complete, and it is not necessary to wait till the goods are actually endeavouring to enter the enemy's port; but beyond that, if the goods are not taken *in delicto*, and in the actual prosecution of such a voyage, the penalty is not now generally held to attach." The latter part of this judgment, that the goods must be taken in the actual voyage to the enemy's port, is now subject to exceptions. The same judge applied a different rule in other cases of contraband, carried from Europe to the East Indies, with false papers and false destination, intended to conceal the real object of the expedition, where the return cargo, the proceeds of the outward cargo taken on the return voyage, was held liable to condemnation (*n*). The soundness of these latter decisions, however, was questionable; for in order to sustain the penalty there must be, on principle, a *delictum* at the moment of seizure. To subject the property to confiscation whilst the offence no longer continues, would be to extend it indefinitely, not only to the return voyage,

(*h*) Droit International (1874), 813.

(*i*) Parl. Papers (1900), Africa, No. 1.

(*k*) Declar. of London, Art. 37.

(*l*) Art. 38.

(*m*) (1800), 3 C. Rob. 167.

(*n*) *The Rosalie and Betty* (1800), 2 C. Rob. 343; *The Nancy* (1800), 3 C. Rob. 122; cf. *The Margaret*, 1 Acton, 333.

but to all future cargoes of the vessel, which would thus never be purified from the contagion communicated by the contraband articles.

“Contraband goods are liable to condemnation” (*o*).

Penalty for  
carrying  
contraband.

“A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo” (*p*).

“If a vessel carrying contraband is released, the costs and expenses incurred by the captor in respect of the proceedings in the national Prize Court and of the custody of the ship and cargo during the proceedings shall be borne by the ship” (*q*).

“Goods which belong to the owner of the contraband and are on board the same vessel are liable to condemnation” (*r*).

In earlier times the vessel and her entire contents were deemed to be contaminated by the contraband portion of the cargo, and were therefore subject to confiscation. In the eighteenth century considerable relaxations were introduced, whereby it became more or less the practice to grant immunity to the innocent part of the cargo, as well as to the vessel in certain circumstances, and to take only the contraband. Under the British practice (which was followed by the American Courts), where the ship and cargo do not belong to the same person, the contraband articles only are, in general, confiscated, and the carrier-master is refused his freight (*s*), to which he is entitled upon innocent articles which are condemned as enemy's property; though in some cases costs have been allowed when the contraband portion of the cargo was very small (*t*). But where the ship and the innocent articles of the cargo belong to the owner of the contraband, they are all involved in the same penalty (*u*). And even where the ship and the cargo do not belong to the same person, the carriage of contraband, under the fraudulent circumstances of false papers and false destination, or if the vessel offer forcible resistance to the captor, will work a confiscation of the ship as well as the cargo (*x*). The same effect has likewise been held to be produced by the carriage of contraband articles in a ship, the owner of which is bound by the express obligation of the treaties subsisting between his own country and the capturing country, to refrain from carrying such articles to the enemy. In such a case, it is said that the ship

(*o*) Declar. of London, Art. 39.  
 (*p*) Art. 40.  
 (*q*) Art. 41.  
 (*r*) Art. 42.  
 (*s*) *The Oster Risoer*, 4 C. Rob. 199.

(*t*) Cf. *The Neptunus* (1800), 3 C. Rob. 108.  
 (*u*) *The Staat Embden* (1798), 1 C. Rob. 26.  
 (*x*) *The Jonge Tobias* (1799), 1 C. Rob. 329.



throws off her neutral character, and is liable to be treated at once as an enemy's vessel, and as a violator of the solemn compacts of the country to which she belongs (*y*). Where, however, no contraband goods were condemned in the case of an intercepted ship, restitution is ordered, the captor is liable to pay compensation for the loss caused by her detention. But if there were reasonable ground for suspicion, costs will not be ordered (*z*), and it may be even that restitution will be ordered subject to the payment of the captor's expenses (*a*).

Practice on the Continent shows some divergence; in some countries the vessel is condemned only when the whole of her cargo is contraband; in others, when the contraband portion forms three-quarters of the entire cargo; in others, again, when any portion of the cargo is contraband. The French rules of 1870 directed the ship to be confiscated if more than three-fourths of the cargo consisted of contraband (*b*).

It appears, then, that on these points the rules incorporated in the Declaration of London are a compromise between the Anglo-American and continental systems.

The Report on the Declaration says, with respect to the proportion of the contraband goods on board the vessel: "It was universally admitted [at the London Naval Conference] that in certain cases the condemnation of the contraband is not enough, and that the vessel herself should also be condemned, but opinions differed as to what these cases were. It was decided to fix upon a certain proportion between the contraband and the total cargo. But the question divides itself into two parts: (1) What shall be the proportion? The solution adopted is the mean between those proposed, which varied from a quarter to three-quarters. (2) How shall this proportion be reckoned? Must the contraband form more than half the cargo in volume, weight, value, or freight? The adoption of a single fixed standard gives rise to theoretical objections, and also to practices intended to avoid condemnation of the vessel in spite of the importance of the cargo. If the standard of weight or volume is adopted, the master will ship innocent goods sufficiently bulky or weighty in order that the

(*y*) *The Neutralitet* (1801), 3 C. Rob. 295; *The Ringende Jacob* (1750), 1 C. Rob. 91; *The Sarah Christina* (1799), 1 C. Rob. 237; *The Mercurius* (1799), 1 C. Rob. 288; *The Franklin* (1801), 3 C. Rob. 217; *The Edward* (1801), 4 C. Rob. 69; *The Ranger* (1805), 6 C. Rob. 125; *Carlington v. Merchants' Ins. Co.* (1834), 8 Peters, 518; *The Bermuda* (1865),

3 Wallace, 557. As to how far the shipowner is liable for the act of the master in cases of contraband, see Wheaton's Rep. vol. ii., Appendix, Note I. pp. 37, 38.

(*z*) Cf. *The Ostsee* (1856), 9 Moo. P. C. 150; *The Leucade*, Spinks, 217.

(*a*) *The Ostsee*, *ibid.*

(*b*) Barboux, Jurisp. du Conseil des Prises, 1870—71, Appendix, Art. 6.

volume or weight of the contraband may be less. A similar remark may be made as regards the standard of value or freight. The consequence is that, in order to justify condemnation, it suffices that the contraband should form more than half the cargo according to any one of the above standards. This may seem severe; but, on the one hand, any other system would make fraudulent calculations easy, and, on the other, it may be said that the condemnation of the vessel is justified when the carriage of contraband formed an important part of her venture—a statement which applies to all the cases specified” (c).

“ If a vessel is encountered at sea while ignorant of the outbreak of hostilities or of the declaration of contraband affecting her cargo, the contraband may not be condemned except on payment of compensation; the vessel herself and the remainder of the cargo are not liable to condemnation or to the costs and expenses referred to in Article 41. The same rule applies if the master, after becoming aware of the outbreak of hostilities or of the declaration of contraband, has had no opportunity of discharging the contraband. A vessel is deemed to be aware of the existence of a state of war or of a declaration of contraband, if she left a neutral port after the notification of the outbreak of hostilities or of the declaration of contraband made in sufficient time to the Power to which such port belongs. A vessel is also deemed to be aware of a state of war if she left an enemy port after the outbreak of hostilities” (d).

Effect of  
ignorance.

The first paragraph of this Article (e) introduces a special form of the practice of pre-emption, which has long been observed under the British system. According to the practice of the British Prize Courts, if there was some doubt as to the contraband nature of the goods, the captor, instead of confiscating them, agreed to purchase them at a fair market price, together with a reasonable profit, and allowed freight to the vessel (f). This procedure was frequently applied also to absolute contraband goods, if they were the produce of the country exporting them, and were still in a raw state (g). The Naval Prize Act of 1864, s. 38, incorporated this right of pre-emption; and the Manual of Naval Prize Law of 1888, Article 84, says: “ The carriage of goods conditionally contraband, and of such absolutely contraband goods as

(c) Parl. Papers, Miscell. No. 4 p. 423.  
(1909).

(d) Art. 43. Cf. the Hague Convention, No. VI. (1907), relative to the status of enemy merchant ships at the outbreak of hostilities, *supra*,

(e) Cf. also Art. 29.

(f) Cf. *The Haabet* (1800), 2 C. Rob. 179.

(g) *The Sarah Christina* (1799), 1 C. Rob. 237.

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 goods."

Handing over  
contraband  
goods to  
belligerent  
warship.

"A vessel which has been stopped on the ground that she is carrying contraband, and which is not liable to condemnation on account of the proportion of contraband on board, may, when the circumstances permit, be allowed to continue her voyage if the master is willing to hand over the contraband to the belligerent warship.

The delivery of the contraband must be entered by the captor in the logbook of the vessel stopped, and the master must give the captor duly certified copies of all relevant papers.

The captor is at liberty to destroy the contraband that has thus been handed over to him" (*h*).

UNNEUTRAL  
SERVICE.

We have seen that contraband trading is forbidden by a belligerent, because it increases the means and resources of the enemy in the prosecution of his hostilities. That is, contraband trading assists the enemy—although the neutral trader undertakes his enterprise solely for the purpose of acquiring profit for himself. In so doing he identifies himself with the enemy, but only indirectly and only to a certain extent; therefore, if he is taken in the act by the other belligerent, he is liable to the penalties imposed, which may bring about the loss of his property hazarded in the adventure. If a neutral, instead of such partial identification with the enemy, entirely identifies himself, his acts, and his possessions with the interests of the enemy, he necessarily becomes one with the enemy, he divests himself completely of his neutral character, and in the eyes of the other belligerent becomes himself an enemy, and so is subject to all the liabilities of an enemy proper. Between these two cases there is an intermediate position, which arises out of the performance of what has been described as 'unneutral service'—'assistance hostile.' This involves an interference in the conflict of a character not merely commercial but also warlike; so that the penalty here will be generally severer than that imposed for contraband commerce; *e.g.*, whereas in the latter case the banned goods alone may in certain circumstances be confiscated, in the former the vessel engaged in the forbidden service will herself be subject to condemnation. To show the connection

(*h*) Art. 44.

With regard to the contraband policy pursued during the Great War,

see Phillipson, *Int. Law and the Great War*, pp. 340 *seq.*; *Manual of Emergency Legislation*, *passim*.



of unneutral service with contraband trading, we may refer to an American case that occurred in the war between Great Britain and the United States at the beginning of the nineteenth century.

Although the general policy of the American Government, in its diplomatic negotiations, then aimed to limit the catalogue of contraband by confining it strictly to munitions of war, excluding all articles of promiscuous use, in the remarkable case of *The Commercen* the Supreme Court of the United States was disposed to adopt all the principles of Sir W. Scott, as to provisions becoming contraband under certain circumstances. But as that was not the case of a cargo of *neutral* property, supposed to be liable to capture and confiscation as contraband of war, but of a cargo of *enemy's* property going for the supply of the enemy's naval and military forces, and clearly liable to condemnation, the question was, whether the neutral master was entitled to his freight as in other cases of the transportation of innocent articles of enemy's property; and it was not essential to the determination of the case to consider under what circumstances articles '*ancipitis usûs*' might become contraband. On the actual question before the Court, it seems there would have been no difference of opinion among the American judges in the case of an ordinary war; all of them concurring in the principle, that a neutral, carrying supplies for the enemy's naval or military forces, does, under the mildest interpretation of international law, expose himself to the loss of freight. But the case was that of a Swedish vessel, captured by an American cruiser, in the act of carrying a cargo of British property, consisting of barley and oats, for the supply of the allied armies in the Spanish peninsula, the United States being at war with Great Britain, but at peace with Sweden and the other Powers allied against France. Under these circumstances a majority of the judges were of the opinion that the voyage was illegal, and that the neutral carrier was not entitled to his freight on the cargo condemned as enemy's property.

It was stated in the judgment of the Court, that it had been solemnly adjudged in the British Prize Courts, that being engaged in the transport service of the enemy, or in the conveyance of military persons in his employment, or the carrying of despatches, are acts of hostility which subject the property to confiscation. In these cases, the fact that the voyage was to a neutral port was not thought to change the character of the transaction. The principle of these determinations was asserted to be, that the party must be deemed to place himself in the service of the enemy State, and to assist in warding off the pressure of the war, or in favouring

'Hostile aid.'

its offensive projects. Now these cases could not be distinguished, in principle, from that before the Court. Here was a cargo of provisions exported from the enemy's country, with the avowed purpose of supplying the army of the enemy. Without this destination, they would not have been permitted to be exported at all. It was vain to contend that the direct effect of the voyage was not to aid the British hostilities against the United States. It might enable the enemy indirectly to operate with more vigour and promptitude against them, and increase his disposable force. But it was not the effect of the particular transaction which the law regards: it was the general tendency of such transactions to assist the military operations of the enemy, and to tempt deviations from strict neutrality. The destination to a neutral port could not vary the application of this rule. It was only doing that indirectly which was directly prohibited. Would it be contended that a neutral might lawfully transport provisions for the British fleet and army, while it lay at Bordeaux preparing for an expedition to the United States? Would it be contended that he might lawfully supply a British fleet stationed on the American coast? An attempt had been made to distinguish this case from the ordinary cases of employment in the transport service of the enemy, on the ground that the war of Great Britain against France was a war distinct from that against the United States; and that Swedish subjects had a perfect right to assist the British arms in respect to the former though not to the latter. But the Court held, that whatever might be the right of the Swedish sovereign, acting under his own authority, if a Swedish vessel be engaged in the actual service of Great Britain, or in carrying stores for the exclusive use of the British armies, she must, to all intents and purposes, be deemed a British transport. It was perfectly immaterial in what particular enterprise those armies might, at the time, be engaged; for the same important benefits were conferred upon the enemy of the United States, who thereby acquired a greater disposable force to bring into action against them. In *The Friendship* (i), Sir W. Scott, speaking on this subject, declared that "it signifies nothing, whether the men so conveyed are to be put into action on an immediate expedition or not. The mere shifting of drafts in detachments, and the conveyance of stores from one place to another, is an ordinary employment of a transport vessel, and it is a distinction totally unimportant whether this or that case may be connected with the immediate active service of the

(i) (1807), 6 C. Rob. 420.

enemy. In removing forces from distant settlements, there may be no intention of immediate action; but still the general importance of having troops conveyed to places where it is convenient that they should be collected, either for present or future use, is what constitutes the object and employment of transport vessels." It was obvious that the learned judge did not deem it material to what places the stores might be destined; and it must be equally immaterial what is the immediate occupation of the enemy's force. That force was always hostile to America, be it where it might. To-day it might act against France, to-morrow against the former country; and the better its commissary department was supplied, the more life and activity was communicated to all its motions. It was not therefore material whether there was another distinct war, in which the enemy of the United States was engaged, or not. It was sufficient that his armies were everywhere their enemies; and every assistance offered to them must, directly or indirectly, operate to their injury.

The Court was, therefore, of opinion that the voyage in which the vessel was engaged was illicit, and inconsistent with the duties of neutrality, and that it was a very lenient administration of justice to confine the penalty to a mere denial of freight (*k*).

In 1807, during the war between Great Britain and Holland, the former captured an American vessel, the *Orozembo*, which—chartered by a merchant at Lisbon ostensibly to take a cargo to America—had received on board three Dutch military officers of distinction and two civil officials. It was proved that this took place with the knowledge of the charterer, and that the vessel had been specially fitted beforehand for the purpose. Condemnation was decreed on the ground that the vessel had been let out in the service of the enemy. In the course of judgment Sir W. Scott pointed out that in accordance with previous decisions a vessel hired by the enemy for the conveyance of military persons was to be regarded as a transport, and therefore liable to confiscation. As to the number of military persons necessary to subject the vessel to confiscation, it was difficult to define; since fewer persons of high quality and character might be of much more importance than a much greater number of persons of lower condition. To carry a veteran general, under some circumstances, might be a much more noxious act than the conveyance of a whole regiment. The consequences of such assistance are greater, and therefore the

Transport  
of military  
persons.

(*k*) *The Commercen* (1816), 1 Wheaton, 382.



belligerent has a stronger right to prevent and punish it; nor is it material, in the judgment of the Prize Court, whether the master be ignorant of the character of the service on which he is engaged. It is deemed sufficient if there has been an injury arising to the belligerent from the employment in which the vessel is found. If imposition is practised, it operates as force; and if redress is to be sought against any person, it must be against those who have, by means either of compulsion or deceit, exposed the property to danger; otherwise such opportunities of conveyance would be constantly used, and it would be almost impossible, in the greater number of cases, to prove the privity of the immediate offender (*l*).

Similarly in *The Caroline* it was held that a neutral vessel, which is used as a transport for the enemy's forces, is subject to confiscation, if captured by the opposite belligerent. Nor will the fact of her having been impressed by violence into the enemy's service, exempt her. The master cannot be permitted to aver that he was an involuntary agent. Were an act of force exercised by one belligerent Power on a neutral ship or person to be considered a justification for an act, contrary to the known duties of the neutral character, there would be an end of any prohibition under the law of nations to carry contraband, or to engage in any other hostile act. If any loss is sustained in such a service, the neutral yielding to such demands must seek redress from the Government which has imposed the restraint upon him (*m*).

We find a similar practice a century later, when in the Russo-Japanese war, 1904, the Japanese captured and condemned the *Nigretia*, a British vessel, on a voyage from Shanghai to Vladivostock, on the ground that she had on board two Russian officers, who were proceeding, under feigned names and under the pretence of belonging to the crew, with the connivance of the charterers, to a naval port of the enemy (*n*).

In 1908, in a case arising out of a policy insurance with regard to the above-mentioned vessel, it was held by the Privy Council that enemy military persons carried by a neutral vessel are not contraband of war in the proper sense of the term (*o*).

A neutral vessel employed for the transport of merely civil officials would, it appears, be equally liable to condemnation, if they were despatched, with the knowledge of the charterer or master, on the enemy's public service and at the enemy's public

(*l*) *The Orozembo* (1807), 6 C. Rob. 430.

(*m*) *The Caroline* (1802), 4 C. Rob. 256.

(*n*) *The Nigretia* (1904), Takahashi, p. 639.

(*o*) *Yangtze Insurance Association v. The Indemnity Marine Mutual Assurance Co.*, (1908) 1 K. B. 910; 2 K. B. 504. Cf. *The Trent*, *supra*, pp. 178, 331.

Transportation of military persons and despatches in the enemy's service.

Carriage of enemy civil officials.

expense (*p*). But it would be otherwise if such persons, or even military persons, were private passengers travelling at their own expense (*q*).

The fraudulently carrying the despatches of the enemy will also subject the neutral vessel, in which they are transported, to capture and confiscation. The consequences of such a service are indefinite, infinitely beyond the effect of any contraband that can be conveyed. In 1807, during the war between Great Britain and France, the British captured a neutral ship, the *Atalanta*, on which French despatches were found concealed in a tea chest. Both ship and cargo were therefore condemned, on the ground that the carriage of enemy despatches constitutes an engagement in the service of the enemy. "The carrying of two or three cargoes of military stores," said Sir W. Scott, "is necessarily an assistance of a limited nature; but in the transmission of despatches may be conveyed the entire plan of a campaign, that may defeat all the plans of the other belligerent in that quarter of the world. It is true, as it has been said, that one ball might take off a Charles the XIIth, and might produce the most disastrous effects in a campaign; but that is a consequence so remote and accidental, that, in the contemplation of human events, it is a sort of evanescent quantity of which no account is taken; and the practice has been, accordingly, that it is in considerable quantities only that the offence of contraband is contemplated. The case of despatches is very different; it is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences. It is a service, therefore, which, in whatever degree it exists, can only be considered in one character—as an act of the most hostile nature. The offence of fraudulently carrying despatches in the service of the enemy being, then, greater than that of carrying contraband under any circumstances, it becomes absolutely necessary, as well as just, to resort to some other penalty than that inflicted in cases of contraband. The confiscation of the noxious article which constitutes the penalty in contraband, where the vessel and cargo do not belong to the same person, would be ridiculous when applied to despatches. There would be no freight dependent on their transportation, and therefore this penalty could not, in the nature of things, be applied. The vehicle in which they are carried must, therefore, be confiscated" (*r*). But when it was proved that the master was not

The carriage  
of enemy  
despatches.

(*p*) *The Orozembo* (1807), 6 C. Rob. 430. dum, Parl. Papers, Miscell. No. 4 (1909), p. 9.

(*q*) *The Friendship* (1807), 6 C. Rob. 429. Cf. the British Memorandum, Parl. Papers, Miscell. No. 440.

(*r*) *The Atalanta* (1808), 6 C. Rob. 440.

aware of the fact that enemy despatches were being carried in his vessel—his ignorance not being due to his negligence (*s*)—or that he was ignorant of their real nature (*t*), the penalty of condemnation was not imposed.

Diplomatic  
despatches  
an exception.

But carrying the despatches of an ambassador or other public minister of the enemy, resident in a neutral country, is an exception to the reasoning on which the above general rule is founded. "They are," said Sir W. Scott in *The Caroline*, "despatches from persons who are, in a peculiar manner, the favourite object of the protection of the law of nations, residing in the neutral country for the purpose of preserving the relations of amity between that State and their own Government. On this ground a very material distinction arises with respect to the right of furnishing the conveyance. The neutral country has a right to preserve its relations with the enemy, and you are not at liberty to conclude that any communication between them can partake, in any degree, of the nature of hostility against you. The limits assigned to the operations of war against ambassadors, by writers on public law, are, that the belligerent may exercise his right of war against them, wherever the character of hostility exists: he may stop the ambassador of his enemy on his passage; but when he has arrived in the neutral country, and taken on himself the functions of his office, and has been admitted in his representative character, he becomes a sort of 'middle man,' entitled to peculiar privileges, as set apart for the preservation of the relations of amity and peace, in maintaining which all nations are, in some degree, interested. If it be argued that he retains his national character unmixed, and that even his residence is considered as a residence in his own country, it is answered that this is a fiction of law, invented for his further protection only, and as such a fiction, it is not to be extended beyond the reasoning on which it depends. It was intended as a privilege, and cannot be urged to his disadvantage. Could it be said that he would, on that principle, be subject to any of the rights of war in the neutral territory? Certainly not: he is there for the purpose of carrying on the relations of peace and amity, for the interests of his own country primarily, but at the same time for the furtherance and protection of the interests which the neutral country also has in the continuance of those relations. It is to be considered also, with regard to this question, what may be due to the convenience of the neutral State; for its interests may require that the intercourse of correspondence with

(*s*) *The Susan* (1808), 6 C. Rob. 461.

(*t*) *The Rapid* (1814), Edw. 228.



the enemy's country should not be altogether interdicted. It might be thought to amount almost to a declaration, that an ambassador from the enemy shall not reside in the neutral State, if he is declared to be debarred from the only means of communicating with his own. For to what useful purpose can he reside there without the opportunity of such a communication? It is too much to say that all the business of the two States shall be transacted by the minister of the neutral State resident in the enemy's country. The practice of nations has allowed to neutral States the privilege of receiving ministers from the belligerent Powers, and of an immediate negotiation with them" (*u*).

These propositions represent pretty accurately what was conceived to be the customary law on the subject. And this customary law is valid now, subject to certain modifications introduced by the Hague Code—*e.g.*, the rule that a belligerent may seize enemy sick or wounded found in neutral hospital ships or merchantmen (*x*)—and by the Declaration of London (1909). The latter deals with the question of unneutral service ('assistance hostile') generally, and divides the offences into two classes—lesser offences and more serious offences.

"A neutral vessel will be condemned and will, in a general way, receive the same treatment as a neutral vessel liable to condemnation for carriage of contraband:

Declaration  
of London  
on unneutral  
service.

(a) Lesser  
offences.

(1) If she is on a voyage specially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy, or with a view to the transmission of intelligence in the interest of the enemy.

(2) If, with the knowledge of the owner, the charterer, or the master, she is transporting a military detachment of the enemy, or one or more persons who, in the course of the voyage, directly assist the operations of the enemy.

In the cases specified in the preceding paragraphs, goods belonging to the owner of the vessel are likewise liable to condemnation.

The provisions of the present Article do not apply if the vessel is encountered at sea while unaware of the outbreak of hostilities, or if the master, after becoming aware of the outbreak of hostilities, has had no opportunity of disembarking the passengers. The vessel is deemed to be aware of the state of war if she left an enemy port after the outbreak of hostilities, or a neutral port

(*u*) *The Caroline* (1807), 6 C. Rob. 461.

(*x*) Hague Convention (1907), No. X. Art. 12; *supra*, p. 559.

after the notification of the outbreak of hostilities made in sufficient time to the Power to which such port belongs" (y).

The expression "a voyage specially undertaken" does not refer to a voyage made in the ordinary or usual employment of the vessel, but to departures therefrom, as, for example, when she deliberately deviates from her course or touches at a point not ordinarily called at, in order to embark the individual passengers in question. This Article does not imply that the vessel is *exclusively* devoted to the service of the enemy (z). The word "embodied" gave rise to some difficulty; the London Naval Conference agreed, after much deliberation, that it shall not refer to such enemy individuals as are on their way to their country for the purpose of performing the military service required of them by their municipal law.

In the second case specified in the Article, the fact that the persons mentioned are in civilian dress will afford no protection, if the master or owner was aware of their true character. Assisting the enemy during the voyage includes such services as signalling (a).

Article 45 thus introduces a certain relaxation of the British system, in requiring proof that the master or owner was aware of the character of the persons on board. The former British rule was—as we have seen in the case of *The Orozambo* (b)—that proof of knowledge or delinquency on the part of the master or owner was not essential; it was sufficient if the employment of the vessel involved an injury to the belligerent.

"A neutral vessel will be condemned and will, in a general way, receive the same treatment as if she were a merchant vessel of the enemy;

- (1) If she takes a direct part in the hostilities.
- (2) If she is under the orders or control of an agent placed on board by the enemy Government.
- (3) If she is in the exclusive employment of the enemy Government.
- (4) If she is exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy.

In the cases covered by the present Article, goods belonging to the owner of the vessel are likewise liable to condemnation" (c).

(y) Declar. of London (1909), Art. 45.

(z) The case of exclusive employment is dealt with in the following Article.

(a) Cf. Report on the Declar. of London, Parl. Papers, Miscell. No. 4 (1909).

(b) See *supra*, p. 757.

(c) Art. 46.

The first case mentioned in this Article—as to taking a direct part in the hostilities—includes various forms of service, *e.g.*, laying or removing mines, acting as a scout, or notifying a blockading squadron of the approach of vessels. The third case refers to a vessel that is wholly chartered by the enemy Government, for purposes more or less directly related to the war, especially for transport, *e.g.*, a collier accompanying a fleet, a vessel providing the enemy's forces with provisions. The fourth case contemplates permanent service, whereas the service considered in Article 45 was only temporary service; so that under Article 46, so long as the service lasts "the vessel is liable to capture, even if, at the moment when an enemy cruiser searches her, she is engaged neither in the transport of troops nor in the transmission of intelligence" (*d*). It makes no difference, of course, if the neutral vessel is engaged in the forbidden service in pursuance of a contract entered into before the war; for the essential point is not the time of the contract, but the time of the service done. If a belligerent finds a neutral vessel, then, committing any of the more serious offences relating to unneutral service, he may confiscate not only the cargo belonging to the owner of the vessel, but all enemy goods even though they are not contraband; furthermore he may, if circumstances demand, sink the vessel.

One or two cases that occurred in recent wars (but before the Declaration of London) may be recalled, in order to illustrate the above rules. In 1894, during the war between China and Japan, the *Kowshing*, a British vessel, was hired by China to transport troops and war material to Korea. She was encountered by a Japanese cruiser and, refusing to be taken into a Japanese port, was sunk. Protests were made, but the Japanese proceeding was justifiable, inasmuch as the *Kowshing* being notified of the state of war by the Japanese commander—assuming she was ignorant of it before (for a formal declaration was not then obligatory)—should have undertaken to discontinue her unneutral service (*e*).

During the Russo-Japanese war, 1904, in reference to the *Haimun*, a vessel flying the British flag and chartered by a British war correspondent for the purpose of sending wireless messages to neutral countries, the Russian authorities declared they would regard as spies correspondents who sent such messages to the enemy from certain areas, and seize their ships. Great Britain and the United States protesting, Russia took no further action. In the first place, the sending of such messages could not amount to

(*d*) Report on the Declaration, *ibid.*

(*e*) Cf. Holland, *Studies in International Law* (Oxford, 1898), p. 126.



espionage; secondly, it could not be unneutral service if the messages were despatched to neutral countries (f).

In the same war, a German vessel, the *Industrie*, was condemned by the Japanese Prize Court, on the ground that, whilst purporting to send war intelligence to a newspaper at Chefoo, she was found sending information to the enemy with regard to the Japanese naval movements (g).

Again, in 1905, a French steamship, the *Quangnam*, took a cargo of spirits from Saigon to the Russian squadron in Kamranh Bay; then proceeding ostensibly to Manila actually directed her course between Formosa and the Pescadores, and reached Hatto Channel, where she was seized by a Japanese cruiser. She was brought before the Japanese Prize Court, and condemned on the ground that she was employed in the enemy's service in carrying supplies to his fleet and in reconnoitring on his behalf (h).

Enemy combatants on neutral vessels.

“Any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel may be made a prisoner of war, even though there be no ground for the capture of the vessel” (i).

This Article introduces a modification of the earlier British view, as expressed, for example, in the *Trent* controversy (ii). As in the case of Article 45, the expression “embodied in the armed forces” does not apply to purely civil officials and to persons who are on their way to take up military service but have not yet joined their corps. It is difficult to see the ground for differentiating between men enrolled and men proceeding to be enrolled. The provision savours more of compromise than of logical consistency.

The vessel will not be subject to capture if, for example, the persons embodied in the enemy forces came on board as ordinary passengers and the master was ignorant of their status. But if the vessel deviated from her ordinary voyage for the purpose of receiving such persons on board, such deviation will constitute a presumption of unneutral service, and so will render her liable to seizure.

During the war between Italy and Turkey, 1912, a French mail-boat, the *Manouba*, proceeding from Marseilles to Tunis, was seized by an Italian cruiser, and taken into Cagliari, on the

(f) On this case, see Takahashi, pp. 387 *seq.*; Hershey, *Russo-Japanese War*, pp. 116 *seq.*; Smith and Sibley, *Russo-Japanese War*, pp. 82 *seq.*

(g) Takahashi, p. 732.

(h) *Ibid.* p. 735.

(i) Declar. of London, Art. 47.

(ii) See *supra*, pp. 178, 331.

ground that she carried a number of Turkish passengers who were thought to be military officers on their way to the scene of hostilities, but who claimed to be in the medical service. The French Government protesting, the vessel was released and the suspected passengers were committed to the charge of the French consul at Tunis, who undertook to prevent their crossing over into Tripoli if they were found on enquiry to be combatants. Subsequently, however, their arrest was shown to be unwarranted, and Italy paid compensation to France in accordance with an award of the Hague Court of Arbitration (*h*).

At the London Naval Conference a proposal was put forward that a neutral vessel should be regarded as an enemy vessel if she made, with the enemy's authorization, a voyage which she was only permitted to make after the outbreak of hostilities or during the two preceding months. Had this proposal been accepted by the Conference, the "rule of the war of 1756" would have been formally revived, whereby a ship was deemed to lose her neutral character if she engaged in a trade which had been reserved in time of peace to the national marine of the enemy (*l*). The rule in question is, nevertheless, considered by Great Britain to be a constituent element of international law; though in several quarters a stand has been made against it from time to time. Its legality has always been contested by the American Government—from the time the United States acquired their independence right down to our own day when their delegates at the London Naval Conference strongly opposed it—and it appears in its origin to have been founded on principles different from those that were later urged in its defence.

During the war of 1756, the French Government, finding the trade with their colonies almost entirely cut off by the maritime superiority of Great Britain, relaxed their monopoly of that trade, and allowed the Dutch, then neutral, to carry on the commerce between France and her colonies under special licenses or passes, granted for this particular purpose, excluding at the same time all other neutrals from the same trade. Many Dutch vessels so employed were captured by the British cruisers, and, together with their cargoes, were condemned by the Prize Courts, upon the

NEUTRALS  
CARRYING ON  
TRADE CLOSED  
TO THEM IN  
TIME OF PEACE.

(*h*) Cf. Amer. Journ. of Inter. Law, vol. vii. (1913), p. 629.

(*l*) Cf. Art. 57 of the Declaration of London, which says that a neutral vessel, which is engaged in a trade

closed to her in time of peace, is outside the scope of the rule whereby the character of a vessel is determined by the flag she is entitled to fly, *supra*, p. 572.

principle, that by such employment they were in effect incorporated into the French navigation, having adopted the commerce and character of the enemy, and identified themselves with his interests and purposes (*m*). They were, in the judgment of these courts, to be considered like transports in the enemy's service, and hence liable to capture and condemnation, upon the same principle with property condemned for carrying military persons or despatches. In these cases the property was considered *pro hâc vice*, as enemy's property, as so completely identified with his interests as to acquire a hostile character (*n*). So, where a neutral is engaged in a trade, which is exclusively confined to the subjects of any country, in peace and in war, and is interdicted to all others, and cannot at any time be avowedly carried on in the name of a foreigner, such a trade is considered so entirely national, that it must follow the hostile situation of the country (*o*). There is all the difference between this principle and the more modern doctrine which interdicts to neutrals, during war, all trade not open to them in time of peace, that there is between the granting by the enemy of special licenses to the subjects of the opposite belligerent, protecting their property from capture in a particular trade which the policy of the enemy induces him to tolerate, and a general exemption of such trade from capture. The former is clearly cause of confiscation, whilst the latter has never been deemed to have such an effect. The 'rule of the war of 1756' was originally founded upon the former principle: it was suffered to lie dormant during the war of the American Revolution; and when revived at the commencement of the war against France in 1793, was applied, with various relaxations and modifications, to the prohibition of all neutral traffic with the colonies and upon the coasts of the enemy. The principle of the rule was frequently vindicated by Sir W. Scott, in his masterly judgments in the High Court of Admiralty and in the writings of other British public jurists of great learning and ability. But the conclusiveness of their reasonings was ably contested by different American statesmen, and failed to procure the acquiescence of neutral Powers in this prohibition of their trade with the enemy's colonies. The question continued a fruitful source of contention between Great Britain and those Powers, until they became her allies or enemies

(*m*) Cf. *Berens v. Rucker*, 1 W. Bl. 213; *Brymer v. Atkins*, 1 H. Bl. 165.

(*n*) See *The Immanuel* (1799), 2 C. Rob. 186; *The Yonge Thomas*, 3 C. Rob. 232, n. Cf. Phillimore, vol. iii. 385.

(*o*) *The Princessa* (1799), 2 C. Rob. 52; *The Anna Catherina*, 4 C. Rob. 118; *The Rendsborg* (1802), 4 C. Rob. 121; *The Vrow Anna Catherina* (1803), 5 C. Rob. 161. Wheaton's Rep. vol. ii. Appendix, p. 29.



at the close of the war; but its practical importance was afterwards much diminished by the revolution which has since taken place in the colonial system of Europe (*p*).

From time to time the rule has not been enforced even by Great Britain; and the Manual of Naval Prize Law of 1888 expressly stated that its general application was suspended, and that it would only be enforced under special instructions (*q*). As no agreement was arrived at on the subject at the Naval Conference of 1908-1909, it must be considered as being now an open one (*r*).

Another exception to the general freedom of neutral commerce in time of war is to be found in the trade to ports or places besieged or blockaded by one of the belligerent Powers. THE LAW OF  
BLOCKADE.

A blockade (that is, a war blockade as distinguished from a 'pacific blockade') may be defined as "an act of war carried out by the warships of a belligerent, detailed to prevent access to or departure from a defined part of the enemy's coast" (*s*). The preventive measures are enforced against vessels of all nations. Definition.

The earlier text-writers all require that the siege or blockade should actually exist, and be carried on by an adequate force, and not merely declared by proclamation, in order to render commercial intercourse with the port or place unlawful on the part of neutrals. Thus Grotius forbids the carrying any thing to besieged or blockaded places, "if it might impede the execution of the belligerent's lawful designs, and if the carriers might have known of the siege or blockade, as in the case of a town actually invested, or a port closely blockaded, and when a surrender or peace is already expected to take place" (*t*). And Bynkershoek, in commenting upon this passage, holds it to be "unlawful to carry any thing, whether contraband or not, to a place thus circumstanced; since those who are within may be compelled to surrender, not merely by the direct application of force, but also by the want of provisions and other necessaries. If, therefore, it should be lawful to carry to them what they are in need of, the belligerent might thereby be compelled to raise the siege or blockade, which would be doing him an injury, and therefore would be unjust. And because it cannot be known what articles the besieged may, Views of  
earlier  
writers.

(*p*) Wheaton's Rep. vol. i. Appendix, Note iii. See Madison, "Examination of the British doctrine which subjects to capture a neutral trade not open in time of peace."

(*q*) Art. 141.

(*r*) Cf. Parl. Papers, Miscell. No. 4

(1909), p. 100; and Miscell. No. 5 (1909), p. 247.

(*s*) Cf. the British memorandum, Parl. Papers, Miscell. No. 4 (1909), p. 5; see also No. 5 (1909), p. 35.

(*t*) Grotius, De Jur. Bel. ac Pac. lib. iii. cap. 1, § 5, note 3.

want, the law forbids, in general terms, carrying anything to them; otherwise disputes and altercations would arise to which there would be no end" (*u*).

Opinion of  
Bynkershoek  
on blockade.

Bynkershoek appears to have mistaken the true sense of the above-cited passage from Grotius, in supposing that the latter meant to require, as a necessary ingredient in a strict blockade, that there should be an expectation of peace or of a surrender, when, in fact, he merely mentions that as an example, by way of putting the strongest possible case. But that he concurred with Grotius in requiring a strict and actual siege or blockade, such as where a town is actually invested with troops, or a port closely blockaded by ships of war ('*oppidum obsessum*,' '*portus clausos*'), is evident from his subsequent remarks in the same chapter, upon the decrees of the States-General against those who should carry anything to the Spanish camp, the same not being then actually besieged. He holds the decrees to be perfectly justifiable, so far as they prohibited the carrying of contraband of war to the enemy's camp; "but, as to other things, whether they were or were not lawfully prohibited, depends entirely upon the circumstance of the place being besieged or not." So also, in commenting upon the decree of the States-General of the 26th June, 1630 (*x*), declaring the ports of Flanders in a state of blockade, he states that this decree was for some time not carried into execution by the actual presence of a sufficient naval force, during which period certain neutral vessels trading to those ports were captured by the Dutch cruisers; and that part of their cargoes only which consisted of contraband articles was condemned, whilst the residue was released with the vessels. "It has been asked," says he, "by what law the contraband goods were condemned under those circumstances, and there are those who deny the legality of their condemnation. It is evident, however, that whilst those coasts were guarded in a lax or remiss manner, the law of blockade, by which all neutral goods going to or coming from a blockaded port may be lawfully captured, might also have been relaxed; but not so the general law of war, by which contraband goods, when carried to an enemy's port, even though not blockaded, are liable to confiscation" (*y*).

Legal aspect  
of blockade

The law of blockade (*z*) like that of contraband is a compromise

(*u*) Bynkershoek, *Quæst. Jur. Pub.* lib. i. cap. 11.

(*x*) This famous Dutch decree of 1630 may be regarded as the first systematic attempt at State legislation for the purpose of regulating the sub-

ject of blockade. Cf. R. Kleen, *Lois et usages de la neutralité*, 2 vols. (Paris, 1898—1900), vol. i. p. 543.

(*y*) Wheaton, *Hist. Law of Nations*, pp. 138—143.

(*z*) The law of blockade was con-

between the conflicting rights of belligerents and neutrals, viz., the right of the belligerent to injure his foe so as to compel him to give up the struggle, and the right of the neutral to carry on his usual trade with that foe. It is often said that the violation of a blockade and the transportation of contraband are unlawful, but this requires some explanation. If by this expression it is intended to imply that such acts are contrary to international law, in the sense of being criminal or as being acts of disobedience to a positive rule, the term unlawful is then wrongly used. Neutral subjects are under no positive duty imposed by the law of nations, to abstain from blockade running, or from carrying contraband; and with regard to the latter this has been formally recognised, as we have seen, by the conventional law drawn up at the Hague Conference (a). The acts which amount to such prohibited proceedings in time of war are perfectly lawful in time of peace, but the existence of war gives to the belligerents certain rights which they may enforce against the neutrals who engage in these two transactions. Thus the exportation of a cargo of arms to any State during peace is indisputably lawful, and it is also permissible when the State to which the arms are consigned is at war, but in this case the sender is exposed to the risk of forfeiting his goods if the other belligerent can capture them on their way. So it is with blockade. Its violation only exposes the blockade runner to the chance of losing his ship and cargo, if he is unsuccessful. It is no violation of neutrality for a State not to prevent its subjects from engaging in such traffic; its duty as a neutral consists in letting them do so at their own risk, and abandoning them to the Prize Courts of the belligerent who may capture them (b). Proclamations of neutrality usually inform subjects that if they engage in blockade running or the carriage of contraband they "will rightfully incur, and be justly liable to, hostile capture, and to the penalties denounced by the law of nations in that behalf," and that persons venturing on such proceedings will act at their peril and will in no wise obtain any protection from their sovereign (c). Thus these two transactions are only "unlawful" in the sense that the belligerent may inflict the punishment of confiscation if he can catch the perpetrators in the act. When the act

running and  
conveying  
contraband.

considered by the London Naval Conference, 1908—1909, which drew up the fundamental principles of the international law on the subject in a brief code of twenty-one Articles, viz., Arts. 1—21 of the Declaration of London (1909).

(a) See *supra*, p. 664.

(b) Parl. Papers, N. America, 1873 (No. 2), p. 109.

(c) British Proclamation of Feb. 11th, 1904, in reference to the Russo-Japanese War, Appendix A. See Rep. of Neutrality Laws Commission (1868), p. 74; and see there other proclamations.



is completed no penalty can be imposed; the responsibility for it ceases on completion (*d*). In the foregoing remarks it is assumed that the neutral States have not enacted any municipal law expressly prohibiting blockade running, &c., and that they are not bound by any treaty stipulations on the subjects. The matter is here discussed only from the point of view of international law unrestricted by any special arrangement (*e*).

Sieges and blockades.

There is an important distinction between sieges and blockades. The former are as a rule undertaken with the object of capturing the place besieged, while the usual object of the latter is to cripple the resources of the enemy by intercepting his commerce with neutral States. A city may be, and often is, both besieged and blockaded at the same time (*f*). It is thus evident that neutral States suffer to a great extent from a blockade, and such an undertaking has been described as "la plus grave atteinte qui puisse être portée par la guerre au droit des neutres" (*g*).

Extent of blockade.

A blockade being thus an infringement of neutral rights, its operation is not to be extended further than the actual circumstances of the case render it necessary. The Declaration of London lays down specifically that a blockade must be limited to the ports and coasts belonging to or occupied by the enemy (*h*), and that the blockading forces must not bar access to neutral ports or coasts (*i*). Thus when the United States declared all the Southern ports blockaded, and a squadron cruised off the mouth of the Rio Grande to intercept the trade with Texas, the Supreme Court decided that this blockade was not to be held to apply to the western side of the Rio Grande, which was in Mexican and neutral territory (*k*). The enemy territory that may be blockaded includes the enemy's own country, his colonies, his colonial protectorates, his leased territory, and any territory occupied or controlled by him, whether the occupation be political or military. Thus, in the Russo-Japanese war, Japan declared a blockade of Chinese territory that had been leased (in 1898) to Russia.

*The Peterhoff.*

There is a difference of opinion as to whether the mouth of an international river may legitimately be blockaded, if the riparian States are not all belligerents. In the Crimean war, 1854, the

(*d*) *The Helen* (1855), L. R. 1 A. & E. 1; *Ex parte Chavasse* (1865), 11 Jur. N. S. 400; *Naylor v. Taylor*, 9 B. & C. 718.

(*e*) See on this subject Parl. Papers, N. America, 1873 (No. 2), p. 14. Letters of Historicus: Contraband.

(*f*) Calvo, Droit International, vol. ii. § 1139.

(*g*) E. Cauchy, Droit Maritime In-

ternational (Paris, 1862), tom. ii. p. 196. See also P. Fiore, Trattato di diritto internazionale pubblico, 3 vols. (Torino, 1884), tom. ii. p. 446.

(*h*) Declar. of London (1909), Art. 1.

(*i*) *Ibid.* Art. 18.

(*k*) *The Peterhoff* (1866), 5 Wallace, 35. Cf. *The Frau Isabe* (1801), 4 C. Rob. 63; *The Luna*, Edw. 190.

British and French fleets blockaded the mouth of the Danube, but Bavaria and Württemberg, which were then neutral, protested. During the Franco-German war, however, when the French blockaded the German coast of the North Sea, they exempted the mouth of the River Ems, which flows partly through Holland.

With regard to the neutralized—or rather internationalized—canals of Suez and Panama, there are special treaty stipulations which exempt them from blockade.

A maritime blockade is not violated by sending goods to the blockaded port, or by bringing them from the same, through the interior canal navigation or land carriage of the country. A blockade may be of different descriptions. A mere maritime blockade, effected by a force operating only at sea, can have no operation upon the interior communications of the port. The legal blockade can extend no further than the actual blockade can be applied. If the place be not invested on the land side, its interior communications with other ports cannot be cut off. If the blockade be rendered imperfect by this rule of construction, it must be ascribed to its physical inadequacy, by which the extent of its legal pretensions is unavoidably limited (*l*). But goods shipped in a river, having been previously sent in lighters along the coast from the blockaded port, with the ship under charter-party proceeding also from the blockaded port in ballast to take them on board, were held liable to confiscation. This case is very different from the preceding, because there the communication had been by inland navigation, which was in no manner and in no part of it subject to the blockade (*m*).

Interior canal navigation.

A blockade must also be absolute, that is, it must interdict all commerce whatever with the blockaded port. It is not legitimate if it allows to either belligerent a freedom of commerce denied to the subjects of neutral States (*n*). This rule is recognised by the Declaration of London, which says that a blockade must be applied impartially to the ships of all nations (*o*); although the commander of a blockading force may, if he sees fit, allow a neutral warship to enter a blockaded port, and afterwards to leave it (*p*). During the Crimean War various orders were issued by the English, French, and Russian Governments, the effect of which was to permit trade to be carried on by their respective subjects in the

Impartiality.

*The Francisca.*

(*l*) *The Comet*, Edw. Ad. 32; *The Peterhoff* (1866), 5 Wallace, 35.

(*m*) *The Neutralitet* (1801), 3 C. Rob. 297; *The Stert* (1801), 4 C. Rob.

65.

(*n*) *The Rolla* (1807), 6 C. Rob. 364.

(*o*) Declar. of London, Art. 5.

(*p*) *Ibid.* Art. 6.

Baltic ports, while those ports were blockaded by the English and French fleets, but which excluded neutrals from such trade. During this blockade a Danish (and neutral) ship was captured by an English cruiser near the entrance of the Gulf of Riga. The Privy Council held that as the blockade was relaxed in favour of belligerents to the exclusion of neutrals, it was not a legal blockade, and therefore the vessel was improperly seized for attempting to enter the port of Riga, and must be restored (*q*).

Entry on account of distress.

Under the British practice, the stringency of the rule prohibiting vessels from entering a blockaded port is only relaxed when the ship attempting to enter does so from reasons of necessity. She may be out of provisions or water, or she may be in a leaking condition, or otherwise in need of immediate repairs, and there is no other port easy of access. The case, however, must be one of absolute and uncontrollable necessity; and this must be established beyond reasonable doubt. "Nothing less," says Lord Stowell, "than an uncontrollable necessity, which admits of no compromise, and cannot be resisted," will be held a justification of the offence. Any rule less stringent than this would open the door to all sorts of fraud; and attempted evasions of the blockade would be sought to be excused on pretences of distress and danger not warranted by the facts, but the falsity of which it would be difficult to expose (*r*). The Declaration of London says on this point that in circumstances of distress, acknowledged by an officer of the blockading force, a neutral vessel may enter and leave a blockaded place, provided that she has neither discharged nor shipped any cargo there (*s*). This provision, then, gives the vessel a right to enter, and then to depart, if the distress be established (*t*).

What things must be proved to constitute a violation of blockade.

"To constitute a violation of blockade," said Sir W. Scott, "three things must be proved: firstly, the existence of an actual blockade; secondly, the knowledge of the party supposed to have offended; and thirdly, some act of violation, either by going in or coming out with a cargo laden after the commencement of blockade" (*u*).

Actual presence of the blockading force.

1. The definition of a lawful maritime blockade, requiring the actual presence of a maritime force stationed at the entrance of the port, sufficiently near to prevent communication as given by

(*q*) *The Franciska* (1854), 10 Moo. P. C. 36; Spinks, 111.

(*r*) *The Diana* (1803), 7 Wallace, 369; *The Major Barbour*, Blatchford, Prize Cases, 167; *The Forest King*, Blatchford, P. C. 2; *The Panaghia*

*Rhomba* (1858), 12 Moo. P. C. 168.

(*s*) Art. 7.

(*t*) Cf. *The Hiawatha*, Blatchford, P. C. 15.

(*u*) *The Betsey* (1798), 1 C. Rob. 92.



the text-writers, is confirmed by the authority of numerous modern treaties, and especially by the Convention of 1801, between Great Britain and Russia, intended as a final adjustment of the disputed points of maritime law, which had given rise to the armed neutrality of 1780 and of 1801 (*x*).

The only exception to the general rule, which requires the actual presence of an adequate force to constitute a lawful blockade, arises out of the circumstance of the occasional temporary absence of the blockading squadron, produced by accident, as in the case of a storm, which does not suspend the legal operation of the blockade (*y*). The law considers an attempt to take advantage of such an accidental removal a fraudulent attempt to break the blockade (*z*).

Temporary interruption.

The fourth Article of the Declaration of Paris, 1856, says: "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" (*a*). This merely put into a formula what was already a principle of the law of nations, but it left the often disputed question of what is a "sufficient force" in the same state as before. This is, in reality, more a question of fact than of law, and it seems almost impossible to lay down any precise rule defining in all cases what is a sufficient force (*b*). The Declaration of London, 1909, summarizes these principles with regard to the efficiency of blockades. It reproduces in exactly the same terms the provision of the Declaration of Paris (*c*), and adds that the question whether a blockade is effective is a question of fact (*d*)—to be determined by the Courts—and that a blockade is not considered to be raised if the blockading forces are temporarily driven off by stress of weather (*e*). The rule requiring the actual presence of a sufficient force to render the operation real and effective is directed against the abuse known as 'paper' or 'cabinet' blockades, of which examples are found in the Napoleonic wars. The efficiency of the force present does not necessarily depend on the number or the position of the blockading vessels; nor need they be stationary—the essential criterion is the danger of attempting

Effectiveness of blockades.

(*x*) The 3rd Art. sect. 4, of this convention, declares:—"That in order to determine what characterizes a blockaded port, that domination is given only where there is, by the disposition of the Power which attacks it with ships stationary, or sufficiently near, an evident danger in entering."

(*y*) *The Frederick Molke* (1798), 1 C. Rob. 86.

(*z*) *The Columbia* (1799), 1 C. Rob. 154.

(*a*) Hertslet, *Map of Europe*, vol. ii. p. 1283.

(*b*) *Calvo*, ii. § 1148. Bluntschli, § 829.

(*c*) *Declar. of London* (1909), Art. 2.

(*d*) Art. 3.

(*e*) Art. 4.

ingress or egress. If the blockading forces are withdrawn for any reason other than that of bad weather, the blockade may then be deemed to be raised; and in order to re-establish it the requirements as to declaration and notification (to be considered presently) must again be fulfilled.

“In the eye of the law,” said Lord Chief Justice Cockburn, “a blockade is effective if the enemy’s ships are in such numbers and positions as to render running the blockade a matter of danger, although some vessels may succeed in getting through” (*f*). Similarly, in a case decided later by the Supreme Court of the United States, during the Spanish-American war, 1898, it was declared to be sufficient if the danger was real and apparent, and that the question of effectiveness was not controlled by the number of the blockading forces, and that one modern cruiser is enough as a matter of law, if it is sufficient in fact for the purpose and renders it dangerous for other craft to enter the port (*g*). In the Crimean war, the Russian port of Riga was blockaded by one British cruiser at a distance of over a hundred miles from the town; the vessel, however, was stationed in a narrow channel which constituted the only navigable approach to the port. Similarly the blockade of Buenos Ayres was held to have been efficiently maintained when the blockading force was stationed at a distance of a hundred miles from the town (*h*). A blockade is not necessarily confined to maritime operations. It may be made effectual by batteries ashore as well as by ships afloat. In the case of an inland port, the most effective blockade would be maintained by batteries commanding the river or inlet by which it may be approached, supported by a naval force sufficient to warn off innocent and capture offending vessels attempting to enter (*i*). The blockade of the Confederate ports by the United States was one of the most extraordinary in history. It extended over a coast line of more than 3,000 miles, and though, at the outset, the Federal fleet was not equal to such a gigantic task, foreign Governments recognised the blockade. As the war progressed the development of the naval resources of the Northern States enabled them to intercept most of the trade with the South, and this was one of the chief causes of their ultimate success (*k*). The Supreme Court held that this extensive blockade, being once established, and duly notified, was to be deemed to continue until notice of discontinuance,

(*f*) *Geipel v. Smith*, L. R. 7 Q. B. 410.

(*g*) *The Olindo Rodrigues* (1898), 174 U. S. Rep. 510.

(*h*) *Naylor v. Taylor*, 1 Moo. & M. 207.

(*i*) *The Circassian* (1864), 2 Wallace, 149.

(*k*) Wheaton, ed. Dana, note 232.

in the absence of positive proof of discontinuance by other evidence. Thus ships captured for endeavouring to enter or leave the Confederate ports were condemned as prize when their officers saw, or swore they saw no blockading ships off the ports they were making for or quitting (*l*). A milder rule towards neutrals was adopted by France in 1870. French naval officers were instructed that ships approaching a blockaded port were not to be deemed to intend violating the blockade, until its notification had been inscribed on their register or ship's papers, by an officer of one of the ships forming the blockade (*m*).

A question respecting the efficiency of a blockade arose during the Russo-Turkish war of 1877. Turkey proclaimed a blockade of the whole of the coasts of the Black Sea, from Trebizond to the mouth of the Danube, and maintained it by a force of cruisers in the Black Sea itself. This force prevented most of the trade with the Russian ports from being carried on; but, besides this, the Porte stationed two cruisers in the Bosphorus, and any vessels which escaped the Black Sea squadron were captured on arriving there, and taken before the Prize Court sitting at Constantinople. A more complete and efficient blockade could not possibly be devised, nevertheless it was argued for the owners of the prizes, that being neutral vessels (mostly Greek), as soon as they had escaped the Black Sea squadron, they were free, and were no longer liable to capture. The Turkish Prize Court, however, condemned the vessels. This case was peculiarly important from the fact that some of the foreign ambassadors at the Porte had intimated that if these vessels were not condemned, the blockade would not be recognised by other countries. To hold that these Greek vessels were not liable to be captured in the Bosphorus would have been tantamount to opening the general commerce of the Black Sea to Greece, and this would have immediately invalidated the whole blockade (*n*).

Turkish  
blockade of  
the Black Sea.

The blockade of Formosa was notified by France in 1884. Great Britain protested, through its ambassador at Paris, alleging that the force at the disposal of the French admiral was insufficient. The blockade was in consequence abandoned till the arrival of reinforcements (*o*).

Blockade of  
Formosa.

The blockade of insurgent Haytian ports, proclaimed by Hayti

Blockade of  
Hayti.

(*l*) *The Baigorry* (1864), 2 Wallace, 480; *The Andromeda*, 2 Wallace, 481.

(*m*) See Instructions, Art. 7; Barboux, *Jurisp. du Conseil des Prises*, 1870—71, Appendix. Cf. *Parl. Papers, Miscell. No. 5* (1909), p. 30; as to

German, Italian and Dutch practice, see *ibid.* pp. 4, 44, 51.

(*n*) See *The Times*, 15th Dec. 1877, p. 6.

(*o*) *Annual Register*, 1884, p. 373.



in November, 1888, having ceased to be effective in the July following, Lord Salisbury notified to the Haytian Government that it could no longer be respected, and that British vessels entering or leaving ports in the possession of the insurgents must not be molested by the Government cruisers (*p*).

Knowledge of  
the party.

2. As a proclamation, or general public notification, is not of itself sufficient to constitute a legal blockade, so neither can a knowledge of the existence of such a blockade be imputed to the party, *merely* in consequence of such a proclamation or notification. Not only must an actual blockade exist, but a knowledge of it must be brought home to the party, in order to show that it has been violated (*q*). As, on the one hand, a declaration of blockade which is not supported by the fact cannot be deemed legally to exist, so, on the other hand, the fact, duly notified to the party on the spot, is of itself sufficient to affect him with a knowledge of it; for the public notifications between Governments can be meant only for the information of individuals; but if the individual is personally informed, that purpose is still better obtained than by a public declaration (*r*). Where the vessel sails from a country lying sufficiently near to the blockaded port to have constant information of the state of the blockade, whether it is continued or is relaxed, no special notice is necessary; for the public declaration in this case implies notice to the party, after sufficient time has elapsed to receive the declaration at the port whence the vessel sails (*s*). But where the country lies at such a distance that the inhabitants cannot have this constant information, they may lawfully send their vessels conjecturally, upon the expectation of finding the blockade broken up, after it has existed for a considerable time. In this case, the party has a right to make a fair inquiry whether the blockade be determined or not, and consequently cannot be involved in the penalties affixed to a violation of it, unless, upon such inquiry, he receives notice of the existence of the blockade (*t*).

Extent of  
notice.

“A notice of blockade,” says Bernard, “must not be more extensive than the blockade itself. A belligerent cannot be allowed to proclaim that he has instituted a blockade of all the ports of the enemy, within certain specified limits, when in truth he has only blockaded some of them. Such a course would introduce all

(*p*) London Gazette, 12th July, 1889.

(*q*) *The Betsey* (1798), 1 C. Rob. 93.

(*r*) *The Mercurius* (1799), 1 C. Rob.

(*s*) *The Jonge Petronella* (1799), 2

C. Rob. 131; *The Calypso* (1799), 2

C. Rob. 298.

(*t*) *The Betsey* (1798), 1 C. Rob.

the evils of what is termed a 'paper blockade,' and would be attended with the grossest injustice to the commerce of neutrals. Accordingly, a neutral is at liberty to disregard such a notice, and is not liable to the penalties attending a breach of blockade for afterwards attempting to enter one of the ports which really are blockaded" (*u*).

With regard to notice, the Declaration of London provides the following rules:—

"A blockade, in order to be binding, must be declared in accordance with Article 9, and notified in accordance with Articles 11 and 16" (*x*).

Notice under the Declaration of London, 1909.

The declaration and notification will, in general, take place before the actual blockade is enforced; but a blockade runner cannot rely on the absence of these, if in fact a special or personal notification has been received by him.

"A declaration of blockade is made either by the blockading Power or by the naval authorities acting in its name. It specifies (1) the date when the blockade begins; (2) the geographical limits of the coast-line under blockade; (3) the period within which neutral vessels may come out" (*y*).

No time for departure has been fixed; a period of fifteen days has frequently been allowed, and sometimes a longer delay has been permitted. In 1902, when the Venezuelan ports were blockaded by Great Britain and Germany, a fortnight was granted. In the Spanish-American war, 1898, the United States allowed thirty days in the case of the Cuban ports.

"If the operations of the blockading Power, or of the naval authorities acting in its name, are not in conformity with the particulars which, in accordance with Article 9 (1) and (2), must be inserted in the declaration of blockade, the declaration is void, and a new declaration is necessary in order to make the blockade operative" (*z*).

If, for example, the declaration specified a certain date for the commencement of the blockade, and the blockade did not actually begin till a few days later, then not only was there no blockade at all during the interval, but also the blockade has no validity even after it has really begun at that later date; so that a new declaration becomes necessary.

"A declaration of blockade is notified: (1) to the neutral Powers, by the blockading Power by means of a communication addressed

(*u*) Mountague Bernard, *Neutrality of Gt. Britain*, p. 231. Cf. *The Franciska* (1854), 10 Moo. P. C. 37; Spinks, 111.

(*x*) Declar. of London (1909), Art. 8.

(*y*) Art. 9.

(*z*) Art. 10.

to the Governments direct, or to their representatives accredited to it; (2) to the local authorities, by the officer commanding the blockading force. The local authorities will, in turn, inform the foreign consular officers at the port or on the coast-line under blockade as soon as possible" (a).

This Article effects a compromise between the Anglo-American practice and the French practice (which was also followed by Italy and Spain). Under the former, actual notice was not indispensable (b): it might be presumed from the fact that the blockade was generally notorious. Under the latter, a special notification had to be given to every approaching vessel. In 1899, the United States Supreme Court recognised the validity of a *de facto* blockade that had not been notified (c); but under the Declaration of London this would no longer be possible.

"The rules as to declaration and notification of blockade apply to cases where the limits of a blockade are extended, or where a blockade is re-established after having been raised" (d).

"The voluntary raising of a blockade, as well as any restriction in the limits of a blockade, must be notified in the manner prescribed by Article 11" (e).

But effective publicity is, in this case, of greater consequence than official notification; whereas in the establishment of a blockade public notification is of greater consequence than its (presumed) notoriety. Where the blockading belligerent has been driven off, the rule as to notification of the raising of the blockade does not, of course, apply to him.

"The liability of a neutral vessel to capture for breach of blockade is contingent on her knowledge, actual or presumptive, of the blockade" (f).

"There are," said Sir W. Scott, in reference to the earlier British practice, "two sorts of blockade; one by the simple fact only, the other by a notification accompanied with the fact. In the former case, when the fact ceases otherwise than by accident, or the shifting of the wind, there is immediately an end of the blockade; but where the fact is accompanied by a public notification from the Government of a belligerent country to neutral Governments, I apprehend, *primâ facie*, the blockade must be supposed to exist till it has been publicly repealed. It is the duty, undoubtedly, of a belligerent country, which has made the

(a) Art. 11.

(b) Cf. *The Vrouw Judith* (1799), 1 C. Rob. 150; *The Franciska* (1854), Spinks, 111; 10 Moo. P. C. 37.

(c) *The Adula* (1899), 176 U. S.

Rep. 361.

(d) Art. 12.

(e) Art. 13.

(f) Art. 14.



notification of blockade, to notify in the same way, and immediately, the discontinuance of it; to suffer the fact to cease, and to apply the notification again at a distant time, would be a fraud on neutral nations, and a conduct which we are not to suppose that any country would pursue. I do not say that a blockade of this sort may not, in any case, expire *de facto*; but I say that such a conduct is not hastily to be presumed against any nation; and, therefore, till such a case is clearly made out, I shall hold that a blockade by notification is, *primâ facie*, to be presumed to continue till the notification is revoked" (g). And in another case he observed:—"The effect of a notification to any foreign Government would clearly be to include all the individuals of that nation; it would be nugatory, if individuals were allowed to plead their ignorance of it; it is the duty of foreign Governments to communicate the information to their subjects, whose interests they are bound to protect. I shall hold, therefore, that a neutral master can never be heard to aver against a notification of blockade that he is ignorant of it. If he is really ignorant of it, it may be subject of representation to his own Government, and may raise a claim of compensation from them, but it can be no plea in the court of a belligerent. In the case of a blockade *de facto* only, it may be otherwise; but this is a case of a blockade by notification. Another distinction between a notified blockade and a blockade existing *de facto* only, is, that in the former the act of sailing for a blockaded place is sufficient to constitute the offence. It is to be presumed that the notification will be formally revoked, and that due notice will be given of it; till that is done, the port is to be considered as closed up, and from the moment of quitting port to sail on such a destination, the offence of violating the blockade is complete, and the property engaged in it subject to confiscation. It may be different in a blockade existing *de facto* only; there no presumption arises as to the continuance, and the ignorance of the party may be admitted as an excuse for sailing on a doubtful and provisional destination" (h).

In the case of a *de facto* blockade, the captors were bound to prove its existence at the time of capture; while in the case of a notified blockade, the claimants were held liable to proof of discontinuance, in order to protect themselves from the penalties of alleged violation (i). In the case of a notified blockade, a ship hovering near a blockaded port cannot say she was going

(g) *The Neptunus* (1799), 1 C. Rob. 112.

(i) *The Circassian* (1864), 2 Wall.

(h) *The Neptunus* (1799), 2 C. 150.

to the blockading squadron to ask for authority to continue her voyage (*k*).

Declaration  
of London on  
presumptive  
knowledge.

As to presumptive knowledge in the case of a notified blockade the Declaration of London provides as follows:—"Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port after the notification of the blockade made to the Power to which such port belongs, provided that the notification was made in sufficient time" (*l*).

"A vessel has left a neutral port subsequently to the notification of the blockade made to the Powers to which the port belongs. Was this notification made in sufficient time, that is to say, so as to reach the port in question, where it had to be published by the port authorities? That is a question of fact to be examined. If it is settled affirmatively, it is natural to suppose that the vessel was aware of the blockade at the time of her departure. This presumption is not, however, absolute, and the right to adduce proof to the contrary is reserved. It is for the incriminated vessel to furnish it, by showing that circumstances existed which explain her ignorance" (*m*).

Thus, the Declaration of London adopts the Anglo-American rule as to presumptive knowledge in the case of blockade by notification, but not in the case of a *de facto* blockade.

Special noti-  
fication in case  
of lack of  
knowledge.

"If a vessel approaching a blockaded port has no knowledge, actual or presumptive, of the blockade, the notification must be made to the vessel herself by an officer of one of the ships of the blockading force. This notification should be entered in the vessel's log-book, and must state the day and hour, and the geographical position of the vessel at the time.

If through the negligence of the officer commanding the blockading force no declaration of blockade has been notified to the local authorities, or, if in the declaration, as notified, no period has been mentioned within which neutral vessels may come out, a neutral vessel coming out of the blockaded port must be allowed to pass free" (*n*).

In the case of a convoyed fleet, the special notification may be made through the commanding officer of the convoy, who acknowledges receipt of it and causes it to be entered on the log-book of each vessel. Such notification operates in the same manner as a

(*k*) *The Admiral*, 3 Wallace, 603; *The Josephine*, 3 Wallace, 83; *The Cheshire*, 3 Wallace, 231.

(*l*) Art. 15.

(*m*) Report on the Declar. of London, Parl. Papers, Miscell. No. 4 (1909).

(*n*) Art. 16.

general and formal notification, and therefore is binding on each vessel that receives it.

Where a vessel leaving a blockaded port has received no notice, owing to the fact that the declaration has not been notified to the local authorities, or if the declaration has been notified but without specifying the period allowed for departure, then she must be permitted to pass free. This does not, of course, apply to vessels that are in the port after having broken the blockade. If a vessel's lack of notice is due, however, to the negligence or ill-will of the local authorities, she remains subject to capture (o).

A more definite rule as to the notification of an existing blockade was frequently provided by conventional stipulations between different maritime Powers. Thus, by the 18th Article of the treaty of 1794, between Great Britain and the United States, it was declared: "That whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded, or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place; but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again attempt to enter; but she shall be permitted to go to any other port or place she may think proper." This stipulation, which is equivalent to that contained in previous treaties between Great Britain and the Baltic Powers, having been disregarded by the naval authorities and prize courts in the West Indies, the attention of the British Government was called to the subject by an official communication from the American Government. In consequence of this communication, instructions were sent out in the year 1804, by the Board of Admiralty, to the naval commanders and judges of the vice-admiralty courts, not to consider any blockade of the French West-India islands as existing, unless in respect to particular ports which were actually invested; and then not to capture vessels bound to such ports, unless they should previously have been warned not to enter them. The stipulation in the treaty intended to be enforced by these instructions seems to be a correct exposition of the law of nations, and is admitted by the contracting parties to be a correct exposition of that law, or to constitute a rule between themselves in place of it. Neither the law of nations nor the treaty admits of the condemnation of a neutral vessel for the mere intention to enter a blockaded port, unconnected with any fact. In the above-cited cases, the fact of

Treaty  
stipulations  
as to notice.

(o) Cf. Report on the Declar. of London, Parl. Papers, Miscell. No. 4 (1909).



sailing was coupled with the intention, and the condemnation was thus founded upon a supposed actual breach of the blockade. Sailing for a blockaded port, knowing it to be blockaded, was there construed into an attempt to enter that port, and was, therefore, adjudged a breach of blockade from the departure of the vessel. But the fact of clearing out for a blockaded port is, in itself, innocent, unless it be accompanied with a knowledge of the blockade. The right to treat the vessel as an enemy, is declared by Vattel (liv. iii. sect. 177) to be founded on the *attempt* to enter; and certainly this attempt must be made by a person knowing the fact. The import of the treaty, and of the instructions issued in pursuance of the treaty, is, that a vessel cannot be placed in the situation of one having a notice of the blockade, until she is warned off. They gave her a right to inquire of the blockading squadron, if she had not previously received this warning from one capable of giving it, and consequently dispensed with her making that inquiry elsewhere (*p*).

Cessation of blockade. Blockading force driven off by hostile attack.

Where an enemy's port was declared in a state of blockade by notification, and at the same time when the notification was issued news arrived that the blockading squadron had been driven off by a superior force of the enemy, the blockade was held by the Prize Court to be null and defective from the beginning; for it would be unjust to hold neutral vessels to the observance of a notification, accompanied by a circumstance that defeated its effect. This case was, therefore, considered as independent of the presumption arising from notification in other instances; the notification being defeated, it must have been shown that the actual blockade was again resumed, and the vessel would have been entitled to a warning, if any such blockade had existed when she arrived off the port. The mere act of sailing for the port, under the dubious state of the actual blockade at the time, was deemed insufficient to fix upon the vessel the penalty for breaking the blockade (*q*).

New notice necessary in such a case.

In the above case, a question was raised whether the notification which had issued was not still operative; but the court was of opinion that it could not be so considered, and that a neutral Power was not obliged, under such circumstances, to presume the continuance of a blockade, nor to act upon a supposition that the blockade would be resumed by any other competent force. But

(*p*) *Fitzsimmons v. The Newport Insurance Company* (1808), 4 Cranch, 185. Mr. Merry's Letter to Mr. Secretary Madison, 12th April, 1804.

Wheaton's Rep. vol. iii. Appendix, p. 11.

(*q*) *The Triheten* (1805), 6 O. Rob. 65.

in a subsequent case, where it was suggested that the blockading squadron had actually returned to its former station off the port, in order to renew the blockade, a question arose whether there had been that notoriety of the fact, arising from the operation of time, or other circumstances, which must be taken to have brought the existence of the blockade to the knowledge of the parties. Among other modes of resolving this question, a prevailing consideration would have been the length of time in proportion to the distance of the country from which the vessel sailed. But as nothing more came out in evidence than that the squadron came off the port on a certain day, it was held that this would not restore a blockade which had been thus effectually raised, but that it must be renewed again by notification, before foreign nations could be affected with an obligation to observe it. The squadron might return off the port with different intentions. It might arrive there as a fleet of observation merely, or for the purpose of only a qualified blockade. On the other hand, the commander might attempt to connect the two blockades together; but this is what could not be done; and, in order to revive the former blockade, the same form of communication must have been observed *de novo* that is necessary to establish an original blockade (*r*).

We have already seen that a blockade is deemed to be at an end, firstly, when it is voluntarily raised by the blockading Power or by the commanding officer; secondly, when it is not effectively maintained or enforced; and thirdly, when the blockading forces have been driven off by the enemy. According to the British practice, there is a fourth mode, viz., when the blockading forces occupy the place blockaded. A contrary view, however, was adopted by the American Supreme Court in *The Circassian* (*s*). This was a British vessel which, having attempted to run the blockade of New Orleans after the city had been seized by the United States forces, was captured and condemned. But as an indemnity was subsequently awarded to the owners by a Joint Commission (appointed under the Treaty of Washington) (*t*), the force of the judicial decision was, if not entirely destroyed, at least considerably diminished. But if the occupation is only partial, the blockade will be deemed to exist. Thus, in the Spanish-American war, the *Adula* (*u*), a British vessel, was condemned by the Supreme Court for attempting to run into the blockaded Cuban

Cessation of blockade when blockaded place occupied by the blockading forces.

(*r*) *The Hoffnung* (1805), 6 C. Rob. 112.

(*s*) (1864), 2 Wallace, 135.

(*t*) Cf. Moore, Inter. Arbit. vol. iv. 3911; Wharton, Digest, § 359.

(*u*) *The Adula* (1899), 176 U. S. Rep. 361.

port of Guantanamo, which, though it had been seized by the American forces, was still in the possession of the Spanish troops.

Some act of  
violation  
necessary.

3. Besides the knowledge of the party, some act of violation is essential to a breach of blockade; as either going in or coming out of the port with a cargo laden after the commencement of the blockade (x).

Thus, by the edict of the States-General of Holland, of 1630, relative to the blockade of the ports of Flanders, it was ordered that the vessels and goods of neutrals which should be found going in or coming out of the said ports, or so near thereto as to show beyond a doubt that they were endeavouring to run into them; or which, from the documents on board, should appear bound to the said ports, although they should be found at a distance from them, should be confiscated, unless they should, voluntarily, before coming in sight of or being chased by the Dutch ships of war, change their intention, while the thing was yet undone, and alter their course. Bynkershoek, in commenting upon this part of the decree, defends the reasonableness of the provision which affects vessels found so near to the blockaded ports as to show beyond a doubt that they were endeavouring to run into them, upon the ground of legal presumption, with the exception of extreme and well-proved necessity only. Still more reasonable is the infliction of the penalty of confiscation, where the intention is expressly avowed by the papers found on board. The third Article of the same edict also subjected to confiscation such vessels and their cargoes as should come out of the said ports, not having been forced into them by stress of weather, although they should be captured at a distance from them, unless they had, after leaving the enemy's port, performed their voyage to a port of their own country, or to some other neutral or free port, in which case they should be exempt from condemnation; but if, in coming out of the said ports of Flanders, they should be pursued by the Dutch ships of war, and chased into another port, such as their own, or that of their destination, and found on the high seas coming out of such port, in that case they might be captured and condemned. Bynkershoek considers this provision as distinguishing the case of a vessel having broken the blockade, and afterwards terminated her voyage by proceeding voluntarily to her destined port, and that of a vessel chased and compelled to take refuge; which latter might still be captured after leaving the port in which she had

(x) *The Betsey* (1798), 1 C. Rob. 93.



taken refuge (*y*). And in general conformity with these principles are the more modern law and practice (*z*), though the Anglo-American doctrines differ in certain respects from those entertained in various continental countries.

Under the Anglo-American system (though not latterly enforced), the sailing of a vessel with a premeditated intent to violate a blockade is, *ipso facto*, a violation of the blockade, and renders her subject to capture from the moment she leaves the port of departure; and if a master has actual notice of a blockade he is not at liberty even to approach the blockaded port for the purpose of making inquiries (*a*). It is not the mere mental design that subjects the goods to confiscation, but the overt act of starting for, or proceeding towards the prohibited port with the knowledge that it is blockaded, and continuing that course up to the time of capture (*b*). The intent, however, must exist in order to constitute the *delictum*, and it must be gathered from the circumstances of each case. It may be inferred from the bills of lading, the letters and papers on board, the acts and words of the owners and charterers, or the spoliation of papers. Delay in sailing after complete loading, or a change of course in order to avoid a man-of-war, afford good grounds for suspicion (*c*). Every dissemblance in the ship's papers will be regarded as intended to conceal what could not safely be disclosed, and to afford evidence that the destination of the vessel is falsified (*d*). The circumstance that the master was also master of a ship condemned before, will be noticed by the Court (*e*). But if the intention be *bonâ fide* abandoned at the time of capture, the ship will not be condemned; only in this case very clear and satisfactory proof of a complete abandonment of the intent will be required (*f*). Since a blockade exposes ships intending to enter the port to the risk of confiscation, a shipowner who before the blockade contracted to carry goods to the port (unless restrained by princes, &c.), is entitled to throw up his contract when the port becomes blockaded (*g*). Under the

Intent to  
violate  
blockade.

(*y*) Bynkershoek, Quæst. Jur. Pub. lib. 1. cap. 11.

(*z*) *The Welvaart Van Pillaw* (1799), 2 C. Rob. 138; *The Juffrow Maria Schroeder* (1800), 3 C. Rob. 147.

(*a*) *The Adula* (1899), 176 U. S. Rep. 362.

(*b*) *The John Gilpin* (1863), Blatchford, Prize Cases, 291; *Yeaton v. Fry* (1809), 5 Cranch, 335. Cf. Halleck, ch. 23, § 23.

(*c*) *The Circassian*, 2 Wallace, 135; *The Baigorry* (1864), 2 Wallace, 474;

*The Andromeda*, 2 Wallace, 482; *The Cornelius*, 3 Wallace, 214.

(*d*) *The Louisa Agnes*, Blatchford, Prize Cases, 112; *The Mentor*, Edw. 207.

(*e*) *The Diana*, 7 Wallace, 360; *The William H. Northrop*, Blatchford, Prize Cases, 235.

(*f*) *The John Gilpin* (1863), Blatchford, Prize Cases, 291.

(*g*) *Geipel v. Smith*, L. R. 7 Q. B. 404.

Continental practice (notably the French), a vessel was not considered to have committed a breach of blockade until she had made an attempt to cross the line after receiving a special notification in the vicinity.

Violation of blockade by egress.

With respect to violating a blockade by coming out with a cargo, the time of shipment is very material; for although it might be hard to refuse a neutral liberty to retire with a cargo already laden, and by that act already become neutral property; yet, after the commencement of a blockade, a neutral cannot be allowed to interpose, in any way, to assist the exportation of the property of the enemy (*h*). A neutral ship departing can only take away a cargo *bonâ fide* purchased and delivered before the commencement of the blockade; if she afterwards take on board a cargo, it is a violation of the blockade. But where a ship was transferred from one neutral merchant to another in a blockaded port, and sailed out in ballast, she was held not to have violated the blockade (*i*). So where goods were sent into the blockaded port before the commencement of the blockade, but reshipped by order of the neutral proprietor, as found unsaleable, during the blockade, they were held entitled to restitution. For the same rule which permits neutrals to withdraw their vessels from a blockaded port extends also, with equal justice, to merchandise sent in before the blockade, and withdrawn *bonâ fide* by the neutral proprietor (*k*).

Purchase of goods in a blockaded port.

After the commencement of a blockade, a neutral is no longer at liberty to make any purchase in that port. Thus, where a ship which had been purchased by a neutral of the enemy in a blockaded port, and sailed on a voyage to the neutral country, had been driven by stress of weather into a belligerent port, where she was seized, she was held liable to condemnation under the general rule. That the vessel had been purchased out of the proceeds of the cargo of another vessel, was considered as an unavailing circumstance on a question of blockade. If the ship has been purchased in a blockaded port, that alone is the illegal act, and it is perfectly immaterial out of what funds the purchase was effected. The fact that the vessel had terminated her voyage did not absolve her from the penalty, because the port into which she had been driven was not represented as forming any part of

(*h*) *The Betsey* (1798), 1 C. Rob. 93.

(*i*) *The Vrow Judith* (1799), 1 C. Rob. 150.

(*k*) *The Potsdam* (1801), 4 C. Rob. 89; *Olivera v. Union Insurance Company* (1818), 3 Wheaton, 183.

her original destination. It was therefore impossible to consider this accident as any discontinuance of the voyage, or as a defeasance of the penalty which had been incurred (*l*).

The offence incurred by a breach of blockade generally remains during the voyage; but the offence never travels on with the vessel further than to the end of the return voyage, although if she is taken in any part of that voyage, she is taken *in delicto*. This was deemed reasonable, on the ground that no other opportunity was afforded to the belligerent cruisers to vindicate the violated law. But where the blockade has been raised between the time of sailing and the capture, the penalty does not attach; because the blockade being gone, the necessity of applying the penalty to prevent future transgression no longer exists. When the blockade is raised, a veil is thrown over everything that has been done, and the vessel is no longer taken *in delicto*. The *delictum* may have been completed at one period, but it is by subsequent events done away (*m*).

Duration of the offence.

If the Declaration of London as it now stands should come to be definitely established as binding law, then some of the Anglo-American doctrines with regard to the above matters will be abrogated or modified. Thus, the rule will no longer hold good that once intent is established a neutral vessel may be seized at any time after the commencement of her voyage and at any distance from the blockaded port. Further, the duration of a vessel's liability for violation of blockade by egress will have to be limited. As to the range of capture, the Declaration provides thus:—

Declaration of London on range of capture.

“Neutral vessels may not be captured for breach of blockade except within the area of operations (or radius of action, ‘*rayon d’action*’) of the warships detailed to render the blockade effective” (*n*).

The ‘radius of action’ consists of the sum total of the zones of surveillance occupied by the respective blockading vessels that are distributed according to the configuration of the coast and the geographical position of the blockaded places, so as to make the blockade effective. The extent of the radius of action will depend on the actual circumstances of each case, *e.g.*, the nature and position of the place blockaded, the character of its means of defence, the nearness of neutral ports, the number of vessels em-

(*l*) *The Juffrow Maria Schroeder* (1799), 2 C. Rob. 128; *The Lisette* (1800), 3 C. Rob. 147, n. (1807), 6 C. Rob. 387.

(*m*) *The Welvaart Van Pillaw* (*n*) Art. 17.



ployed, their distance from the place blockaded; but in no case must the range be too large for the effective maintenance of the blockade (o).

"A vessel which has broken blockade outwards, or which has attempted to break blockade inwards, is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned, or if the blockade is raised, her capture may no longer be effected" (p).

The Report adds by way of commentary: "This vessel must remain liable to capture so long as she is pursued by a ship of the blockading force; and it would not suffice that she be encountered by a cruiser of the blockading enemy which did not belong to the blockading squadron. The question whether or not the pursuit is abandoned is a question of fact; it does not suffice that the vessel should take refuge in a neutral port. The ship which is pursuing her can wait till she leaves it, so that the pursuit is necessarily suspended, but not abandoned" (q).

The United States accepted this Article subject to the reservation that "a pursuit is considered as continued and not abandoned within the meaning of the Article, even if it is abandoned by one line of the blockading force to be resumed after an interval by a ship of the second line, until the limit of the area of the operations is reached. In certain conditions there might be several lines, each having its respective zone of pursuit" (r).

'Continuous voyage' in-applicable to blockade.

"Whatever may be the ulterior destination of a vessel or of her cargo, she may not be captured for breach of blockade, if at the time she is on her way to a non-blockaded port" (s).

We have seen that the doctrine of 'continuous voyage' is applied by the Declaration of London to the case of absolute contraband, but not to that of conditional contraband. It is also excluded in the case of blockade. The Report adds: "It is the true destination of the vessel which must be considered when a breach of blockade is in question, and not the ulterior destination of the cargo. Proof or presumption of the latter is therefore not enough to justify the capture, for violation of blockade, of a ship actually bound for an unblockaded port. But the cruiser might always prove that this destination to an unblockaded port is only apparent, and that in reality the immediate destination of the vessel is the blockaded port" (t).

(o) Cf. Report on the Declar. of London, *loc. cit.*

(p) Art. 20.

(q) Parl. Papers, Miscell. No. 4 (1909).

(r) *Ibid.* No. 5 (1909).

(s) Declar. of London (1909), Art. 19.

(t) Parl. Papers, Miscell. No. 4 (1909).

“A vessel found guilty of breach of blockade is liable to condemnation. The cargo is also condemned, unless it is proved that at the time the goods were shipped the shipper neither knew nor could have known of the intention to break the blockade” (u). Penalty for breach of blockade. Liability of cargo.

Under the British practice the general rule is that when a ship is condemned for breach of blockade the cargo follows the same fate. The owners of the cargo are bound by the act of the master, even though the breach of blockade was without their privity, or contrary to their wishes; though in such a case the owners of the cargo have their remedy against the master and owners of the ship (x). When the owners of the cargo knew, or might have known, of the existence of the blockade when the shipment was made, the inference of law is irresistible that they were privy to violating the blockade. The master is to be treated as the agent for the cargo as well as for the ship (y). If the goods were shipped before the blockade was or could be known, the owners will be absolved from liability (z). Thus Article 21 introduces—with regard to the cargo—a certain modification of the British rule, under which knowledge of the existence of the blockade was sufficient, from which the intention to break blockade was presumed. But according to the Article the shipper, in order to obtain exemption for the cargo, must prove simply that he neither knew nor could have known of the intention of the master to violate the blockade (a).

The right of visit and search of neutral vessels at sea is a belligerent right, essential to the exercise of the right of capturing enemy's property, contraband of war, and vessels committing a breach of blockade, or an act of unneutral service. Even if the right of capturing enemy's property be ever so strictly limited, and the rule of 'free ships free goods' be adopted, the right of visit and search is essential, in order to determine whether the ships themselves are neutral, and documented as such, according to the law of nations and treaties; for, as Bynkershoek observes, THE RIGHT OF VISIT AND SEARCH. CONVOY.

(u) Art. 21.

(x) *The James Cook*, Edw. 261; *The Panaghia Rhomba* (1858), 12 Moo. P. C. 168.

(y) *The Panaghia Rhomba* (*Baltazzi v. Ryder*) (1858), 12 Moo. P. C. 168. Cf. *The Mercurius*, 1 C. Rob. 80; *The Alexander* (1801), 4 C. Rob. 93; *The Adonis* (1804), 5 C. Rob. 256; *The Exchange*, Edw. 39; *The James Cook*, Edw. 261; *The Wren*, 6 Wall.

582. As to how far the acts of the master bind the shipowner, see the cases collected in Wheaton's Rep. vol. ii. Appendix, pp. 36—40.

(z) *The Exchange*, Edw. 39.

(a) As to blockade by means of submarine mines during the Great War, 1914, and certain modifications of the ordinary practice of blockade, see Phillipson, *Int. Law and the Great War*, pp. 381 seq.

“it is lawful to detain a neutral vessel, in order to ascertain, not by the flag merely, which may be fraudulently assumed, but by the documents themselves on board, whether she is really neutral.” Indeed, it seems that the practice of maritime captures could not exist without it. Accordingly the text-writers generally concur in recognising the existence of this right (b).

*The Maria.*

The customary international law on this subject was ably summed up by Sir W. Scott, in the case of *The Maria* (1799), where the exercise of the right was attempted to be resisted by the interposition of a convoy of Swedish ships of war. In delivering the judgment of the High Court of Admiralty in that memorable case, the eminent judge laid down the three following principles of law:—

A belli-  
gerent's right.

1. That the right of visiting and searching merchant ships on the high seas, whatever be the ships, the cargoes, the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. “I say, be the ships, the cargoes, and the destinations what they may, because, till they are visited and searched, it does not appear what the ships or the destination are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the right of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule that ‘free ships make free goods’ (c), must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice; for practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hübner (d) himself, the great champion of neutral privileges.”

2. That the authority of the neutral sovereign being forcibly interposed cannot legally vary the rights of a lawfully commis-

(b) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 14. Vattel, Droit des Gens, liv. iii. ch. 7, § 114. Martens, Précis, &c., liv. viii. c. 7, §§ 317, 321. Galliani, Dei Doveri de Principi Neutrali, &c., p. 458. Lampredi, Del Commercio de Popoli Neutrali, &c. p. 185. Klüber, Droit des Gens Moderne de l'Europe, § 293. It has been well observed that at bottom the right is not exercised

upon a neutral vessel, but upon a vessel the character of which is unknown. Heffter, § 168, Geffcken, note 3, citing Hautefeuille.

(c) It is to be noted that this judgment was delivered more than half a century before the Declaration of Paris.

(d) M. Von Hübner, De la saisie des bâtimens neutres (1778).



sioned belligerent cruiser. "Two sovereigns may unquestionably agree, if they think fit, as in some late instances they have agreed, by special covenant, that the presence of one of their armed ships along with their merchant ships shall be mutually understood to imply that nothing is to be found in that convoy of merchant ships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it, any more than any other pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independently of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it."

3. That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visit and search. "For the proof of this I need only refer to Vattel, one of the most correct, and certainly not the least indulgent, of modern professors of public law. In book iii. c. 7, sect. 114, he expresses himself thus:—'On ne peut empêcher le transport des effets de contrebande, si l'on ne visite pas les vaisseaux neutres. On est donc en droit de les visiter. Quelques nations puissantes ont refusé en différents temps de se soumettre à cette visite. Aujourd'hui un vaisseau neutre, qui refuseroit de souffrir la visite, se feroit condamner par cela seul, comme étant de bonne prise.' Vattel is here to be considered, not as a lawyer merely delivering an opinion, but as a witness asserting a fact—the fact that such is the existing practice of modern Europe. Conformably to this principle, we find in the celebrated French ordinance of 1681, now in force, Article 12, 'That every vessel shall be good prize in case of resistance and combat;' and Valin, in his smaller Commentary, p. 81, says expressly, that, although the expression is in the conjunctive, yet that the resistance alone is sufficient. He refers to the Spanish Ordinance, 1718, evidently copied from it, in which it is expressed in the disjunctive, 'in case of resistance *or* combat.' And recent instances are at hand and within view, in which it appears that Spain continues to act upon this principle. The first time it occurs to my notice on the inquiries I have been able to make in the institutes of our own country respecting matters of this nature, except what occurs in the Black Book of the Admiralty, is in the Order of Council, 1664, Article 12, which directs, 'That when any ship, met withal by the royal navy or other ship commissioned, shall fight or make resistance, the ship and goods shall be adjudged lawful prize.' A similar Article

Long-  
established  
practice.

occurs in the proclamation of 1672. I am, therefore, warranted in saying that it was the rule, and the undisputed rule, of the British Admiralty. I will not say that the rule may not have been broken in upon, in some instances, by considerations of comity or of policy, by which it may be fit that the administration of this species of law should be tempered in the hands of those tribunals which have a right to entertain and apply them; for no man can deny that a State may recede from its extreme rights, and that its supreme councils are authorized to determine in what cases it may be fit to do so, the particular captor having, in no case, any other right and title than what the State itself would possess under the same facts of capture. But I stand with confidence upon all principles of reason—upon the distinct authority of Vattel—upon the institutes of other great maritime countries, as well as those of our own country, when I venture to lay it down that, by the law of nations, as now understood, a deliberate and continued resistance to search, on the part of a neutral vessel, to a lawful cruiser, is followed by the legal consequence of confiscation” (e).

The Armed  
Neutrality  
of 1800.

The judgment of condemnation pronounced in this case was followed by the treaty of Armed Neutrality, entered into by the Baltic Powers, in 1800, which league was dissolved by the death of the Emperor Paul; and the points in controversy between these Powers and Great Britain were finally adjusted by the Convention of 5th June, 1801. By the fourth Article of this Convention, the right of search as to merchant vessels sailing under neutral convoy was modified by limiting it to public ships of war of the belligerent party, excluding private armed vessels. Subject to this modification, the pretension of resisting by means of convoy, the exercise of the belligerent right of search was surrendered by Russia and the other Northern Powers, and various regulations were provided to prevent the abuse of that right to the injury of neutral commerce. As has already been observed, the object of this treaty is expressly declared by the contracting parties, in its preamble, to be the settlement of the differences which had grown out of the Armed Neutrality by “an invariable determination of their principles upon the rights of neutrality in their application to their respective monarchies.” The eighth Article also provides that “the principles and measures adopted by the present Act, shall be alike applicable to all the maritime wars in which one of the two Powers may be engaged, whilst the other remains

(e) *The Maria* (1799), 1 C. Rob. 340.

neutral. These stipulations shall consequently be regarded as permanent, and shall serve as a constant rule for the contracting parties in matters of commerce and navigation" (f).

It was only by reason of such special Conventions that Great Britain temporarily recognised the immunity from visit and search of neutral vessels sailing under their national convoy. When these Conventions were rescinded, Great Britain resumed the right of visit and search in the case of convoyed vessels. But the practice was rarely enforced, however, after the conclusion of the Napoleonic wars. Moreover, in 1854, during the Crimean war, the British Government for the time being waived the right of search, in order to secure harmonious co-operation with France which recognised the right of convoy (g). The Declaration of Paris, 1856, having declared that the neutral flag shall cover enemy goods other than contraband, the application of the British doctrine was considerably restricted; but it was not abandoned. Great Britain has stood almost alone in opposing the right of convoy; Continental practice—followed generally by the United States, though opposed by most of the American publicists—has supported it (h). At the London Naval Conference, 1908, the British delegates signified their readiness to admit the right of convoy (i), and the Declaration of London (1909) arrived at a solution to this effect (k).

Divergent views.

In the case of *The Maria*, the resistance of the convoying ship was held to be a resistance of the whole fleet of merchant vessels under convoy, and subjected the whole to confiscation. This was a case of neutral property condemned for an attempted resistance by a neutral armed vessel to the exercise of the right of visit and search, by a lawfully commissioned belligerent cruiser. But the forcible resistance by an enemy master will not, in general, affect neutral property laden on board an enemy's merchant vessel; for an attempt on his part to rescue his vessel from the possession of the captor is nothing more than the hostile act of a hostile person, who has a perfect right to make such an attempt. "If a *neutral*

Forcible resistance by an enemy master.

(f) The question arising out of the case of the Swedish convoy gave rise to several instructive polemic essays. The judgment of Sir W. Scott was attacked by Professor J. F. W. Schlegel, of Copenhagen, in a Treatise on the Visitation of Neutral Ships under Convoy (transl. London, 1801); and vindicated by Dr. Croke in "Remarks on M. Schlegel's Work" (1801). See also "Letters of Sulpicius on the Northern Confederacy" (London,

1801). "Substance of the Speech of Lord Grenville in the House of Lords, November 13, 1801" (London, 1802). Wheaton, Hist. Law of Nations, pp. 390—420.

(g) Cf. Parl. Papers, Miscell. No. 4 (1909), p. 25.

(h) Cf. Parl. Papers, Miscell. No. 5 (1909), p. 78.

(i) Parl. Papers, Miscell. No. 4 (1909), p. 25.

(k) See *infra*, p. 798.



master," says Sir W. Scott, "attempts a rescue, or to withdraw himself from search, he violates a duty which is imposed upon him by the law of nations, to submit to search, and to come in for inquiry as to the property of the ship or cargo; and if he violates this obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner; and it would, I think, extend also to the whole property intrusted to his care, and thus fraudulently attempted to be withdrawn from the operation of the rights of war. With an *enemy* master the case is very different; no duty is violated by such an act on his part—'lupum auribus teneo'—and if he can withdraw himself he has a right so to do" (*l*).

Neutral goods  
in an armed  
enemy vessel.

The question how far a neutral merchant has a right to carry his goods on board an armed enemy vessel, and how far his property is involved in the consequences of resistance by the enemy master, was considered both in the British and American Prize Courts, during the war between Great Britain and the United States. In a case decided by the Supreme Court of the United States, in 1815, it was determined that a neutral had a right to charter and place his goods on board a belligerent armed merchant ship, without forfeiting his neutral character, unless he actually concurred and participated in the enemy master's resistance to capture (*m*). Contemporaneously with this decision of the American Court, Sir W. Scott held directly the contrary doctrine, and decreed salvage for the recapture of neutral Portuguese property, previously taken by an American cruiser from on board an armed British vessel, on the ground that the American Prize Courts might justly have condemned the property, since such hostile association was evidence of an intention to resist visit and search (*n*). In reviewing its former decision, in a subsequent case decided in 1818, the American Court confirmed it; and, alluding to the decisions in the English High Court of Admiralty, stated, that if a similar case should again occur in that Court, and the decisions of the American Court should in the meantime have reached the learned judge, he would be called upon to acknowledge that the danger of condemnation in the United States Courts was not as great as he had imagined. In determining the last-mentioned case, the American Court distinguished it both from those where neutral vessels were condemned for the unneutral act of the convoying vessel, and those where neutral vessels had been con-

(*l*) *The Catherina Elizabeth* (1804), 388; Story, J., dissenting.  
5 C. Rob. 232. (*n*) *The Fanny* (1815), 1 Dods. Ad.  
(*m*) *The Nereide* (1815), 9 Cranch, 443.

demned for placing themselves under enemy's convoy. With regard to the first class of cases, it was well known that they originated in the capture of the Swedish convoy, at the time when Great Britain had resolved to throw down the glove to all the world, on the contested principles of the northern maritime confederacy. But, independently of this, there were several considerations which presented an obvious distinction between both classes of cases and that under consideration. A convoy was an association for a hostile object. In undertaking it, a State spreads over the merchant vessels an immunity from search which belongs only to a national ship; and by joining a convoy, every individual vessel puts off her pacific character and undertakes for the discharge of duties which belong only to the military marine. If, then, the association be voluntary, the neutral, in suffering the fate of the entire convoy, has only to regret his own folly in wedding his fortune to theirs; or if involved in the resistance of the conveying ship, he shares the fate to which the leader of his own choice is liable in case of capture (o).

The Danish Government issued, in 1810, an ordinance relating to captures, which declared to be 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." Under this ordinance, many American neutral vessels were captured, and, with their cargoes, condemned in the Danish Prize Courts for offending against its provisions. In the course of the discussions which subsequently took place between the American and Danish Governments respecting the legality of these condemnations, the principle upon which the ordinance was grounded was questioned by the United States Government, as inconsistent with the established rules of international law. It was contended that to regard the fact of having navigated under enemy's convoy as, *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—was an unparalleled belligerent pretension. The American vessels in question were engaged in their accustomed lawful trade, between Russia and the United States; they were unarmed, and made no resistance to the

Neutral  
vessels under  
enemy's  
convoy.

(o) *The Atalanta* (1818), 3 Wheaton, 409.

Danish cruisers; they were captured on the return voyage, after having passed up the Baltic and been subjected to examination by the Danish cruisers and authorities; and were condemned under an edict which was unknown, and consequently, as to them, did not exist when they sailed from Cronstadt, and which, unless it could be strictly shown to be consistent with the pre-existing law of nations, must be considered as an unauthorized measure of retrospective legislation.

Being found in company with an enemy's convoy might, indeed, furnish a presumption that the captured vessel and cargo belong to the enemy; but the presumption is by no means conclusive—it will readily yield to countervailing proof. The simple fact, then, of having navigated under enemy convoy could be considered as a ground of suspicion only, warranting the captors in sending in the captured vessel for further examination, but not constituting in itself a conclusive ground of confiscation. This case is to be distinguished from sailing under *neutral* convoy—a proceeding which tends to impede and defeat the belligerent right of search, to render every attempt to exercise this lawful right a contest of violence, to disturb the peace of the world, and to withdraw from the proper forum the determination of such controversies by forcibly preventing the exercise of its jurisdiction. But the mere circumstance of sailing in company with a belligerent convoy had no such effect; being an enemy, the belligerent had a right to resist. The masters of the vessels under his convoy could not be involved in the consequences of that resistance, because they were neutral, and had not actually participated in the resistance. It is, indeed, as legitimate for a neutral vessel to sail under enemy convoy, as it is for a neutral vessel to seek shelter in a belligerent port.

But it might perhaps be said, that as resistance to the right of search is, by the law and usage of nations, a substantive ground of condemnation in the case of the master of a single ship, still more must it be so, where many vessels are associated for the purpose of defeating the exercise of the same right. In order to render the two cases stated perfectly analogous, there must have been an actual resistance on the part of the vessels in question, or, at least, on the part of the enemy's fleet, having them at the time under its protection, so as to connect them inseparably with the acts of the enemy. Here was no actual resistance on the part of either, but only a constructive resistance on the part of the neutral vessels, implied from the fact of their having joined the enemy's convoy. This, however, was, at most, a mere intention to resist,



never carried into effect, which had never been considered in the case of a single ship, as involving the penalty of confiscation. But the resistance of the master of a single ship, which is supposed to be analogous to the case of convoy, must refer to a neutral master, whose resistance would, by the established law of nations, involve both ship and cargo in the penalty of confiscation. The same principle would not, however, apply to the case of an enemy master, who has an incontestable right to resist his enemy, and whose resistance could not affect the neutral owner of the cargo, unless he was on board, and actually participated in the resistance. Such was, in a similar case, the judgment of Sir W. Scott.

Moreover, to sail under a belligerent convoy is not necessarily to injure the right of the other belligerent. If any such right is injured, it must be the right of visit and search. But that right is not a substantive and independent right, with which belligerents are invested by the law of nations for the purpose of wantonly vexing and interrupting the commerce of neutrals. It is a right growing out of a greater right of capturing enemy's property, or contraband of war, and to be used, as means to an end, to enforce the exercise of that right. Here the actual exercise of the right was never in fact opposed, and no injury had accrued to the belligerent Power (*p*).

The negotiation finally resulted in the conclusion of a treaty, in 1830, between the United States and Denmark, by which the latter Power stipulated to indemnify the American claimants generally for the seizure of their property by the payment of a fixed sum *en bloc*, leaving it to the American Government to apportion it by commissioners appointed by itself, and authorized to determine "according to the principles of justice, equity, and the law of nations," with a declaration that the convention, having no other object than to terminate all the claims, "can never hereafter be invoked, by one party or the other, as a precedent or rule for the future" (*q*).

With regard to the question of neutral vessels sailing under belligerent convoy, under British practice—which is warranted by general principles and supported by the views of leading British and American jurists and publicists—a neutral vessel that had placed herself under the protection of a belligerent armed ship is liable to detention and enquiry, on the ground of *primâ*

British practice as to neutral vessels under belligerent convoy.

(*p*) Mr. Wheaton to Count Schimmelmänn, 1828.

(*q*) Martens, *Nouveau Recueil*, tom. viii. p. 350. Elliot, *American Diplomatic Code*, vol. i. p. 453.

*facie* hostile association. If no other incriminating circumstances appeared against her, a decree of condemnation would not be pronounced. But if she is intercepted by a belligerent whilst she is actually under enemy convoy, and after the convoying vessel has offered or when the convoying vessel is offering resistance to that belligerent, then she may be condemned on the ground of manifest hostile association and because of her intention to resist the right of visit and search (*r*).

Declaration  
of London on  
convoy.

By the Declaration of London (1909), provision is made for the right of convoy and for resistance to search:—

“Neutral vessels under convoy of their national flag are exempt from search. The commander of a convoy gives, in writing, at the request of the commander of a belligerent warship, all information as to the character of the vessels and their cargoes, which could be obtained by search” (*s*).

The exemption conferred by this Article is conditional on the convoying commander's assurance of the innocent character of the vessel and cargo under convoy. The very act of convoying vessels necessarily implies a guarantee on the part of the neutral Government concerned that the vessels in question will take no advantage of the protection thus accorded them, for the purpose of doing anything inconsistent with neutrality, *e.g.*, to carry contraband, to render unneutral service, to attempt to break blockade. The neutral Government is therefore called upon to exercise due supervision throughout in order to prevent all abuse of convoy, and to instruct the commander of the convoy accordingly (*t*).

“If the commander of the belligerent warship has reason to suspect that the confidence of the commander of the convoy has been abused, he communicates his suspicions to him. In such a case it is for the commander of the convoy alone to investigate the matter. He must record the result of such investigation in a report, of which a copy is handed to the officer of the warship. If, in the opinion of the commander of the convoy, the facts shown in the report justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels” (*u*).

The commander of the convoy may, but he is not obliged to, allow the officer of the cruiser to be present at the investigation. In case of difference of opinion between the two officers, *e.g.*, as

(*r*) Cf. the dissenting judgment of Story, J., in *The Nereide* (1815), 9 Cranch, 388, at pp. 445, 453, 454; *The Nancy* (1892), 27 C. C. 99; *The Sea Nymph* (1901), 36 C. C. 369.

(*s*) Declar. of London (1909), Art. 61.

(*t*) Cf. Report on the Declaration, Parl. Papers, Miscell. No. 4 (1909).

(*u*) Art. 62.

to conditional contraband, the character of the port to which conditional contraband is destined, the officer of the cruiser may make a protest and leave the question to be settled by diplomatic means. "The situation is altogether different if a convoyed vessel is found beyond the possibility of dispute to be carrying contraband. The vessel has no longer a right to protection, since the condition upon which such protection depends has not been fulfilled. She has deceived her own Government, and has tried to deceive the belligerent. She must therefore be treated as a neutral merchant vessel which, in the ordinary way, encounters a belligerent cruiser and is visited and searched by her. She cannot complain at being treated thus rigorously, since there is in her case an aggravation of the offence, committed by a carrier of contraband" (x).

The position and liability of enemy merchantmen encountered at sea by belligerent warships have already been considered (y). As to neutral vessels met with by a belligerent, where certain offences have been committed or are suspected of having been committed by them—*e.g.*, the carriage of contraband, unneutral service, breach of blockade, resistance to search, use of fraudulent papers—they are liable to seizure. Under the British practice they are to be then sent in for adjudication, as without due condemnation change of ownership does not take place. But should it be found impossible to send them in, they are, as a general rule, to be released (z). In cases of emergency, however, or in *bonâ fide* mistake (a), their destruction is not deemed to be unlawful; but in these cases, since the owners of ship and cargo have not been divested of their property by judicial determination, compensation is paid to them (b). This practice has been adopted by certain other countries, for example, Holland and Japan (c); but adoption in time of peace has sometimes been followed by a different régime in time of war (d). The majority of the great maritime Powers, *e.g.*, France, Germany, Russia, the United States, are in favour of the more rigorous course of destroying neutral prizes at sea, if they cannot be brought in without risk to the captor. Thus, in the Russo-Japanese war, Russia, in

DESTRUCTION  
OF NEUTRAL  
PRIZES.

(x) Report, *loc. cit.*

(y) See *supra*, p. 586.

(z) *The Leucade* (1854), Spinks, 217. Cf. Manual of Naval Prize Law (1888), § 303.

(a) Cf. *The Acteon*, 2 Dods. 48.

(b) *The Felicity* (1819), 2 Dods. 381.

(c) See Parl. Papers, Miscell. No. 5 (1909), p. 101.

(d) Cf. Japanese Regulations governing Captures at Sea (1904), Art. 91; Takahashi, p. 788.



Declaration  
of London  
(1909) on  
destruction  
of neutral  
prizes.

accordance with her regulations (*e*), sank several neutral merchantmen instead of bringing them in for adjudication—*e.g.*, the *Knight Commander*, the *Hipsang*, the *Ikhona*, the *St. Kilda* (all British); the *Thea* (German); the *Princess Maria* (Danish) (*f*).

In 1907 the question was discussed at the second Hague Conference, but owing to the conflicting views entertained by the delegates no conclusion was arrived at. The London Naval Conference, however, arrived at an agreement in 1909, whereby Great Britain modified her opposition to the practice of destruction when carried out in circumstances of exceptional urgency. The following are the rules laid down:—

“ A neutral vessel that has been captured may not be destroyed by the captor, but must be taken into such port as is proper in order to determine there all questions concerning the validity of the capture ” (*g*).

“ As an exception, a neutral vessel which has been captured by a belligerent warship, and which would be liable to condemnation, may be destroyed if the observance of Article 48 would involve danger to the safety of the warship or to the success of the operations in which she is engaged at the time ” (*h*).

The Report emphasizes, in reference to this Article, that it is the circumstances existing at the moment of destruction that must be considered, in order to decide whether the conditions specified are or are not fulfilled (*i*).

“ Before the vessel is destroyed all persons on board must be placed in safety, and all the ship’s papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the warship ” (*k*).

“ A captor who has destroyed a neutral vessel must, prior to any decision respecting the validity of the prize, establish that he only acted in the face of an exceptional necessity of the nature contemplated in Article 49. If he fails to do this, he must compensate the parties interested without examination as to whether the capture was valid or not ” (*l*).

“ If the capture of a neutral vessel is subsequently held to be invalid, though the act of destruction has been held to have been justifiable, the captor must pay compensation to the parties

( <i>e</i> ) Russian Regulations (1895),	Art. 48.
§ 21; Instructions (1900), § 40.	( <i>h</i> ) Art. 49.
( <i>f</i> ) Cf. Lawrence, War and Neutrality in the Far East, 2nd ed. (1904), pp. 250—289.	( <i>i</i> ) Parl. Papers, Miscell. No. 4 (1909).
( <i>g</i> ) Declar. of London (1909),	( <i>k</i> ) Art. 50.
	( <i>l</i> ) Art. 51.

interested instead of the restitution to which they would have been entitled" (m).

"If neutral goods not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation" (n). The cargo.

That is, the owner of the innocent neutral cargo is entitled to an indemnity, regardless of the justifiable or unjustifiable destruction of the vessel.

"The captor has the right to demand the surrender or to proceed himself to the destruction of any goods liable to condemnation found on board a vessel not herself liable to condemnation, provided that the circumstances are such as would, under Article 49, justify the destruction of a vessel herself liable to condemnation. The captor must enter the goods surrendered or destroyed in the log-book of the vessel stopped, and must obtain duly certified copies of all relevant papers. When the goods have been surrendered or destroyed, and the formalities duly carried out, the master must be allowed to continue his voyage. The provisions of Articles 51 and 52 respecting the obligations of a captor who has destroyed a neutral vessel are applicable" (o).

The provisions laid down in this Article constitute a novel contribution to international maritime practice. The Report comments thereon as follows: "A cruiser encounters a neutral merchant vessel carrying contraband in a proportion less than that specified in Article 40 (p). The captain of the cruiser may put a prize crew on board the vessel and take her into port for adjudication. He may, in conformity with the provisions of Article 44 (q), accept the contraband if it is offered to him by the vessel stopped. But what is to happen if neither of these solutions is reached? The vessel stopped does not offer to deliver the contraband, and the cruiser is not in a position to take the vessel into a national port. Is the cruiser obliged to let the neutral vessel go with the contraband on board? This has seemed excessive, at least in certain exceptional circumstances. These circumstances are in fact the same as would have justified the destruction of the vessel, if she had been liable to condemnation. In such a case the cruiser may require the delivery or proceed to the destruction of the goods liable to condemnation. The reasons which warrant the destruction of the vessel would justify the destruction of the contraband

(m) Art. 52.

(n) Art. 53.

(o) Art. 54.

(p) *I.e.*, less than half, reckoned

either by value, or by weight, by volume, or by freight, see *supra*.

(q) See *supra*, p. 754.

goods, the more so as the considerations of humanity which may be invoked against the destruction of a vessel do not in this case apply. Against an arbitrary demand by the cruiser there are the same guarantees as those which made it possible to recognise the right to destroy the vessel. The captor must, as a condition precedent, prove that he was really faced by the exceptional circumstances specified; failing this, he is condemned to pay the value of the goods delivered or destroyed, without investigation as to whether they were or were not contraband.

The Article prescribes certain formalities which are necessary to establish the facts of the case and to enable the Prize Court to adjudicate" (r).

Compensa-  
tion.

"If the capture of a vessel or of goods is not upheld by the Prize Court, or if the prize is released without any judgment being given, the parties interested have the right to compensation, unless there were good reasons for capturing the vessel or goods" (s).

(r) Parl. Papers, Miscell. No. 4 (1909), pp. 52, 97. (s) Declar. of London, Art. 64.



## CHAPTER V.

## TREATY OF PEACE.

THE power of concluding peace, like that of declaring war, depends upon the municipal constitution of the State. These authorities are generally associated. In unlimited monarchies, both reside in the sovereign; and even in limited or constitutional monarchies, each may be vested in the Crown. Such is the British Constitution, at least in form; but it is well known, that in its practical administration, the real power of making war actually resides in the Parliament, without whose approbation it cannot be carried on, and which body has consequently the power of compelling the Crown to make peace, by withholding the supplies necessary to prosecute hostilities. The American Constitution vests the power of declaring war in the two houses of Congress, with the assent of the President. By the forms of the Constitution, the President has the exclusive power of making treaties of peace, which, when ratified with the advice and consent of the Senate, become the supreme law of the land, and have the effect of repealing the declaration of war and all other laws of Congress, and of the several States which stand in the way of their stipulations. But the Congress may at any time compel the President to make peace, by refusing the means of carrying on war. In France, the President has nominally power to declare war, to make treaties of peace, of alliance, and of commerce; though it is the Cabinet (as in Great Britain) that actually exercises it. But the real power of making both peace and war resides ultimately in the two Chambers, which have the authority of granting or refusing the means of prosecuting hostilities (a).

Power of making peace dependent on the municipal constitution.

The power of making treaties of peace, like that of making other treaties with foreign States is, or may be, limited in its extent by the national constitution. We have already seen that a general authority to make treaties of peace necessarily implies a power to stipulate the conditions of peace; and among these may properly be involved the cession of the public territory and other property, as well as of private property included in the eminent

Power of making treaties of peace limited in its extent.

(a) Cf. the Constitutional Law of 1875.

domain. If, then, there be no limitation, expressed in the fundamental laws of the State, or necessarily implied from the distribution of its constitutional authorities, on the treaty-making power in this respect, it necessarily extends to the alienation of public and private property, when deemed necessary for the national safety or policy (*b*).

Indemnity to individuals for losses by public concessions.

The duty of making compensation to individuals, whose private property is thus sacrificed to the general welfare, is inculcated by public jurists, as correlative to the sovereign right of alienating those things which are included in the eminent domain; but this duty must have its limits. No Government can be supposed to be able, consistently with the welfare of the whole community, to assume the burden of losses produced by conquest, or the violent dismemberment of the State. Where, then, the cession of territory is the result of coercion and conquest, forming a case of imperious necessity, beyond the power of the State to control, it does not impose any obligation upon the Government to indemnify those who may suffer a loss of property by the cession (*c*).

Dismemberment of States by treaty.

The fundamental laws of most free Governments limit the treaty-making power, in respect to the dismemberment of the State, either by an express prohibition, or by necessary implication from the nature of the constitution. Thus, even under the constitution of the old French monarchy, the States-General of the kingdom declared that Francis I. had no power to dismember the kingdom, as was attempted by the Treaty of Madrid, concluded by that monarch; and that not merely upon the ground that he was a prisoner, but that the assent of the nation, represented in the States-General, was essential to the validity of the treaty. The cession of the province of Burgundy was therefore annulled, as contrary to the fundamental laws of the kingdom; and the provincial States of that duchy, according to Mézeray, declared, that "never having been other than subjects of the crown of France, they would die in that allegiance; and if abandoned by the king, they would take up arms, and maintain by force their independence, rather than pass under a foreign dominion." But when the ancient feudal constitution of France was gradually abolished by the disuse of the States-General, and the absolute monarchy became firmly established under Richelieu and Louis XIV., the authority of ceding portions of the public territory, as the price of peace, passed into the hands of the

(*b*) *Vide ante*, Pt. iii. ch. 2, p. 365.

(*c*) Grotius, *De Jur. Bel. ac Pac.* lib. iii. cap. 20, § 7. Vattel, *Droit*

*des Gens*, liv. i. ch. 20, § 244; liv. iv. ch. 2, § 12. Kent, *Comment. on American Law*, vol. i. p. 178 (5th ed.).

king, in whom all the other powers of government were concentrated. The different constitutions established in France, subsequently to the Revolution of 1789, limited this authority in the hands of the Executive in various degrees. The provision in the Constitution of 1795, by which the recently-conquered countries on the left bank of the Rhine were annexed to the French territory, became an insuperable obstacle to the conclusion of peace in the conferences at Lisle. By the Constitutional Charter of 1830, the king was invested with the power of making peace, without any limitation of this authority, other than that which is implied in the general distribution of the constitutional powers of the Government. Still it was believed that, according to the general understanding of French public jurists, the assent of the Chambers, clothed with the forms of a legislative act, was considered essential to the ultimate validity of a treaty ceding any portion of the national territory. The extent and limits of the territory being defined by the municipal laws, the treaty-making power is not considered sufficient to repeal those laws.

In Great Britain, the treaty-making power, as a branch of the royal prerogative, has in theory no limits; but it is practically limited by the general controlling authority of Parliament, whose approbation is necessary to carry into effect a treaty, by which the existing territorial arrangements of the empire are altered.

Treaty-making power of Great Britain.

In confederated Governments, the extent of the treaty-making power, in this respect, must depend upon the nature of the confederation. If the union consists of a system of confederated States, each retaining its own sovereignty complete and unimpaired, it is evident that the federal head, even if invested with the general power of making treaties of peace for the confederacy, cannot lawfully alienate the whole or any portion of the territory of any member of the union, without the express assent of that member. Such was the theory of the Germanic Confederation; the dismemberment of its territory was contrary to the fundamental laws and maxims of the empire. But this theory of the public law of Germany has often been compelled to yield in practice to imperious necessity; such as that which forced the cession to France of the territories belonging to the States of the empire, on the left bank of the Rhine, by the treaty of Lunéville, in 1800. Even in the case of a supreme Federal Government, or composite State, like that of the United States of America, it may, perhaps, be doubted how far the mere general treaty-making power, vested in the federal head, necessarily carries with it that of alienating the territory of any member of the union without its consent.

Treaty-making power of a Confederation.



Effects of a  
treaty of  
peace.

The effect of a treaty of peace is to put an end to the war, and to abolish the subject of it. It is an agreement to waive all discussion concerning the respective rights and claims of the parties, and to bury in oblivion the original causes of the war. It forbids the revival of the same war, by resuming hostilities for the original cause which first kindled it, or for whatever may have occurred in the course of it. But the reciprocal stipulation of perpetual peace and amity between the parties does not imply that they are never again to make war against each other for any cause whatever. The peace relates to the war which it terminates; and is perpetual, in the sense that the war cannot be revived for the same cause. This will not, however, preclude the right to claim and resist, if the grievances which originally kindled the war be repeated—for that would furnish a new injury and a new cause of war, equally just with the former. If an abstract right be in question between the parties, on which the treaty of peace is silent, it follows, that all previous complaints and injury, arising under such claim, are thrown into oblivion, by the amnesty necessarily implied, if not expressed; but the claim itself is not thereby settled either one way or the other. In the absence of express renunciation or recognition, it remains open for future discussion. And even a specific arrangement of a matter in dispute, if it be special and limited, has reference only to that particular mode of asserting the claim, and does not preclude the party from any subsequent pretensions to the same thing on other grounds. Hence the utility in practice of requiring a general renunciation of all pretensions to the thing in controversy, which has the effect of precluding for ever the assertion of the claim in any mode (*d*).

The treaty of peace does not extinguish claims founded upon debts contracted or injuries inflicted previously to the war, and unconnected with its causes, unless there be an express stipulation to that effect. Nor does it affect private rights acquired antecedently to the war, or private injuries unconnected with the causes which produced the war. Hence debts previously contracted between the respective subjects, though the remedy for their recovery is suspended during the war, are revived on the restoration of peace. There are even cases where debts contracted, or injuries committed, between the respective subjects of the belligerent nations during the war, may become the ground of a valid claim, as in the case of ransom-bills, and of contracts made by prisoners of war for subsistence, or in the course of trade

carried on under a licence. In all these cases, the remedy may be asserted subsequently to the peace (e).

The treaty of peace leaves everything in the state in which it found it—according to the principle of *uti possidetis*—unless there be some express stipulation to the contrary. The existing state of possession is maintained, except so far as altered by the terms of the treaty. If nothing be said about the conquered country or places, they remain with the conqueror, and his title cannot afterwards be called in question. During the continuance of the war, the conqueror in possession has only a usufructuary right, and the latent title of the former sovereign continues, until the treaty of peace, by its silent operation, or express provisions, extinguishes his title for ever (f).

*Uti possidetis* the basis of every treaty of peace, unless the contrary be expressed.

The restoration of the conquered territory to its original sovereign, by the treaty of peace, carries with it the restoration of all persons and things which have been temporarily under the enemy's dominion, to their original state. This general rule is applied, without exception, to real property or immovables. The title acquired in war to this species of property, until confirmed by a treaty of peace, confers a mere temporary right of possession. The proprietary right cannot be transferred by the conqueror to a third party, so as to entitle him to claim against the former owner, on the restoration of the territory to the original sovereign. If, on the other hand, the conquered territory is ceded by the treaty of peace to the conqueror, such an intermediate transfer is thereby confirmed, and the title of the purchaser becomes valid and complete. In respect to personal property or movables, a different rule is applied. The title of the enemy to things of this description is considered complete against the original owner after twenty-four hours' possession, in respect to booty on land. The same rule was formerly considered applicable to captures at sea; but the more modern usage of maritime nations requires a formal sentence of condemnation as prize of war, in order to preclude the right of the original owner to restitution on payment of salvage. But since the *jus postliminii* does not, strictly speaking, operate after the peace, if the treaty of peace contains no express stipulation respecting captured property, it remains in the condition in which the treaty finds it, and is thus tacitly ceded to the actual possessor. The *jus post-*

Effect of restoration of territory by a treaty of peace.

(e) Cf. Kent, Comment. vol. i. p. 168 (5th ed.).

(f) Grotius, De Jur. Bel. ac Pac. lib. iii. cap. 6, §§ 4, 5. Vattel, Droit des Gens, liv. iii. ch. 13, §§ 197, 198.

Martens, Précis du Droit des Gens, liv. iii. ch. 4, § 282. Klüber, Droit des Gens Moderne de l'Europe, §§ 254—259.

*liminii* is a right which belongs exclusively to a state of war; and therefore a transfer to a neutral, before the peace, even without a judicial sentence of condemnation, is valid, if there has been no recovery or recapture before the peace. The intervention of peace covers all defects of title, and vests a lawful possession in the neutral, in the same manner as it quiets the title of the hostile captor himself (*g*).

From what time the treaty of peace commences its operation.

A treaty of peace binds the contracting parties from the time of its signature. Hostilities are to cease between them from that time, unless some other period be provided in the treaty itself (*h*). But the treaty binds the subjects of the belligerent nations only from the time it is notified to them. Any intermediate acts of hostility committed by them before it was known, cannot be punished as criminal acts, though it is the duty of the State to make restitution of the property seized subsequently to the conclusion of the treaty (*i*); and in order to avoid disputes respecting the consequences of such acts, it is usual to provide, in the treaty, itself, the periods at which hostilities are to cease in different places. Grotius intimates an opinion that individuals are not responsible, even *civilliter*, for hostilities thus continued after the conclusion of peace, so long as they are ignorant of the fact, although it is the duty of the State to make restitution, wherever the property has not been actually lost or destroyed. But the better opinion seems to be, that wherever a capture takes place at sea, after the signature of the treaty of peace, mere ignorance of the fact will not protect the captor from civil responsibility in damages; and that, if he acted in good faith, his own Government must protect him and save him harmless. When a place or country is exempted from hostility by Articles of peace, it is the duty of the State to give its subjects timely notice of the fact. In such a case it is the actual wrong-doer who is made responsible to the injured party, and not the superior commanding officer of the fleet, unless he be on the spot, and actually participating in the transaction. Nor will damages be decreed by the Prize Court, against the actual wrong-doer, after a lapse of a great length of time (*k*).

Cessation of hostilities after treaty.

When the treaty of peace contains an express stipulation that hostilities are to cease in a given place at a certain time, and a capture is made previous to the expiration of the period limited,

(*g*) Vattel, liv. iii. ch. 14, §§ 209, 212, 216. *The Purissima Concepcion* (1805), 6 C. Rob. 45; *The Sophia* (1805), 6 C. Rob. 138.

(*h*) Cf. *The Thétis* (1801), 1 Pistoye

et Duverdy, 148.

(*i*) *Bain v. Speedwell* (1784), 2 Dall. 40.

(*k*) *The Mentor*, 1 C. Rob. 121; cf. *The John* (1818), 2 Dodson, 336.



but with a knowledge of the peace on the part of the captor, the capture is still invalid; for since constructive knowledge of the peace, after the periods limited in the different parts of the world, renders the capture void, much more ought actual knowledge of the peace to produce that effect. It may, however, be questionable whether anything short of an official notification from his own Government would be sufficient, in such a case, to affect the captor with the legal consequences of actual knowledge (*l*). And where a capture of a British vessel was made by an American cruiser, before the period fixed for the cessation of hostilities by the Treaty of Ghent, in 1814, and in ignorance of the fact,—but the prize had not been carried *infra præsidia* and condemned, and while at sea was recaptured by a British ship of war, after the period fixed for the cessation of hostilities, but without knowledge of the peace,—it was judicially determined, that the possession of the vessel by an American cruiser was a lawful possession, and that the British recaptor could not, after the peace, lawfully use force to divest this lawful possession (*m*). The restoration of peace put an end, from the time limited, to all force; and then the general principle applied, that things acquired in war remain, as to title and possession, precisely as they stood when the peace took place. The *uti possidetis* is the basis of every treaty of peace, unless the contrary be expressly stipulated. Peace gives a final and perfect title to captures without condemnation, and as it forbids all force, it destroys all hope of recovery, as much as if the captured vessel was carried *infra præsidia* and judicially condemned (*n*).

Things stipulated to be restored by the treaty, are to be restored in the condition in which they were first taken, unless there be an express provision to the contrary; but this does not refer to alterations which have been the natural effect of time, or of the operations of war. A fortress or town is to be restored as it was when taken, so far as it still remains in that condition when the peace is concluded. There is no obligation to repair, as well as

In what condition things taken are to be restored.

(*l*) Cf. *The Swineherd* (1801); a British ship having been captured in the Indian Ocean by a French privateer, after the latter had received news from English and Portuguese sources of the conclusion of peace, but had received no notification from the French authorities, was condemned by the French Prize Court: Merlin, Répertoire, tit. Prise, xiii. 183; Snow, Cases, p. 388.

(*m*) Cf. *The Sophia* (1805), 6 C. Rob. 138. In the case of *The Doelwyk* (1896) (see *Ruys v. R. Ex. Assur. Corp.*, (1897) 2 Q. B. 135), a

Dutch vessel was captured by an Italian warship during the war between Italy and Abyssinia. The Italian Prize Court found her guilty of contraband trading, but did not decree condemnation, as peace had in the meantime been declared. Cf. Archives Diplomatiques, Jan. 1897, p. 81.

(*n*) Cf. Valin, *Traité des Prises*, ch. 4, §§ 4, 5. Émérigon, *Traité des Assurances*, ch. 12, § 19. Merlin, *Répertoire de Jurisprudence*, tom. ix. tit. *Prise Maritime*, § 5. Kent, *Comment. vol. i. p. 172* (5th ed.).

restore, a dismantled fortress or a ravaged territory. The peace extinguishes all claim for damages done in war, or arising from the operations of war. Things are to be restored in the condition in which the peace found them; and to dismantle a fortification or waste a country after the conclusion of peace, and previously to the surrender, would be an act of perfidy. If the conqueror has repaired the fortifications, and re-established the place in the state it was in before the siege, he is bound to restore it in the same condition. But if he has constructed new works, he may demolish them; and, in general, in order to avoid disputes, it is advisable to stipulate in the treaty precisely in what condition the places occupied by the enemy are to be restored (o).

Breach of the treaty.

The violation of any one Article of the treaty is a violation of the whole treaty; for all the Articles are dependent on each other, and one is to be deemed a condition of the other. A violation of any single Article abrogates the whole treaty, if the injured party so elects to consider it. This may, however, be prevented by an express stipulation, that if one Article be broken, the others shall nevertheless continue in full force. If the treaty is violated by one of the contracting parties, either by proceedings incompatible with its general spirit, or by a specific breach of any one of its Articles, it becomes not absolutely void, but voidable at the election of the injured party. If he prefers not to come to a rupture, the treaty remains valid and obligatory. He may waive or remit the infraction committed, or he may demand a just satisfaction (p).

Disputes respecting its breach, how adjusted.

Treaties of peace are to be interpreted by the same rules as are applied to other treaties. Disputes respecting their meaning or alleged infraction may be adjusted by amicable negotiation between the contracting parties, by the mediation of friendly Powers, or by reference to the arbitration of some one Power selected by the parties. This latter office has effectively been assumed, in several instances, by the great Powers of Europe, with the view of preventing the disturbance of the general peace, by a partial infraction of the territorial arrangements stipulated by the treaties of Vienna, in consequence of the internal revolutions which have taken place in some of the States constituted by those treaties. Such are the protocols of the conference of London (1830), by which a suspension of hostilities between Holland and Belgium was enforced, and terms of separation between the two

(o) Vattel, *Droit des Gens*, liv. iv. lib. ii. cap. 15, § 15; lib. iii. cap. 19, ch. 3, § 81. § 14. Vattel, liv. iv. ch. 4, §§ 47, 48,

(p) Grotius, *De Jur. Bel. ac Pac.* 54.

countries proposed, which, when accepted by both, became the basis of a permanent peace. The objections to this species of interference, and the difficulty of reconciling it with the independence of the smaller Powers, are obvious; but it is clearly distinguishable from that general right of superintendence over the internal affairs of other States, asserted by the Powers who were the original parties to the Holy Alliance, for the purpose of preventing changes in the municipal constitutions not proceeding from the voluntary concession of the reigning sovereign, or supposed in their consequences, immediate or remote, to threaten the social order of Europe. The proceedings of the conference treated the revolution, by which the union between Holland and Belgium, established by the Congress of Vienna, had been dissolved, as an irrevocable event; and confirmed the independence, neutrality, and state of territorial possession of Belgium, upon the conditions contained in the Treaty of the 15th November, 1831, between the five Powers and that kingdom, subject to such modifications as might ultimately be the result of direct negotiations between Holland and Belgium (*q*). In the same way the great Powers, signatories of the Berlin Treaty, intervened to regulate the state of affairs caused by the revolutionary union of Eastern Roumelia with Bulgaria in 1885 (*r*); and compelled Greece to preserve the peace the year following (*s*).

(*q*) Wheaton, *Hist. Law of Nations*, pp. 538—555.

(*r*) *Ante*, p. 115.

(*s*) *Ante*, p. 119. See further *ante*, Part II. ch. 1; Lawrence, *Essays on some disputed questions in modern International Law* (1885), Essay V.





## APPENDIX A.

### ENGLISH AND AMERICAN FOREIGN ENLISTMENT ACTS.

#### I.—ENGLISH ACT.—33 & 34 VICT. CHAP. 90.

*An Act to regulate the conduct of Her Majesty's Subjects during the existence of hostilities between foreign States with which Her Majesty is at peace.* [9th August, 1870.]

WHEREAS it is expedient to make provision for the regulation of the conduct of Her Majesty's subjects during the existence of hostilities between foreign States with which Her Majesty is at peace:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

#### *Preliminary.*

1. This Act may be cited for all purposes as "The Foreign Enlistment Act, 1870." Short title of Act.
2. This Act shall extend to all the dominions of Her Majesty, including the adjacent territorial waters. Application of Act.
3. This Act shall come into operation in the United Kingdom immediately on the passing thereof, and shall be proclaimed in every British possession by the governor thereof as soon as may be after he receives notice of this Act, and shall come into operation in that British possession on the day of such proclamation, and the time at which this Act comes into operation in any place is, as respects such place, in this Act referred to as the commencement of this Act. Commencement of Act.

#### *Illegal Enlistment.*

4. If any person, without the license of Her Majesty, being a British subject, within or without Her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign State at war with any foreign State at peace with Her Majesty, and in this Act referred to as a friendly State, or whether a British subject or not within Her Majesty's dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign State as aforesaid,— Penalty on enlistment in service of foreign State.

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

Penalty on leaving Her Majesty's dominions with intent to serve a foreign State.

5. If any person, without the license of Her Majesty, being a British subject, quits or goes on board any ship with a view of quitting Her Majesty's dominions, with intent to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State, or, whether a British subject or not, within Her Majesty's dominions, induces any other person to quit or to go on board any ship with a view of quitting Her Majesty's dominions with the like intent,—

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

Penalty on embarking persons under false representations as to service.

6. If any person induces any other person to quit Her Majesty's dominions or to embark on any ship within Her Majesty's dominions under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State,—

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

Penalty on taking illegally enlisted persons on board ship.

7. If the master or owner of any ship, without the license of Her Majesty, knowingly either takes on board, or engages to take on board, or has on board such ship within Her Majesty's dominions any of the following persons, in this Act referred to as illegally enlisted persons; that is to say,

- (1.) Any person who, being a British subject within or without the dominions of Her Majesty, has, without the license of Her Majesty, accepted or agreed to accept any commission or engagement in the military or naval service of any foreign State at war with any friendly State:
- (2.) Any person, being a British subject, who, without the license of Her Majesty, is about to quit Her Majesty's dominions with intent to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State:
- (3.) Any person who has been induced to embark under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State:

such master or owner shall be guilty of an offence against this Act, and the following consequences shall ensue; that is to say,

- (1.) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour: and
- (2.) Such ship shall be detained until the trial and conviction or acquittal of the master or owner, and until all penalties inflicted on the master or owner have been paid, or the



master or owner has given security for the payment of such penalties to the satisfaction of two justices of the peace, or other magistrate or magistrates having the authority of two justices of the peace: and

- (3.) All illegally enlisted persons shall immediately on the discovery of the offence be taken on shore, and shall not be allowed to return to the ship.

*Illegal Shipbuilding and Illegal Expeditions.*

8. If any person within Her Majesty's dominions, without the license of Her Majesty, does any of the following acts; that is to say,
- (1.) Builds or agrees to build, or causes to be built any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State: or
- (2.) Issues or delivers any commission for any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State: or
- (3.) Equips any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State: or
- (4.) Despatches, or causes or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State:

Penalty on illegal shipbuilding and illegal expeditions.

such person shall be deemed to have committed an offence against this Act, and the following consequences shall ensue:

- (1.) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour:
- (2.) The ship in respect of which any such offence is committed, and her equipment, shall be forfeited to Her Majesty:

Provided that a person building, causing to be built, or equipping a ship in any of the cases aforesaid, in pursuance of a contract made before the commencement of such war as aforesaid, shall not be liable to any of the penalties imposed by this section in respect of such building or equipping if he satisfies the conditions following; that is to say,

- (1.) If forthwith upon a proclamation of neutrality being issued by Her Majesty he gives notice to the Secretary of State that he is so building, causing to be built, or equipping such ship, and furnishes such particulars of the contract and of any matters relating to, or done, or to be done under the contract as may be required by the Secretary of State:
- (2.) If he gives such security, and takes and permits to be taken such other measures, if any, as the Secretary of State may prescribe for ensuring that such ship shall not be despatched,

delivered, or removed without the license of Her Majesty until the termination of such war as aforesaid.

Presumption as to evidence in case of illegal ship.

9. Where any ship is built by order of or on behalf of any foreign State when at war with a friendly State, or is delivered to or to the order of such foreign State, or any person who to the knowledge of the person building is an agent of such foreign State, or is paid for by such foreign State or such agent, and is employed in the military or naval service of such foreign State, such ship shall, until the contrary is proved, be deemed to have been built with a view to being so employed, and the burden shall lie on the builder of such ship of proving that he did not know that the ship was intended to be so employed in the military or naval service of such foreign State.

Penalty on aiding the warlike equipment of foreign ships.

10. If any person within the dominions of Her Majesty, and without the license of Her Majesty,—

By adding to the number of the guns, or by changing those on board for other guns, or by the addition of any equipment for war, increases or augments, or procures to be increased or augmented, or is knowingly concerned in increasing or augmenting the warlike force of any ship which at the time of her being within the dominions of Her Majesty was a ship in the military or naval service of any foreign State at war with any friendly State,—

Such person shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

Penalty on fitting out naval or military expeditions without license.

11. If any person within the limits of Her Majesty's dominions, and without the license of Her Majesty,—

Prepares or fits out any naval or military expedition to proceed against the dominions of any friendly State, the following consequences shall ensue:

(1.) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

(2.) All ships, and their equipments, and all arms and munitions of war, used in or forming part of such expedition, shall be forfeited to Her Majesty.

Punishment of accessories.

12. Any person who aids, abets, counsels, or procures the commission of any offence against this Act, shall be liable to be tried and punished as a principal offender.

Limitation of term of imprisonment.

13. The term of imprisonment to be awarded in respect of any offence against this Act shall not exceed two years.

#### *Illegal Prize.*

Illegal prize brought into British ports restored.

14. If, during the continuance of any war in which Her Majesty may be neutral, any ship, goods, or merchandize captured as prize of war within the territorial jurisdiction of Her Majesty, in violation of the neutrality of this realm, or captured by any ship which may have been built, equipped, commissioned, or despatched, or the force of which may have been augmented, contrary to the provisions of this Act, are brought within the limits of Her Majesty's dominions



by the captor, or any agent of the captor, or by any person having come into possession thereof with knowledge that the same was prize of war so captured as aforesaid, it shall be lawful for the original owner of such prize, or his agent, or for any person authorized in that behalf by the Government of the foreign State to which such owner belongs, to make application to the Court of Admiralty for seizure and detention of such prize, and the Court shall, on due proof of the facts, order such prize to be restored.

Every such order shall be executed and carried into effect in the same manner, and subject to the same right of appeal, as in case of any order made in the exercise of the ordinary jurisdiction of such Court; and in the meantime and until a final order has been made on such application the Court shall have power to make all such provisional and other orders as to the care or custody of such captured ship, goods, or merchandize, and (if the same be of perishable nature, or incurring risk of deterioration) for the sale thereof, and with respect to the deposit or investment of the proceeds of any such sale, as may be made by such Court in the exercise of its ordinary jurisdiction.

#### *General Provision.*

15. For the purposes of this Act, a license by Her Majesty shall be under the sign manual of Her Majesty, or be signified by Order in Council or by proclamation of Her Majesty.

License by Her Majesty, how granted.

#### *Legal Procedure.*

16. Any offence against this Act shall, for all purposes of and incidental to the trial and punishment of any person guilty of any such offence, be deemed to have been committed either in the place in which the offence was wholly or partly committed, or in any place within Her Majesty's dominions in which the person who committed such offence may be.

Jurisdiction in respect of offences by persons against Act.

17. Any offence against this Act may be described in any indictment or other document relating to such offence, in cases where the mode of trial requires such a description, as having been committed at the place where it was wholly or partly committed, or it may be averred generally to have been committed within Her Majesty's dominions, and the venue or local description in the margin may be that of the county, city, or place in which the trial is held.

Venue in respect of offences by persons. 24 & 25 Vict. c. 97.

18. The following authorities, that is to say, in the United Kingdom any judge of a Superior Court, in any other place within the jurisdiction of any British court of justice, such Court, or, if there are more Courts than one, the Court having the highest criminal jurisdiction in that place, may, by warrant or instrument in the nature of a warrant in this section included in the term "warrant," direct that any offender charged with an offence against this Act shall be removed to some other place in Her Majesty's dominions for trial in cases where it appears to the authority granting the warrant that the removal of such offender would be conducive to the interests of justice, and any prisoner so removed shall be triable at the place to which he is removed, in the same manner as if his offence had been committed at such place.

Power to remove offenders for trial.

Any warrant for the purposes of this section may be addressed to the master of any ship or to any other person or persons, and the person or persons to whom such warrant is addressed shall have power to convey the prisoner therein named to any place or places



named in such warrant, and to deliver him, when arrived at such place or places, into the custody of any authority designated by such warrant.

Every prisoner shall, during the time of his removal under any such warrant as aforesaid, be deemed to be in the legal custody of the person or persons empowered to remove him.

Jurisdiction  
in respect of  
forfeiture of  
ships for  
offences  
against Act.

19. All proceedings for the condemnation and forfeiture of a ship, or ship and equipment, or arms and munitions of war, in pursuance of this Act shall require the sanction of the Secretary of State or such chief executive authority as is in this Act mentioned, and shall be had in the Court of Admiralty, and not in any other Court; and the Court of Admiralty shall, in addition to any power given to the Court by this Act, have in respect of any ship or other matter brought before it in pursuance of this Act all powers which it has in the case of a ship or matter brought before it in the exercise of its ordinary jurisdiction.

Regulations  
as to proceed-  
ings against  
the offender  
and against  
the ship.

20. Where any offence against this Act has been committed by any person by reason whereof a ship, or ship and equipment, or arms and munitions of war, has or have become liable to forfeiture, proceedings may be instituted contemporaneously or not, as may be thought fit, against the offender in any Court having jurisdiction of the offence, and against the ship, or ship and equipment, or arms and munitions of war, for the forfeiture in the Court of Admiralty; but it shall not be necessary to take proceedings against the offender because proceedings are instituted for the forfeiture, or to take proceedings for the forfeiture because proceedings are taken against the offender.

Officers  
authorized to  
seize offend-  
ing ships.

21. The following officers, that is to say,

- (1.) Any officer of Customs in the United Kingdom, subject nevertheless to any special or general instructions from the Commissioners of Customs or any officer of the Board of Trade, subject nevertheless to any special or general instructions from the Board of Trade:
- (2.) Any officer of Customs or public officer in any British possession, subject nevertheless to any special or general instructions from the governor of such possession:
- (3.) Any commissioned officer on full pay in the military service of the Crown, subject nevertheless to any special or general instructions from his commanding officer:
- (4.) Any commissioned officer on full pay in the naval service of the Crown, subject nevertheless to any special or general instructions from the Admiralty or his superior officer,

may seize or detain any ship liable to be seized or detained in pursuance of this Act, and such officers are in this Act referred to as the "local authority"; but nothing in this Act contained shall derogate from the power of the Court of Admiralty to direct any ship to be seized or detained by any officer by whom such Court may have power under its ordinary jurisdiction to direct a ship to be seized or detained.

Powers of  
officers  
authorized to  
seize ships.

22. Any officer authorized to seize or detain any ship in respect of any offence against this Act may, for the purpose of enforcing such seizure or detention, call to his aid any constable or officers of police, or any officers of Her Majesty's army or navy or marines, or any excise officers or officers of Customs, or any harbour-master or dock-master, or any officers having authority by law to make seizures of ships, and may put on board any ship so seized or detained any one or more of such officers to take charge of the same, and to enforce

the provisions of this Act, and any officer seizing or detaining any ship under this Act may use force, if necessary, for the purpose of enforcing seizure or detention, and if any person is killed or maimed by reason of his resisting such officer in the execution of his duties, or any person acting under his orders, such officer so seizing or detaining the ship, or other person, shall be freely and fully indemnified as well against the Queen's Majesty, her heirs and successors, as against all persons so killed, maimed, or hurt.

23. If the Secretary of State or the chief executive authority is satisfied that there is a reasonable and probable cause for believing that a ship within Her Majesty's dominions has been or is being built, commissioned, or equipped contrary to this Act, and is about to be taken beyond the limits of such dominions, or that a ship is about to be despatched contrary to this Act, such Secretary of State or chief executive authority shall have power to issue a warrant stating that there is reasonable and probable cause for believing as aforesaid, and upon such warrant the local authority shall have power to seize and search such ship, and to detain the same until it has been either condemned or released by process of law, or in manner hereinafter mentioned.

Special  
power of  
Secretary of  
State or chief  
executive  
authority to  
detain ship.

The owner of the ship so detained, or his agent, may apply to the Court of Admiralty for its release, and the Court shall as soon as possible put the matter of such seizure and detention in course of trial between the applicant and the Crown.

If the applicant establish to the satisfaction of the Court that the ship was not and is not being built, commissioned, or equipped, or intended to be despatched contrary to this Act, the ship shall be released and restored.

If the applicant fail to establish to the satisfaction of the Court that the ship was not and is not being built, commissioned, or equipped, or intended to be despatched contrary to this Act, then the ship shall be detained until released by order of the Secretary of State or chief executive authority.

The Court may in cases where no proceedings are pending for its condemnation, release any ship detained under this section on the owner giving security to the satisfaction of the Court that the ship shall not be employed contrary to this Act, notwithstanding that the applicant may have failed to establish to the satisfaction of the Court that the ship was not and is not being built, commissioned, or intended to be despatched contrary to this Act. The Secretary of State or the chief executive authority may likewise release any ship detained under this section on the owner giving security to the satisfaction of such Secretary of State or chief executive authority that the ship shall not be employed contrary to this Act, or may release the ship without such security if the Secretary of State or chief executive authority think fit so to release the same.

If the Court be of opinion that there was not reasonable and probable cause for the detention, and if no such cause appear in the course of the proceedings, the Court shall have power to declare that the owner is to be indemnified by the payment of costs and damages in respect of the detention, the amount thereof to be assessed by the Court, and any amount so assessed shall be payable by the Commissioners of the Treasury out of any moneys legally applicable for that purpose. The Court of Admiralty shall also have power to make a like order for the indemnity of the owner, on the application of such owner to the Court, in a summary way, in cases where the ship is



released by the order of the Secretary of State or the chief executive authority, before any application is made by the owner or his agent to the Court for such release.

Nothing in this section contained shall affect any proceedings instituted or to be instituted for the condemnation of any ship detained under this section where such ship is liable to forfeiture, subject to this provision, that if such ship is restored in pursuance of this section, all proceedings for such condemnation shall be stayed; and where the Court declares that the owner is to be indemnified by the payment of costs and damages for the detainer, all costs, charges and expenses incurred by such owner in or about any proceedings for the condemnation of such ship shall be added to the costs and damages payable to him in respect of the detention of the ship.

Nothing in this section contained shall apply to any foreign non-commissioned ship despatched from any part of Her Majesty's dominions after having come within them under stress of weather or in the course of a peaceful voyage, and upon which ship no fitting out or equipping of a warlike character has taken place in this country.

Special power  
of local  
authority to  
detain ship.

24. Where it is represented to any local authority, as defined by this Act, and such local authority believes the representation, that there is a reasonable and probable cause for believing that a ship within Her Majesty's dominions has been or is being built, commissioned, or equipped contrary to this Act, and is about to be taken beyond the limits of such dominions, or that a ship is about to be despatched contrary to this Act, it shall be the duty of such local authority to detain such ship, and forthwith to communicate the fact of such detention to the Secretary of State or chief executive authority.

Upon the receipt of such communication, the Secretary of State or chief executive authority may order the ship to be released if he thinks there is no cause for detaining her, but if satisfied that there is reasonable and probable cause for believing that such ship was built, commissioned, or equipped, or intended to be despatched in contravention of this Act, he shall issue his warrant, stating that there is reasonable and probable cause for believing as aforesaid, and upon such warrant being issued further proceedings shall be had as in cases where the seizure or detention has taken place on a warrant issued by the Secretary of State without any communication from the local authority.

Where the Secretary of State or chief executive authority orders the ship to be released on the receipt of a communication from the local authority without issuing his warrant, the owner of the ship shall be indemnified by the payment of costs and damages in respect of the detention upon application to the Court of Admiralty in a summary way in like manner as he is entitled to be indemnified where the Secretary of State having issued his warrant under this Act releases the ship before any application is made by the owner or his agent to the Court for such release.

Power of  
Secretary of  
State or  
executive  
authority to  
grant search  
warrant.

25. The Secretary of State or the chief executive authority may, by warrant, empower any person to enter any dockyard or other place within Her Majesty's dominions, and inquire as to the destination of any ship which may appear to him to be intended to be employed in the naval or military service of any foreign State at war with a friendly State, and to search such ship.

Exercise of  
powers of  
Secretary of

26. Any powers or jurisdiction by this Act given to the Secretary of State may be exercised by him throughout the dominions of Her



Majesty, and such powers and jurisdiction may also be exercised by any of the following officers, in this Act referred to as the chief executive authority, within their respective jurisdictions; that is to say,

- (1.) In Ireland by the Lord Lieutenant or other the chief governor or governors of Ireland for the time being, or the chief secretary to the Lord Lieutenant:
- (2.) In Jersey by the Lieutenant Governor:
- (3.) In Guernsey, Alderney, and Sark, and the dependent islands by the Lieutenant Governor:
- (4.) In the Isle of Man by the Lieutenant Governor:
- (5.) In any British possession by the Governor.

A copy of any warrant issued by a Secretary of State or by any officer authorized in pursuance of this Act to issue such warrant in Ireland, the Channel Islands, or the Isle of Man shall be laid before Parliament.

27. An appeal may be had from any decision of a Court of Admiralty under this Act to the same tribunal and in the same manner to and in which an appeal may be had in cases within the ordinary jurisdiction of the Court as a Court of Admiralty.

28. Subject to the provisions of this Act providing for the award of damages in certain cases in respect of the seizure or detention of a ship by the Court of Admiralty no damages shall be payable, and no officer or local authority shall be responsible, either civilly or criminally, in respect of the seizure or detention of any ship in pursuance of this Act.

29. The Secretary of State shall not, nor shall the chief executive authority, be responsible in any action or other legal proceedings whatsoever for any warrant issued by him in pursuance of this Act, or be examinable as a witness, except at his own request, in any Court of justice in respect of the circumstances which led to the issue of the warrant.

*Interpretation Clause.*

30. In this Act, if not inconsistent with the context, the following terms have the meanings hereinafter respectively assigned to them; that is to say,

“Foreign State” includes any foreign prince, colony, province, or part of any province or people, or any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people:

“Military service” shall include military telegraphy and any other employment whatever, in or in connection with any military operation:

“Naval service” shall, as respects a person, include service as a marine, employment as a pilot in piloting or directing the course of a ship of war or other ship when such ship of war or other ship is being used in any military or naval operation, and any employment whatever on board a ship of war, transport, store ship, privateer or ship under letters of marque; and as respects a ship, include any user of a ship as a transport, store ship, privateer or ship under letters of marque:

“United Kingdom” includes the Isle of Man, the Channel Islands, and other adjacent islands:

State or chief executive authority.

Appeal from Court of Admiralty.

Indemnity to officers.

Indemnity to Secretary of State or chief executive authority.

Interpretation of terms.

“Foreign State:”

“Military service:”

“Naval service:”

“United Kingdom:”

- “British possession :” “British possession” means any territory, colony, or place being part of Her Majesty’s dominions, and not part of the United Kingdom, as defined by this Act:
- “The Secretary of State :” “The Secretary of State” shall mean any one of Her Majesty’s Principal Secretaries of State:
- “Governor :” “The Governor” shall as respects India mean the Governor-General or the governor of any presidency, and where a British possession consists of several constituent colonies, mean the Governor-General of the whole possession, or the governor of any of the constituent colonies, and as respects any other British possession it shall mean the officer for the time being administering the government of such possession; also any person acting for or in the capacity of a governor, shall be included under the term “Governor”:
- “Court of Admiralty :” “Court of Admiralty” shall mean the High Court of Admiralty of England or Ireland, the Court of Session of Scotland, or any Vice-Admiralty Court within Her Majesty’s dominions:
- “Ship :” “Ship” shall include any description of boat, vessel, floating battery, or floating craft; also any description of boat, vessel, or other craft or battery, made to move either on the surface of or under water, or sometimes on the surface of and sometimes under water:
- “Building :” “Building” in relation to a ship shall include the doing any act towards or incidental to the construction of a ship, and all words having relation to building shall be construed accordingly:
- “Equip- ping :” “Equipping” in relation to a ship shall include the furnishing a ship with any tackle, apparel, furniture, provisions, arms, munitions, or stores, or any other thing which is used in or about a ship for the purpose of fitting or adapting her for the sea or for naval service, and all words relating to equipping shall be construed accordingly:
- “Ship and equipment :” “Ship and equipment” shall include a ship and everything in or belonging to a ship:
- “Master.” “Master” shall include any person having the charge or command of a ship.

*Repeal of Acts and Saving Clauses.*

Repeal of  
Foreign  
Enlistment  
Act.  
59 Geo. III.  
c. 69.

31. From and after the commencement of this Act, an Act passed in the fifty-ninth year of the reign of His late Majesty King George the Third, chapter sixty-nine, intituled “An Act to prevent the enlisting or engagement of His Majesty’s subjects to serve in foreign service, and the fitting out or equipping, in His Majesty’s dominions, vessels for warlike purposes, without His Majesty’s license,” shall be repealed: Provided that such repeal shall not affect any penalty, forfeiture, or other punishment incurred or to be incurred in respect of any offence committed before this Act comes into operation, nor the institution of any investigation or legal proceeding, or any other remedy for enforcing any such penalty, forfeiture, or punishment as aforesaid.

Saving as to  
commissioned  
foreign ships.

32. Nothing in this Act contained shall subject to forfeiture any commissioned ship of any foreign State, or give to any British Court over or in respect of any ship entitled to recognition as a commissioned ship of any foreign State any jurisdiction which it would not have had if this Act had not passed.

33. Nothing in this Act contained shall extend or be construed to extend to subject to any penalty any person who enters into the military service of any prince, State, or potentate in Asia, with such leave or license as is for the time being required by law in the case of subjects of Her Majesty entering into the military service of princes, States, or potentates in Asia.

Penalties not to extend to persons entering into military service in Asia.

59 Geo. III.  
c. 69, s. 12.

## II.—PROCLAMATION UNDER THE FOREIGN ENLISTMENT ACT (a).

BY THE KING.

*A Proclamation.*

Edward, R. and I.

Whereas we are happily at peace with all sovereigns, powers, and States: And whereas a state of war unhappily exists between His Majesty the Emperor of All the Russias and His Majesty the Emperor of Japan, and between their respective subjects, and others inhabiting within their countries, territories, or dominions: And whereas we are on terms of friendship and amicable intercourse with each of these powers, and with their several subjects, and others inhabiting within their countries, territories, or dominions: And whereas great numbers of our loyal subjects reside and carry on commerce, and possess property and establishments, and enjoy various rights and privileges, within the dominions of each of the aforesaid powers, protected by the faith of treaties between us and each of the aforesaid powers: And whereas we, being desirous of preserving to our subjects the blessings of peace, which they now happily enjoy, are firmly purposed and determined to maintain a strict and impartial neutrality in the said state of war unhappily existing between the aforesaid powers: we, therefore, have thought fit, by and with the advice of our Privy Council, to issue this our royal proclamation: And we do hereby strictly charge and command all our loving subjects to govern themselves accordingly, and to observe a strict neutrality in and during the aforesaid war, and to abstain from violating or contravening either the laws and statutes of the realm in this behalf, or the law of nations in relation thereto, as they will answer to the contrary at their peril: And whereas in and by a certain statute made and passed in a session of Parliament holden in the 33rd and 34th year of the reign of Her late Majesty Queen Victoria, intituled "An Act to Regulate the conduct of Her Majesty's Subjects during the existence of Hostilities between Foreign States with which Her Majesty is at Peace," it is, among other things, declared and enacted as follows:—

The proclamation then recites sects. 2 and 4—10 of the Act as above set out, and continues:—

And whereas by the said Act it is further provided that ships built, commissioned, equipped, or despatched in contravention of the said Act, may be condemned and forfeited by judgment of the Court of Admiralty; and that if the Secretary of State or chief executive authority is satisfied that there is a reasonable and probable cause for believing that a ship within our dominions has been or is being built, commissioned, or equipped, contrary to the said Act, and is about to be taken beyond the limits of such dominions, or that a ship is about



to be despatched contrary to the Act, such Secretary of State or chief executive authority shall have power to issue a warrant authorizing the seizure and search of such ship and her detention until she has been either condemned or released by process of law.

And whereas certain powers of seizure and detention are conferred by the said Act on certain local authorities;

Now, in order that none of our subjects may unwarily render themselves liable to the penalties imposed by the said statute, we do hereby strictly command that no person or persons whatsoever do commit any act, matter, or thing whatsoever contrary to the provisions of the said statute, upon pain of the several penalties by the said statute imposed and of our high displeasure.

And we do hereby further warn and admonish all our loving subjects, and all persons whatsoever entitled to our protection, to observe towards each of the aforesaid powers, their subjects, and territories, and towards all belligerents whatsoever with whom we are at peace, the duties of neutrality; and to respect, in all and each of them, the exercise of belligerent rights.

And we hereby further warn all our loving subjects, and all persons whatsoever entitled to our protection, that if any of them shall presume, in contempt of this our royal proclamation, and of our high displeasure, to do any acts in derogation of their duty as subjects of a neutral power in a war between other powers, or in violation or contravention of the law of nations in that behalf, as more especially by breaking, or endeavouring to break, any blockade lawfully and actually established by or on behalf of either of the said powers, or by carrying officers, soldiers, despatches, arms, ammunition, military stores or materials, or any article or articles considered and deemed to be contraband of war according to the law or modern usages of nations, for the use or service of either of the said powers, that all persons so offending, together with their ships and goods, will rightfully incur and be justly liable to hostile capture, and to the penalties denounced by the law of nations in that behalf.

And we do hereby give notice that all our subjects and persons entitled to our protection who may misconduct themselves in the premises will do so at their peril and of their own wrong; and that they will in no wise obtain any protection from us against such capture or such penalties as aforesaid, but will, on the contrary, incur our high displeasure by such misconduct.

Given at our Court at Buckingham Palace, this eleventh day of February, in the year of our Lord one thousand nine hundred and four, and in the fourth year of our reign.

God save the King.

*Rules for Observation of Neutrality issued under the above Proclamation by the Foreign Secretary to the Lords of the Admiralty and all the Heads of Government Departments.*

Foreign Office, February 10, 1904.

My Lords,—His Majesty being fully determined to observe the duties of neutrality during the existing state of war between Russia and Japan; being, moreover, resolved to prevent, as far as possible, the use of His Majesty's harbours, ports, and coasts, and the waters within His Majesty's territorial jurisdiction, in aid of the warlike purposes of either belligerent, has commanded me to communicate to

your lordships, for your guidance, the following rules, which are to be treated and enforced as His Majesty's orders and directions:—

Rule 1. During the continuance of the present state of war, all ships of war of either belligerent are prohibited from making use of any port or roadstead in the United Kingdom, the Isle of Man, or the Channel Islands, or in any of His Majesty's colonies or foreign possessions or dependencies, or of any waters subject to the territorial jurisdiction of the British Crown, as a station or place of resort for any warlike purpose, or for the purpose of obtaining any facilities for warlike equipment; and no ship of war of either belligerent shall hereafter be permitted to leave any such port, roadstead, or waters from which any vessel of the other belligerent (whether the same shall be a ship of war or a merchant ship) shall have previously departed until after the expiration of at least twenty-four hours from the departure of such last-mentioned vessel beyond the territorial jurisdiction of His Majesty.

Rule 2. If there is now in any such port, roadstead, or waters subject to the territorial jurisdiction of the British Crown any ship of war of either belligerent, such ship of war shall leave such port, roadstead, or waters within such time not less than twenty-four hours as shall be reasonable, having regard to all the circumstances and the condition of such ship as to repairs, provisions, or things necessary for the subsistence of her crew; and if after the date hereof any ship of war of either belligerent shall enter any such port, roadstead, or waters subject to the territorial jurisdiction of the British Crown, such ship shall depart and put to sea within twenty-four hours after her entrance into any such port, roadstead, or waters, except in case of stress of weather, or of her requiring provisions or things necessary for the subsistence of her crew, or repairs; in either of which cases the authorities of the port, or of the nearest port (as the case may be), shall require her to put to sea as soon as possible after the expiration of such period of twenty-four hours, without permitting her to take in supplies beyond what may be necessary for her immediate use; and no such vessel which may have been allowed to remain within British waters for the purpose of repair shall continue in any such port, roadstead, or waters, for a longer period than twenty-four hours after her necessary repairs shall have been completed. Provided, nevertheless, that in all cases in which there shall be any vessels (whether ships of war or merchant ships) of both the said belligerent parties in the same port, roadstead, or waters within the territorial jurisdiction of His Majesty, there shall be an interval of not less than twenty-four hours between the departure therefrom of any such vessel (whether a ship of war or merchant ship) of the one belligerent, and the subsequent departure therefrom of any ship of war of the other belligerent; and the time hereby limited for the departure of such ships of war respectively shall always, in case of necessity, be extended so far as may be requisite for giving effect to this proviso, but no further or otherwise.

Rule 3. No ship of war of either belligerent shall hereafter be permitted, while in any such port, roadstead, or waters subject to the territorial jurisdiction of His Majesty, to take in any supplies, except provisions and such other things as may be requisite for the subsistence of her crew, and except so much coal only as may be sufficient to carry such vessel to the nearest port of her own country, or to some nearer named neutral destination, and no coal shall again be supplied to any such ship of war in the same or any other port, roadstead, or



waters subject to the territorial jurisdiction of His Majesty, without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within British waters as aforesaid.

Rule 4. Armed ships of either belligerent are interdicted from carrying prizes made by them into the ports, harbours, roadsteads, or waters of the United Kingdom, the Isle of Man, the Channel Islands, or any of His Majesty's colonies or possessions abroad.

The governor or other chief authority of each of His Majesty's territories or possessions beyond the seas shall forthwith notify and publish the above rules.

I have, &c. LANSDOWNE.

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## II.—AMERICAN ACT.

*An Act in addition to the "Act for the Punishment of certain Crimes against the United States," and to repeal the Acts therein mentioned (1818) (b).*

BE it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That if any citizen of the United States shall, within the territory or jurisdiction thereof, accept and exercise a commission to serve a foreign prince, State, colony, district, or people, in war, by land or by sea, against any prince, State, colony, district, or people, with whom the United States are at peace, the person so offending shall be deemed guilty of a high misdemeanour, and shall be fined not more than two thousand dollars, and shall be imprisoned not exceeding three years.

Sect. 2. And be it further enacted, That if any person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, State, colony, district, or people, as a soldier, or as a marine or seaman, on board of any vessel of war, letter of marque, or privateer, every person so offending shall be deemed guilty of a high misdemeanour, and shall be fined not exceeding one thousand dollars, and be imprisoned not exceeding three years: Provided that this Act shall not be construed to extend to any subject or citizen of any foreign prince, State, colony, district, or people, who shall transiently be within the United States, and shall on board of any vessel of war, letter of marque, or privateer, which at the time of its arrival within the United States, was fitted and equipped as such, enter and enlist himself, or hire or retain another subject or citizen of the same foreign prince, State, colony, district, or people, who is transiently within the United States, to enlist or enter himself to serve such foreign prince, State, colony, district, or people, on board such vessel of war, letter of marque, or privateer, if the United States shall then be at peace with such foreign prince, State, colony, district, or people.

Sect. 3. And be it further enacted, That if any person shall, within

(b) This Act is given as it was originally passed in order to retain the numbering of the sections referred to in the text. It will be found in the U. S. Revised Statutes under the title of Neutrality.



the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming, of any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or State, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or State, or of any colony, district, or people with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States, for any ship or vessel, to the intent that she may be employed as aforesaid, every person so offending shall be guilty of a high misdemeanour, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years; and every such ship or vessel, with her tackle, apparel, and furniture, together with all material, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one-half to the use of the informer, and the other half to the use of the United States.

Sect. 4. And be it further enacted, That if any citizen or citizens of the United States shall, without the limits thereof, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly aid or be concerned in the furnishing, fitting out, or arming, any private ship or vessel of war, or privateer, with intent that such ship or vessel shall be employed to cruise, or commit hostilities, upon the citizens of the United States, or their property, or shall take the command of, or enter on board of any such ship or vessel, for the intent aforesaid, or shall purchase any interest in any such ship or vessel, with a view to share in the profits thereof, such persons so offending shall be deemed guilty of a high misdemeanour, and fined not more than ten thousand dollars, and imprisoned not more than ten years; and the trial for such offence, if committed within the limits of the United States, shall be in the district in which the offender shall be apprehended or first brought.

Sect. 5. And be it further enacted, That if any persons shall, within the territory or jurisdiction of the United States, increase or augment, or procure to be increased or augmented, or shall knowingly be concerned in increasing or augmenting the force of any ship of war, cruiser, or other armed vessel, which, at the time of her arrival within the United States, was a ship of war, or cruiser, or armed vessel, in the service of any foreign prince or State, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince or State, colony, district, or people, the same being at war with any foreign prince or State, or of any colony, district, or people with whom the United States are at peace, by adding to the number of the guns of such vessel, or by changing those on board of her for guns of a larger calibre, or by the addition thereto of any equipment solely applicable to war, every person so offending shall be deemed guilty of a high misdemeanour, shall be fined not more than one thousand dollars, and be imprisoned not more than one year.

Sect. 6. And be it further enacted, That if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or State, or of any colony, district, or people, with whom the United States are at peace, every person so offending shall be deemed guilty of a high misdemeanour, and shall be fined

not exceeding three thousand dollars, and be imprisoned not more than one year.

Sect. 7. And be it further enacted, That the District Courts shall take cognizance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof.

Sect. 8. And be it further enacted, That in every case in which a vessel shall be fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruiser, or other armed vessel, shall be increased or augmented, or in which any military expedition or enterprise shall be begun or set on foot, contrary to the provisions and prohibitions of this Act; and in every case of the capture of a ship or vessel within the jurisdiction or protection of the United States as before defined, and in every case in which any process issuing out of any Court of the United States shall be disobeyed or resisted by any person or persons having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or State, or of any colony, district, or people, or of any subjects or citizens of any foreign prince or State, or of any colony, district, or people, in every case it shall be lawful for the President of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, for the purpose of taking possession of and detaining any such ship or vessel, with her prize or prizes, if any, in order to the execution of the prohibitions and penalties of this Act, and to the restoring the prize or prizes in the cases in which restoration shall have been adjudged, and also for the purpose of preventing the carrying on any such expedition or enterprise from the territories or jurisdiction of the United States against the territories or dominions of any foreign prince or State, or of any colony, district, or people, with whom the United States are at peace.

Sect. 9. And be it further enacted, That it shall be lawful for the President of the United States, or such person as he shall empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be necessary to compel any foreign ship or vessel to depart the United States in all cases in which by the law of nations or the Treaties of the United States, they ought not to remain within the United States.

Sect. 10. And be it further enacted, That the owners or consignees of every armed ship or vessel sailing out of the ports of the United States, belonging wholly or in part to citizens thereof, shall enter into bond to the United States, with sufficient sureties, prior to clearing out the same, in double the amount of the value of the vessel and cargo on board, including her armament, that the said ship or vessel shall not be employed by such owners to cruise or commit hostilities against the subjects, citizens, or property, of any foreign prince or State, or of any colony, district, or people, with whom the United States are at peace.

Sect. 11. And be it further enacted, That the collectors of the Customs be, and they are, hereby respectively authorized and required to detain any vessel manifestly built for warlike purposes, and about to depart the United States, of which the cargo shall principally consist of arms and munitions of war, when the number of men shipped on board, or other circumstances, shall render it probable that such vessel is intended to be employed by the owner or owners to cruise

or commit hostilities upon the subjects, citizens, or property of any foreign State, or of any colony, district, or people, with whom the United States are at peace, until the decision of the President be had thereon, or until the owner or owners shall give such bond and security as is required of the owners of armed ships by the preceding section of this Act.

Sect. 12. And be it further enacted, That the Act passed on the fifth day of June One thousand seven hundred and ninety-four, entitled, "An Act in addition to the Act for the punishment of certain crimes against the United States," continued in force, for a limited time, by the Act of the second of March One thousand seven hundred and ninety-seven, and perpetuated by the Act passed on the twenty-fourth of April One thousand eight hundred, and the Act passed on the fourteenth day of June One thousand seven hundred and ninety-seven, entitled, "An Act to prevent citizens of the United States from privateering against nations in amity with, or against the citizens of, the United States," and the Act passed the third day of March One thousand eight hundred and seventeen, entitled, "An Act more effectually to preserve the neutral relations of the United States," be, and the same are hereby severally repealed: Provided nevertheless, that persons having heretofore offended against any of the Acts aforesaid may be prosecuted, convicted, and punished as if the same were not repealed; and no forfeiture heretofore incurred by a violation of any of the Acts aforesaid shall be affected by such repeal.

Sect. 13. And be it further enacted, That nothing in the foregoing Act shall be construed to prevent the prosecution or punishment of treason, or any piracy defined by the laws of the United States.



## APPENDIX B.

## ENGLISH NAVAL PRIZE ACT.

27 &amp; 28 VICT. CHAP. 25.

*An Act for regulating Naval Prize of War.* [23rd June, 1864.]

WHEREAS it is expedient to enact permanently, with amendments, such provisions concerning Naval Prize, and matters connected therewith, as have heretofore been usually passed at the beginning of a war:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

*Preliminary.*

Short title.  
Interpreta-  
tion of terms.

1. This Act may be cited as The Naval Prize Act, 1864.

2. In this Act—

The term "the Lords of the Admiralty" means the Lord High Admiral of the United Kingdom, or the Commissioners for executing the office of Lord High Admiral:

The term "the High Court of Admiralty" means the High Court of Admiralty of England:

The term "any of Her Majesty's ships of war" includes any of Her Majesty's vessels of war, and any hired armed ship or vessel in Her Majesty's service:

The term "officers and crew" includes flag officers, commanders, and other officers, engineers, seamen, marines, soldiers, and others on board any of Her Majesty's ships of war:

The term "ship" includes vessel and boat, with the tackle, furniture, and apparel of the ship, vessel, or boat:

The term "ship papers" includes all books, passes, sea briefs, charter parties, bills of lading, cockets, letters, and other documents and writings delivered up or found on board a captured ship:

The term "goods" includes all such things as are by the course of admiralty and law of nations the subject of adjudication as prize (other than ships).

## I. PRIZE COURTS.

High Court of Admiralty and other courts to be Prize Courts for purposes of Act.

3. The High Court of Admiralty, and every Court of Admiralty or of Vice-Admiralty, or other Court exercising admiralty jurisdiction in Her Majesty's dominions, for the time being authorized to take cognizance of and judicially proceed in matters of prize, shall be a Prize Court within the meaning of this Act.

Every such Court, other than the High Court of Admiralty, is com-

prised in the term "Vice-Admiralty Prize Court," when hereafter used in this Act.

*High Court of Admiralty.*

4. The High Court of Admiralty shall have jurisdiction throughout Her Majesty's dominions as a Prize Court.

Jurisdiction of High Court of Admiralty.

The High Court of Admiralty as a Prize Court shall have power to enforce any order or decree of a Vice-Admiralty Prize Court, and any order or decree of the Judicial Committee of the Privy Council, in a prize appeal.

*Appeal; Judicial Committee.*

5. An appeal shall lie to Her Majesty in Council from any order or decree of a Prize Court, as of right in case of a final decree, and in other cases with the leave of the Court making the order or decree.

Appeal to Queen in Council, in what cases.

Every appeal shall be made in such manner and form and subject to such regulations (including regulations as to fees, costs, charges, and expenses), as may for the time being be directed by Order in Council, and in the absence of any such order, or so far as any such order does not extend, then in such manner and form and subject to such regulations as are for the time being prescribed or in force respecting maritime causes of appeal.

6. The Judicial Committee of the Privy Council shall have jurisdiction to hear and report on any such appeal, and may therein exercise all such powers as for the time being appertain to them in respect of appeals from any Court of Admiralty jurisdiction, and all such powers as are under this Act vested in the High Court of Admiralty, and all such powers as were wont to be exercised by the Commissioners of Appeal in Prize Causes.

Jurisdiction of Judicial Committee in prize appeals.

7. All processes and documents required for the purposes of any such appeal shall be transmitted to and shall remain in custody of the Registrar of Her Majesty in Prize Appeals (c).

Custody of processes, papers, &c.

8. In every such appeal the usual inhibition shall be extracted from the Registry of Her Majesty in Prize Appeals within three months after the date of the order or decree appealed from if the appeal be from the High Court of Admiralty, and within six months after that date if it be from a Vice-Admiralty Prize Court.

Limit of time for appeal.

The Judicial Committee may, nevertheless, on sufficient cause shown, allow the inhibition to be extracted and the appeal to be prosecuted after the expiration of the respective periods aforesaid (c).

*Vice-Admiralty Prize Courts.*

9. Every Vice-Admiralty Prize Court shall enforce within its jurisdiction all orders and decrees of the Judicial Committee in Prize Appeals, and of the High Court of Admiralty in Prize Causes.

Enforcement of orders of High Court, &c.

10. Her Majesty in Council may grant to the Judge of any Vice-Admiralty Prize Court a salary not exceeding five hundred pounds a year, payable out of money provided by Parliament, subject to such regulations as seem meet.

Salaries of judges of Vice-Admiralty Prize Courts.

A Judge to whom a salary is so granted shall not be entitled to any further emolument, arising from fees or otherwise, in respect of prize business transacted in his Court.

An account of all such fees shall be kept by the Registrar of the

(c) Repealed by the Prize Courts (Procedure) Act, 1914; see *infra*, p. 842.

Court, and the amount thereof shall be carried to and form part of the Consolidated Fund of the United Kingdom.

Retiring pensions of judges, as in 22 & 23 Vict. c. 26.

11. In accordance, as far as circumstances admit, with the principles and regulations laid down in the Superannuation Act, 1859, Her Majesty in Council may grant to the Judge of any Vice-Admiralty Prize Court an annual or other allowance, to take effect on the termination of his service, and to be payable out of money provided by Parliament.

Returns from Vice-Admiralty Prize Courts.

12. The Registrar of every Vice-Admiralty Prize Court shall, on the First day of January and First day of July in every year, make out a return (in such form as the Lords of the Admiralty from time to time direct) of all cases adjudged in the Court since the last half-yearly return, and shall with all convenient speed send the same to the Registrar of the High Court of Admiralty, who shall keep the same in the Registry of that Court, and who shall, as soon as conveniently may be, send a copy of the returns of each half-year to the Lords of the Admiralty, who shall lay the same before both Houses of Parliament.

#### General.

General orders for Prize Courts.

13. The Judicial Committee of the Privy Council, with the Judge of the High Court of Admiralty, may from time to time frame General Orders for regulating (subject to the provisions of this Act) the procedure and practice of Prize Courts, and the duties and conduct of the officers thereof and of the practitioners therein, and for regulating the fees to be taken by the officers of the Courts, and the costs, charges, and expenses to be allowed to the practitioners therein.

Any such General Orders shall have full effect, if and when approved by Her Majesty in Council, but not sooner or otherwise.

Every Order in Council made under this section shall be laid before both Houses of Parliament.

Every such Order in Council shall be kept exhibited in a conspicuous place in each Court to which it relates (*d*).

Prohibition of officer of Prize Court acting as proctor, &c.

14. It shall not be lawful for any registrar, marshal, or other officer of any Prize Court, or for the Registrar of Her Majesty in Prize Appeals, directly or indirectly to act or be in any manner concerned as advocate, proctor, solicitor, or agent, or otherwise, in any Prize Cause or Appeal, on pain of dismissal or suspension from office, by order of the Court or of the Judicial Committee (as the case may require).

Prohibition of proctors being concerned for adverse parties in a cause.

15. It shall not be lawful for any proctor or solicitor, or person practising as a proctor or solicitor, being employed by a party in a Prize Cause or Appeal, to be employed or concerned, by himself or his partner, or by any other person, directly or indirectly, by or on behalf of any adverse party in that Cause or Appeal, on pain of exclusion or suspension from practice in prize matters, by order of the Court or of the Judicial Committee (as the case may require).

## II.—PROCEDURE IN PRIZE CAUSES.

### *Proceedings by Captors.*

Custody of prize ship.

16. Every ship taken as prize, and brought into port within the jurisdiction of a Prize Court, shall forthwith, and without bulk broken, be delivered up to the marshal of the Court.

(*d*) This section is repealed by section three of the Prize Courts Act, 1894; see *infra*, p. 841.



If there is no such marshal, then the ship shall be in like manner delivered up to the principal officer of customs at the port.

The ship shall remain in the custody of the marshal, or of such officer, subject to the orders of the Court.

17. The captors shall, with all practicable speed after the ship is brought into port, bring the ship papers into the registry of the Court. Bringing in of ship papers.

The officer in command, or one of the chief officers of the capturing ship, or some other person who was present at the capture, and saw the ship papers delivered up or found on board, shall make oath that they are brought in as they were taken, without fraud, addition, subduction, or alteration, or else shall account on oath to the satisfaction of the Court for the absence or altered condition of the ship papers or any of them.

Where no ship papers are delivered up or found on board the captured ship, the officer in command, or one of the chief officers of the capturing ship, or some other person who was present at the capture, shall make oath to that effect.

18. As soon as the affidavit as to ship papers is filed, a monition shall issue, returnable within twenty days from the service thereof, citing all persons in general to show cause why the captured ship should not be condemned (e). Issue of monition.

19. The captors shall, with all practicable speed after the captured ship is brought into port, bring three or four of the principal persons belonging to the captured ship before the Judge of the Court or some person authorized in this behalf, by whom they shall be examined on oath on the standing interrogatories. Examinations on standing interrogatories.

The preparatory examinations on the standing interrogatories shall, if possible, be concluded within five days from the commencement thereof.

20. After the return of the monition, the Court shall, on production of the preparatory examinations and ship papers, proceed with all convenient speed either to condemn or to release the captured ship. Adjudication by Court.

21. Where, on production of the preparatory examinations and ship papers, it appears to the Court doubtful whether the captured ship is good prize or not, the Court may direct further proof to be adduced either by affidavit or by examination of witnesses, with or without pleadings, or by production of further documents; and on such further proof being adduced the Court shall with all convenient speed proceed to adjudication. Further proof.

22. The foregoing provisions, as far as they relate to the custody of the ship, and to examination on the standing interrogatories, shall not apply to ships of war taken as prize. Custody, &c., of ships of war.

*Claim.*

23. At any time before final decree made in the cause, any person claiming an interest in the ship may enter in the registry of the Court a claim, verified on oath. Entry of claim; security for costs.

Within five days after entering the claim, the claimant shall give security for costs in the sum of sixty pounds; but the Court shall have power to enlarge the time for giving security, or to direct security to be given in a larger sum, if the circumstances appear to require it.

(e) Sections 18 to 29, 32, 33 and 36 are repealed by the Prize Courts (Procedure) Act, 1914; see *infra*, p. 842.

*Appraisement.*

Power to  
Court to  
direct ap-  
praisement.

24. The Court may, if it thinks fit, at any time direct that the captured ship be appraised.

Every appraisement shall be made by competent persons sworn to make the same according to the best of their skill and knowledge.

*Delivery on Bail.*

Power to  
Court to  
direct delivery  
to claimant  
on bail.

25. After appraisement, the Court may, if it thinks fit, direct that the captured ship be delivered up to the claimant, on his giving security to the satisfaction of the Court to pay to the captors the appraised value thereof in case of condemnation.

*Sale.*

Power to  
Court to  
order sale.

26. The Court may at any time, if it thinks fit, on account of the condition of the captured ship, or on the application of a claimant, order that the captured ship be appraised as aforesaid (if not already appraised), and be sold.

Sale on con-  
demnation.

27. On or after condemnation the Court may, if it thinks fit, order that the ship be appraised as aforesaid (if not already appraised), and be sold.

How sales to  
be made.

28. Every sale shall be made by or under the superintendence of the Marshal of the Court or of the officer having the custody of the captured ship.

Payment of  
proceeds to  
Paymaster-  
General or  
official  
accountant.

29. The proceeds of any sale, made either before or after condemnation, and after condemnation the appraised value of the captured ship, in case she has been delivered up to a claimant on bail, shall be paid under an order of the Court either into the Bank of England to the credit of Her Majesty's Paymaster-General, or into the hands of an official accountant (belonging to the commissariat or some other department) appointed for this purpose by the commissioners of Her Majesty's Treasury or by the Lords of the Admiralty, subject in either case to such regulations as may from time to time be made, by Order in Council, as to the custody and disposal of money so paid.

*Small-Armed Ships.*

One adjudica-  
tion as to  
several small  
ships.

30. The captors may include in one adjudication any number, not exceeding six, of armed ships not exceeding one hundred tons each, taken within three months next before institution of proceedings.

*Goods.*

Application  
of foregoing  
provisions to  
prize goods.

31. The foregoing provisions relating to ships shall extend and apply, *mutatis mutandis*, to goods taken as prize on board ship; and the Court may direct such goods to be unladen, inventoried and warehoused.

*Monition to Captors to Proceed.*

Power to  
Court to call  
on captors to  
proceed to  
adjudication.

32. If the captors fail to institute or to prosecute with effect proceedings for adjudication, a monition shall, on the application of a claimant, issue against the captors, returnable within six days from the service thereof, citing them to appear and proceed to adjudication; and on the return thereof the Court shall either forthwith proceed to adjudication or direct further proof to be adduced as aforesaid, and then proceed to adjudication.

*Claim on Appeal.*

33. Where any person, not an original party in the cause, intervenes on appeal, he shall enter a claim, verified on oath, and shall give security for costs.

Person intervening on appeal to enter claim.

## III.—SPECIAL CASES OF CAPTURE.

*Land Expeditions.*

34. Where, in an expedition of any of Her Majesty's naval or naval and military forces against a fortress or possession on land, goods belonging to the State of the enemy or to a public trading company of the enemy exercising powers of government are taken in the fortress or possession, or a ship is taken in waters defended by or belonging to the fortress or possession, a Prize Court shall have jurisdiction as to the goods or ship so taken, and any goods taken on board the ship, as in case of prize.

Jurisdiction of Prize Court in case of capture in land expedition.

*Conjunct Capture with Ally.*

35. Where any ship or goods is or are taken by any of Her Majesty's naval or naval and military forces while acting in conjunction with any forces of any of Her Majesty's allies, a Prize Court shall have jurisdiction as to the same as in case of prize, and shall have power, after condemnation, to apportion the due share of the proceeds of Her Majesty's ally, the proportionate amount and the disposition of which share shall be such as may from time to time be agreed between Her Majesty and Her Majesty's ally.

Jurisdiction of Prize Court in case of expedition with ally.

*Joint Capture.*

36. Before condemnation, a petition on behalf of asserted joint captors shall not (except by special leave of the Court) be admitted, unless and until they give security to the satisfaction of the Court to contribute to the actual captors a just proportion of any costs, charges, or expenses or damages that may be incurred by or awarded against the actual captors on account of the capture and detention of the prize.

Restriction on petitions by asserted joint captors.

After condemnation, such a petition shall not (except by special leave of the Court) be admitted unless and until the asserted joint captors pay to the actual captors a just proportion of the costs, charges, and expenses incurred by the actual captors in the case, and give such security as aforesaid, and show sufficient cause to the Court why their petition was not presented before condemnation.

Provided, that nothing in the present section shall extend to the asserted interest of a flag officer claiming to share by virtue of his flag.

*Offences against Law of Prize.*

37. A Prize Court, on proof of any offence against the law of nations, or against this Act, or any Act relating to naval discipline, or against any Order in Council or Royal Proclamation, or of any breach of Her Majesty's instructions relating to prize, or of any act of disobedience to the orders of the Lords of the Admiralty, or to the command of a superior officer, committed by the captors in relation to any ship or goods taken as prize, or in relation to any person on board any such ship, may, on condemnation, reserve the prize to

In case of offence by captors, prize to be reserved for Crown.



Her Majesty's disposal, notwithstanding any grant that may have been made by Her Majesty in favour of captors.

*Pre-emption.*

Purchase by Admiralty for public service of stores on board foreign ships. 38. Where a ship of a foreign nation passing the seas laden with naval or victualling stores intended to be carried to a port of any enemy of Her Majesty is taken and brought into a port of the United Kingdom, and the purchase for the service of Her Majesty of the stores on board the ship appears to the Lords of the Admiralty expedient without the condemnation thereof in a Prize Court, in that case the Lords of the Admiralty may purchase, on the account or for the service of Her Majesty, all or any of the stores on board the ship; and the Commissioners of Customs may permit the stores purchased to be entered and landed within any port.

*Capture by Ship other than a Ship of War.*

Prizes taken by ships other than ships of war to be droits of Admiralty. 39. Any ship or goods taken as prize by any of the officers and crew of a ship other than a ship of war of Her Majesty shall, on condemnation, belong to Her Majesty in her Office of Admiralty.

IV.—PRIZE SALVAGE.

Salvage to re-captors of British ship or goods from enemy. 40. Where any ship or goods belonging to any of Her Majesty's subjects, after being taken as prize by the enemy, is or are retaken from the enemy by any of Her Majesty's ships of war, the same shall be restored by decree of a Prize Court to the owner, on his paying as prize salvage one-eighth part of the value of the prize to be decreed and ascertained by the Court, or such sum not exceeding one-eighth part of the estimated value of the prize as may be agreed on between the owner and the re-captors, and approved by order of the Court; provided, that where the re-capture is made under circumstances of special difficulty or danger, the Prize Court may, if it thinks fit, award to the re-captors as prize salvage a larger part than one-eighth part, but not exceeding in any case one-fourth part, of the value of the prize.

Provided also, that where a ship after being so taken is set forth or used by any of Her Majesty's enemies as a ship of war, this provision for restitution shall not apply, and the ship shall be adjudicated on as in other cases of prize.

Permission to re-captured ship to proceed on voyage. 41. Where a ship belonging to any of Her Majesty's subjects, after being taken as prize by the enemy, is retaken from the enemy by any of Her Majesty's ships of war, she may, with the consent of the re-captors, prosecute her voyage, and it shall not be necessary for the re-captors to proceed to adjudication till her return to a port of the United Kingdom.

The master or owner, or his agent, may, with the consent of the re-captors, unload and dispose of the goods on board the ship before adjudication.

In case the ship does not, within six months, return to a port of the United Kingdom, the re-captors may nevertheless institute proceedings against the ship or goods in the High Court of Admiralty, and the Court may thereupon award prize salvage as aforesaid to the re-captors, and may enforce payment thereof, [either by warrant of arrest against the ship or goods, or by monition and attachment against the owner] (f).

(f) The words bracketed are repealed by the Prize Courts (Procedure) Act, 1914; see *infra*, p. 842.

## V.—PRIZE BOUNTY.

42. If, in relation to any war, Her Majesty is pleased to declare, by proclamation or Order in Council, her intention to grant prize bounty to the officers and crews of her ships of war, then such of the officers and crew of any of Her Majesty's ships of war as are actually present at the taking or destroying of any armed ship of any of Her Majesty's enemies shall be entitled to have distributed among them as prize bounty a sum calculated at the rate of five pounds for each person on board the enemy's ship at the beginning of the engagement (*g*).

Prize bounty to officers and crew present at engagement with an enemy.

43. The number of the persons so on board the enemy's ship shall be proved in a Prize Court, either by the examinations on oath of the survivors of them, or of any three or more of the survivors, or if there is no survivor by the papers of the enemy's ship, or by the examination on oath of three or more of the officers and crew of Her Majesty's ship, or by such other evidence as may seem to the Court sufficient in the circumstances.

Ascertainment of amount of prize bounty by decree of Prize Court.

The Court shall make a decree declaring the title of the officers and crew of Her Majesty's ship to the prize bounty, and stating the amount thereof.

The decree shall be subject to appeal as other decrees of the Court.

44. On production of an official copy of the decree the commissioners of Her Majesty's Treasury shall, out of money provided by Parliament, pay the amount of prize bounty decreed, in such manner as any Order in Council may from time to time direct.

Payment of prize bounty awarded.

## VI.—MISCELLANEOUS PROVISIONS.

*Ransom.*

45. Her Majesty in Council may from time to time, in relation to any war, make such orders as may seem expedient, according to circumstances, for prohibiting or allowing, wholly or in certain cases, or subject to any conditions or regulations or otherwise, as may from time to time seem meet, the ransoming or the entering into any contract or agreement for the ransoming of any ship or goods belonging to any of Her Majesty's subjects, and taken as prize by any of Her Majesty's enemies.

Power for regulating ransom by order in council.

Any contract or agreement entered into, and any bill, bond, or other security given for ransom of any ship or goods, shall be under the exclusive jurisdiction of the High Court of Admiralty as a Prize Court (subject to appeal to the Judicial Committee of the Privy Council), and if entered into or given in contravention of any such Order in Council shall be deemed to have been entered into or given for an illegal consideration.

If any person ransoms or enters into any contract or agreement for ransoming any ship or goods, in contravention of any such Order in Council, he shall for every such offence be liable to be proceeded against in the High Court of Admiralty at the suit of Her Majesty in her Office of Admiralty, and on conviction to be fined, in the discretion of the Court, any sum not exceeding five hundred pounds.

*Convoy.*

46. If the master or other person having the command of any ship of any of Her Majesty's subjects, under the convoy of any of Her

Punishment of masters of merchant

(*g*) It has already been pointed out that during the Great War (1914) prize bounty was substituted for the ordinary grant of prize proceeds.



vessels under  
convoy dis-  
obeying  
orders or  
deserting  
convoy.

Majesty's ships of war, wilfully disobeys any lawful signal, instruction, or command of the commander of the convoy, or without leave deserts the convoy, he shall be liable to be proceeded against in the High Court of Admiralty at the suit of Her Majesty in her Office of Admiralty, and upon conviction to be fined, in the discretion of the Court, any sum not exceeding five hundred pounds, and to suffer imprisonment for such time, not exceeding one year, as the Court may adjudge.

*Customs Duties and Regulations.*

Prize ships  
and goods  
liable to  
duties and  
forfeiture.

47. All ships and goods taken as prize and brought into a port of the United Kingdom shall be liable to and be charged with the same rates and charges and duties of customs as under any Act relating to the customs may be chargeable on other ships and goods of the like description; and

All goods brought in as prize which would on the voluntary importation thereof be liable to forfeiture or subject to any restriction under the laws relating to the Customs, shall be deemed to be so liable and subject, unless the Commissioners of Customs see fit to authorize the sale or delivery thereof for home use or exportation, unconditionally or subject to such conditions and regulations as they may direct.

Regulations  
of customs to  
be observed as  
to prize ships  
and goods.

48. Where any ship or goods taken as prize is or are brought into a port of the United Kingdom, the master or other person in charge or command of the ship which has been taken or in which the goods are brought shall, on arrival at such port, bring to at the proper place of discharge, and shall, when required by any officer of Customs, deliver an account in writing under his hand concerning such ship and goods, giving such particulars relating thereto as may be in his power, and shall truly answer all questions concerning such ship or goods asked by any such officer, and in default shall forfeit a sum not exceeding one hundred pounds, such forfeiture to be enforced as forfeitures for offences against the laws relating to the Customs are enforced, and every such ship shall be liable to such searches as other ships are liable to, and the officers of the Customs may freely go on board such ship and bring to the Queen's warehouse any goods on board the same, subject nevertheless to such regulations in respect of ships of war belonging to Her Majesty as shall from time to time be issued by the Commissioners of Her Majesty's Treasury.

Power for  
treasury to re-  
mit Customs  
duties in  
certain cases.

49. Goods taken as prize may be sold either for home consumption or for exportation; and if in the former case the proceeds thereof, after payment of duties of Customs, are insufficient to satisfy the just and reasonable claims thereon, the Commissioners of Her Majesty's Treasury may remit the whole or such part of the said duties as they see fit.

*Perjury.*

Punishment  
of persons  
guilty of  
perjury.

50. If any person wilfully and corruptly swears, declares, or affirms falsely in any prize cause or appeal, or in any proceeding under this Act, or in respect of any matter required by this Act to be verified on oath, or suborns any other person to do so, he shall be deemed guilty of perjury, or of subornation of perjury (as the case may be), and shall be liable to be punished accordingly.



*Limitation of Actions, &c.*

51. Any action or proceeding shall not lie in any part of Her Majesty's dominions against any person acting under the authority or in the execution or intended execution or in pursuance of this Act for any alleged irregularity or trespass, or other act or thing done or omitted by him under this Act, unless notice in writing (specifying the cause of the action or proceeding) is given by the intending plaintiff or prosecutor to the intended defendant one month at least before the commencement of the action or proceeding, nor unless the action or proceeding is commenced within six months next after the act or thing complained of is done or omitted, or, in case of a continuation of damage, within six months next after the doing of such damage has ceased.

Actions against persons executing Act not to be brought without notice, &c.

In any such action the defendant may plead generally that the act or thing complained of was done or omitted by him when acting under the authority or in the execution or intended execution or in pursuance of this Act, and may give all special matter in evidence; and the plaintiff shall not succeed if tender of sufficient amends is made by the defendant before the commencement of the action; and in case no tender has been made, the defendant may, by leave of the Court in which the action is brought, at any time pay into Court such sum of money as he thinks fit, whereupon such proceeding and order shall be had and made in and by the Court as may be had and made on the payment of money into Court in an ordinary action; and if the plaintiff does not succeed in the action, the defendant shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about the action as may be taxed and allowed by the proper officer, subject to review; and though a verdict is given for the plaintiff in the action he shall not have costs against the defendant, unless the judge before whom the trial is had certifies his approval of the action.

Any such action or proceeding against any person in Her Majesty's naval service, or in the employment of the Lords of the Admiralty, shall not be brought or instituted elsewhere than in the United Kingdom.

*Petitions of Right.*

52. A petition of right, under the Petitions of Right Act, 1860, may, if the suppliant thinks fit, be intitled in the High Court of Admiralty, in case the subject-matter of the petition or any material part thereof arises out of the exercise of any belligerent right on behalf of the Crown, or would be cognizable in a Prize Court within Her Majesty's dominions if the same were a matter in dispute between private persons.

Jurisdiction of High Court of Admiralty on petitions of right in certain cases, as in 23 & 24 Vict. c. 34.

Any petition of right under the last-mentioned Act, whether intitled in the High Court of Admiralty or not, may be prosecuted in that Court, if the Lord Chancellor thinks fit so to direct.

The provisions of this Act relative to appeal, and to the framing and approval of general orders for regulating the procedure and practice of the High Court of Admiralty, shall extend to the case of any such petition of right intitled or directed to be prosecuted in that Court; and, subject thereto, all the provisions of the Petitions of Right Act, 1860, shall apply, *mutatis mutandis*, in the case of any such petition of right; and for the purposes of the present section, the terms "Court" and "Judge" in that Act shall respectively be understood to include and to mean the High Court of Admiralty and

the judge thereof, and other terms shall have the respective meanings given to them in that Act.

*Orders in Council.*

Power to make orders in council.

Order in council to be gazetted, &c.

53. Her Majesty in Council may from time to time make such Orders in Council as seem meet for the better execution of this Act.

54. Every Order in Council under this Act shall be published in the *London Gazette*, and shall be laid before both Houses of Parliament within thirty days after the making thereof, if Parliament is then sitting, and, if not, then within thirty days after the next meeting of Parliament.

*Savings.*

Not to affect rights of Crown; effect of treaties, &c.

55. Nothing in this Act shall—

- (1.) give to the officers and crew of any of Her Majesty's ships of war any right or claim in or to any ship or goods taken as prize or the proceeds thereof, it being the intent of this Act that such officers and crews shall continue to take only such interest (if any) in the proceeds of prizes as may be from time to time granted to them by the Crown; or
- (2.) affect the operation of any existing treaty or convention with any foreign power; or
- (3.) take away or abridge the power of the Crown to enter into any treaty or convention with any foreign power containing any stipulation that may seem meet concerning any matter to which this Act relates; or
- (4.) take away, abridge, or control, further or otherwise than as expressly provided by this Act, any right, power, or prerogative of Her Majesty the Queen in right of her Crown, or in right of her Office of Admiralty, or any right or power of the Lord High Admiral of the United Kingdom, or of the commissioners for executing the office of Lord High Admiral; or
- (5.) take away, abridge, or control, further or otherwise than as expressly provided by this Act, the jurisdiction or authority of a Prize Court to take cognizance of and judicially proceed upon any capture, seizure, prize, or reprisal of any ship or goods, and to hear and determine the same, and, according to the course of Admiralty and the law of nations, to adjudge and condemn any ship or goods, or any other jurisdiction or authority of or exercisable by a Prize Court.

*Commencement.*

Commencement of Act.

56. This Act shall commence on the commencement of the Naval Agency and Distribution Act, 1864 (*h*).

(*h*) By the operation of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), the jurisdiction of the High Court of Admiralty is assigned, subject to any rule under the Act which may transfer it to some other division, to the Probate, Divorce, and Admiralty Division of the High Court of Justice. But any cause or matter assigned to that division may, at the request of the president, with the con-

currence of the Lord Chancellor, or, in his absence, of the Lord Chief Justice, be heard by another judge of the High Court. By sect. 18 of the same Act, the appellate jurisdiction of the Judicial Committee on appeal from the High Court of Admiralty is transferred to the Court of Appeal; from which Court a further appeal lies to the House of Lords (Appellate Jurisdiction Act, 1876, s. 3). The appeal

## PRIZE COURTS ACT, 1894.

57 &amp; 58 VICT. CHAP. 39.

*An Act to make further provisions for the establishment of Prize Courts, and for other purposes connected therewith.*

[17th August, 1894.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the Prize Courts Act, 1894.

2.—(1.) Any commission, warrant, or instructions from Her Majesty the Queen or the Admiralty for the purpose of commissioning or regulating the procedure of a Prize Court at any place in a British possession may, notwithstanding the existence of peace, be issued at any time, with a direction that the Court shall act only upon such proclamation as hereinafter mentioned being made in the possession.

(2.) Where any such commission, warrant, or instructions have been issued, then, subject to instructions from Her Majesty, the Vice-Admiral of such possession may, when satisfied by information from a Secretary of State or otherwise, that war has broken out between Her Majesty and any foreign State, proclaim that war has so broken out, and thereupon the said commission, warrant, and instructions shall take effect as if the same had been issued after the breaking out of such war and such foreign State were named therein.

(3.) The said commission and warrant may authorize either a Vice-Admiralty Court or a colonial Court of Admiralty, within the meaning of the Colonial Courts of Admiralty Act, 1890, to act as a Prize Court, and may establish a Vice-Admiralty Court for that purpose.

(4.) Any such commission, warrant, or instructions may be revoked or altered from time to time.

(5.) A Court duly authorized to act as a Prize Court during any war shall after the conclusion of the war continue so to act in relation to, and finally dispose of, all matters and things which arose during the war, including all penalties and forfeitures incurred during the war.

3.—(1.) Her Majesty the Queen in Council may make rules of Court for regulating, subject to the provisions of the Naval Prize Act, 1864, and this Act, the procedure and practice of Prize Courts within the meaning of that Act, and the duties and conduct of the officers thereof, and of the practitioners therein, and for regulating the fees to be taken by the officers of the Courts, and the costs, charges, and expenses to be allowed to the practitioners therein.

(2.) Every rule so made shall, whenever made, take effect at the time therein mentioned, and shall be laid before both Houses of



Parliament, and shall be kept exhibited in a conspicuous place in each Court to which it relates.

(3.) This section shall be substituted for section thirteen of the Naval Prize Act, 1864, which section is hereby repealed.

(4.) If any colonial Court of Admiralty within the meaning of the Colonial Courts of Admiralty Act, 1890, is authorized under this Act or otherwise to act as a Prize Court, all fees arising in respect of prize business transacted in the Court shall be fixed, collected, and applied in like manner as the fees arising in respect of the Admiralty business of the Court under the said Act.

4. Her Majesty the Queen in Council may make rules of Court for regulating the procedure and practice, including fees and costs, in a Vice-Admiralty Court, whether under this Act or otherwise.

5. Section twenty-five of the Government of India Act, 1800, is hereby repealed.

## PRIZE COURTS (PROCEDURE) ACT, 1914.

4 & 5 GEO. 5, CHAP. 13.

*An Act to amend the Law relating to Procedure in Prize Courts.*

[5th August, 1914.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1.) As from the date when rules under an Order in Council made after the passing of this Act in pursuance of section three of the Prize Courts Act, 1894, regulating the procedure and practice in Prize Courts, come into operation, such of the provisions of the Naval Prize Act, 1864, as are specified in the Schedule to this Act (being enactments relating to the practice and procedure in Prize Courts) shall be repealed:

Provided that nothing in such repeal shall have the effect of extending section sixteen of that Act to ships of war taken as prize, and accordingly that section shall have effect as if the following words were inserted therein:—“Nothing in this section shall apply to ships of war taken as prize.”

(2.) Any cause or proceeding commenced in any Prize Court before such rules as aforesaid come into operation as respects that Court may, as the Court directs, be either—

- (a) recommenced and proceeded with in accordance with the said rules; or
- (b) continued in accordance with the said rules subject to such adaptations as the Court may deem necessary to make them applicable to the case; or
- (c) continued to the determination thereof in accordance with the procedure applicable to the case at the commencement of the cause or proceeding.

2. This Act may be cited as the Prize Courts (Procedure) Act, 1914, and shall be construed as one with the Naval Prize Act, 1864 ;

and that Act and the Prize Courts Act, 1894, and this Act may be cited together as the Naval Prize Acts, 1864 to 1914.

## SCHEDULE.

*Provisions of Naval Prize Act, 1864, repealed.*

Sections 7 and 8, 18 to 29, 32, 33, and 36, and in section 41, the words "either by warrant of arrest against the ship or goods, or by monition and attachment against the owner" (*i*).

(*i*) As to procedure and practice, there is a considerable number of Orders, rules and regulations; many were issued during the Great War. (Cf. Manual of Emergency Legislation, ed. by A. Pulling, *passim*.)

## APPENDIX C.

## THE TREATY OF WASHINGTON, 1871.

*Concluded May 8, 1871 ; Ratifications Exchanged June 17, 1871 ;  
Proclaimed July 4, 1871.*

The United States of America and Her Britannic Majesty, being desirous to provide for an amicable settlement of all causes of difference between the two countries, have for that purpose appointed their respective Plenipotentiaries, that is to say: the President of the United States has appointed, on the part of the United States, as Commissioners in a Joint High Commission and Plenipotentiaries, Hamilton Fish, Secretary of State; Robert Cumming Schenk, Envoy Extraordinary and Minister Plenipotentiary to Great Britain; Samuel Nelson, an Associate Justice of the Supreme Court of the United States; Ebenezer Rockwood Hoar, of Massachusetts; and George Henry Williams, of Oregon; and Her Britannic Majesty, on her part, has appointed as Her High Commissioners and Plenipotentiaries, the Right Honourable George Frederick Samuel, Earl de Grey and Earl of Ripon, Viscount Goderich, Baron Grantham, a Baronet, a Peer of the United Kingdom, Lord President of Her Majesty's Most Honourable Privy Council, Knight of the Most Noble Order of the Garter, &c., &c.; the Right Honourable Sir Stafford Henry Northcote, Baronet, one of Her Majesty's Most Honourable Privy Council, a Member of Parliament, a Companion of the Most Honourable Order of the Bath, &c., &c.; Sir Edward Thornton, Knight Commander of the Most Honourable Order of the Bath, Her Majesty's Envoy Extraordinary and Minister Plenipotentiary to the United States of America; Sir John Alexander Macdonald, Knight Commander of the Most Honourable Order of the Bath, a member of Her Majesty's Privy Council for Canada, and Minister of Justice and Attorney-General of Her Majesty's Dominion of Canada; and Mountague Bernard, Esquire, Chichele Professor of International Law in the University of Oxford.

And the said Plenipotentiaries, after having exchanged their full powers, which were found to be in due and proper form, have agreed to and concluded the following Articles:

## ARTICLE I.

Whereas differences have arisen between the government of the United States and the government of Her Britannic Majesty; and still exist, growing out of the acts committed by the several vessels which have given rise to the claims generically known as the "*Alabama Claims*":

And whereas Her Britannic Majesty has authorized Her High Commissioners and Plenipotentiaries to express, in a friendly spirit, the regret felt by Her Majesty's government for the escape, under what-

*Alabama*  
claims to be  
referred to  
arbitration.



ever circumstances, of *The Alabama* and other vessels from British ports, and for the depredations committed by those vessels:

Now, in order to remove and adjust all complaints and claims on the part of the United States, and to provide for the speedy settlement of such claims, which are not admitted by Her Britannic Majesty's Government, the High Contracting Parties agree that all the said claims, growing out of acts committed by the aforesaid vessels and generically known as the "*Alabama Claims*," shall be referred to a Tribunal of Arbitration to be composed of five Arbitrators, to be appointed in the following manner, that is to say: One shall be named by the President of the United States; one shall be named by Her Britannic Majesty; His Majesty the King of Italy shall be requested to name one; the President of the Swiss Confederation shall be requested to name one; and His Majesty the Emperor of Brazil shall be requested to name one.

Arbitrators,  
how to be  
named.

In case of the death, absence, or incapacity to serve of any or either of the said Arbitrators, or, in the event of either of the said Arbitrators omitting or declining or ceasing to act as such, the President of the United States, or Her Britannic Majesty, or His Majesty the King of Italy, or the President of the Swiss Confederation, or His Majesty the Emperor of Brazil, as the case may be, may forthwith name another person to act as Arbitrator in the place and stead of the Arbitrator originally named by such head of a State.

Vacancies,  
how filled.

And in the event of the refusal or omission for two months after receipt of the request from either of the High Contracting Parties of His Majesty the King of Italy, or the President of the Swiss Confederation, or His Majesty the Emperor of Brazil, to name an Arbitrator either to fill the original appointment or in the place of one who may have died, be absent, or incapacitated, or who may omit, decline, or from any cause cease to act as such Arbitrator, His Majesty the King of Sweden and Norway shall be requested to name one or more persons, as the case may be, to act as such Arbitrator or Arbitrators.

## ARTICLE II.

The Arbitrators shall meet at Geneva, in Switzerland, at the earliest convenient day after they shall have been named, and shall proceed impartially and carefully to examine and decide all questions that shall be laid before them on the part of the governments of the United States and Her Britannic Majesty respectively. All questions considered by the tribunal, including the final award, shall be decided by a majority of all the Arbitrators.

Arbitrators to  
meet, when,  
and where;  
their powers;  
a majority to  
decide.

Each of the High Contracting Parties shall also name one person to attend the tribunal as its agent to represent it generally in all matters connected with the arbitration.

Agents of  
each party.

## ARTICLE III.

The written or printed case of each of the two parties, accompanied by the documents, the official correspondence, and other evidence on which each relies, shall be delivered in duplicate to each of the Arbitrators and to the agent of the other party as soon as may be after the organization of the tribunal, but within a period not exceeding six months from the date of the exchange of the ratifications of this treaty.

Case of each  
party, &c.,  
when to be  
given to  
arbitrators.

## ARTICLE IV.

Counter-case,  
&c.

Within four months after the delivery on both sides of the written or printed case, either party may, in like manner, deliver in duplicate to each of the said Arbitrators, and to the agent of the other party, a counter-case, and additional documents, correspondence, and evidence, in reply to the case, documents, correspondence, and evidence so presented by the other party.

Time may be  
extended.

The Arbitrators may, however, extend the time for delivering such counter-case, documents, correspondence, and evidence, when, in their judgment, it becomes necessary, in consequence of the distance of the place from which the evidence to be presented is to be procured.

Documents  
and papers to  
be produced.

If in the case submitted to the Arbitrators either party shall have specified or alluded to any report or document in its own exclusive possession without annexing a copy, such party shall be bound, if the other party thinks proper to apply for it, to furnish that party with a copy thereof; and either party may call upon the other, through the Arbitrators, to produce the originals or certified copies of any papers adduced as evidence, giving in each instance such reasonable notice as the Arbitrators may require.

## ARTICLE V.

Arguments  
and briefs.

It shall be the duty of the agent of each party, within two months after the expiration of the time limited for the delivery of the counter-case on both sides, to deliver in duplicate to each of the said Arbitrators and to the agent of the other party a written or printed argument showing the points and referring to the evidence upon which his government relies: and the Arbitrators may, if they desire further elucidation with regard to any point, require a written or printed statement or argument, or oral argument by counsel upon it; but in such case the other party shall be entitled to reply either orally or in writing, as the case may be.

## ARTICLE VI.

Rules to  
govern the  
arbitrators in  
their decision.

In deciding the matters submitted to the Arbitrators, they shall be governed by the 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.

Obligation of  
neutral  
government  
as to fitting  
out vessels in  
its waters;

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.

as to the use  
of its ports;

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 provision for the future, agrees that, in deciding the questions between the two countries arising out of those 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.

to prevent violation of its obligations.

These rules not admitted to have been in force when the claims arose.

Rules to govern future cases.

#### ARTICLE VII.

The decision of the tribunal shall, if possible, be made within three months from the close of the argument on both sides.

It shall be made in writing, and dated, and shall be signed by the Arbitrators who may assent to it.

The said tribunal shall first determine as to each vessel separately, whether Great Britain has, by any act or omission, failed to fulfil any of the duties set forth in the foregoing three rules, or recognized by the principles of international law not inconsistent with such rules, and shall certify such fact as to each of the said vessels. In case the tribunal find that Great Britain has failed to fulfil any duty or duties as aforesaid, it may, if it think proper, proceed to award a sum in gross to be paid by Great Britain to the United States for all the claims referred to it; and in such case the gross sum so awarded shall be paid in coin by the Government of Great Britain to the Government of the United States, at Washington, within twelve months after the date of the award.

Decision to be made, when, and in what form;

If Great Britain is found in fault, a gross sum may be awarded.

The award shall be in duplicate, one copy whereof shall be delivered to the agent of the United States for his Government, and the other copy shall be delivered to the agent of Great Britain for his Government.

Award to be in duplicate.

#### ARTICLE VIII.

Each Government shall pay its own agent, and provide for the proper remuneration of the counsel employed by it and of the Arbitrator appointed by it, and for the expense of preparing and submitting its case to the tribunal. All other expenses connected with the arbitration shall be defrayed by the two Governments in equal moieties.

Expenses of the arbitration, how to be defrayed.

#### ARTICLE IX.

The Arbitrators shall keep an accurate record of their proceedings, and may appoint and employ the necessary officers to assist them.

Arbitrators to keep a record.

#### ARTICLE X.

In case the tribunal finds that Great Britain has failed to fulfil any duty or duties as aforesaid, and does not award a sum in gross, the

If Great Britain is found in fault,



and a gross sum is not awarded, board of assessors to be appointed to determine claims.

High Contracting Parties agree that a Board of Assessors shall be appointed to ascertain and determine what claims are valid, and what amount or amounts shall be paid by Great Britain to the United States on account of the liability arising from such failure, as to each vessel according to the extent of such liability as decided by the Arbitrators.

The Board of Assessors shall be constituted as follows: One member thereof shall be named by the President of the United States, one member thereof shall be named by Her Britannic Majesty, and one member thereof shall be named by the representative at Washington of His Majesty the King of Italy; and in case of a vacancy happening from any cause, it shall be filled in the same manner in which the original appointment was made.

Board, when to meet.  
Members to subscribe a declaration.

As soon as possible after such nominations the Board of Assessors shall be organized in Washington, with power to hold their sittings there, or in New York, or in Boston. The members thereof shall severally subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment, and according to justice and equity, all matters submitted to them, and shall forthwith proceed, under such rules and regulations as they may prescribe, to the investigation of the claims which shall be presented to them by the Government of the United States, and shall examine and decide upon them in such order and manner as they may think proper, but upon such evidence or information only as shall be furnished by or on behalf of the Governments of the United States and of Great Britain respectively. They shall be bound to hear on each separate claim, if required, one person on behalf of each Government, as counsel or agent. A majority of the Assessors in each case shall be sufficient for a decision.

Decision, when and how given.

The decision of the Assessors shall be given upon each claim in writing, and shall be signed by them respectively and dated.

Claims, when to be presented.

Every claim shall be presented to the Assessors within six months from the day of their first meeting; but they may, for good cause shown, extend the time for the presentation of any claim to a further period not exceeding three months.

Report of assessors;

The Assessors shall report to each Government at or before the expiration of one year from the date of their first meeting the amount of claims decided by them up to the date of such report; if further claims then remain undecided, they shall make a further report at or before the expiration of two years from the date of such first meeting; and in case any claims remain undetermined at that time, they shall make a final report within a further period of six months.

how to be made and to whom delivered.

The report or reports shall be made in duplicate, and one copy thereof shall be delivered to the Secretary of State of the United States, and one copy thereof to the representative of Her Britannic Majesty at Washington.

Awards, when and where to be paid.

All sums of money which may be awarded under this Article shall be payable at Washington, in coin, within twelve months after the delivery of each report.

Clerks.

The Board of Assessors may employ such clerks as they shall think necessary.

Expenses.

The expenses of the Board of Assessors shall be borne equally by the two Governments, and paid from time to time, as may be found expedient on the production of accounts certified by the Board. The remuneration of the Assessors shall also be paid by the two Governments in equal moieties in a similar manner.

## ARTICLE XI.

The High Contracting Parties engage to consider the result of the proceedings of the Tribunal of Arbitration and of the Board of Assessors, should such Board be appointed, as a full, perfect, and final settlement of all the claims hereinbefore referred to; and further engage that every such claim, whether the same may or may not have been presented to the notice of, made, preferred, or laid before the Tribunal or Board, shall, from and after the conclusion of the proceedings of the Tribunal or Board, be considered and treated as finally settled, barred, and thenceforth inadmissible.

Decisions of the arbitrators and assessors to be final. Claims not presented to be deemed finally settled.

## ARTICLE XII.

The High Contracting Parties agree that all claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of Her Britannic Majesty, arising out of acts committed against the persons or property of citizens of the United States during the period between the 13th of April, 1861, and the 9th of April, 1865, inclusive, not being claims growing out of the acts of the vessels referred to in Article I. of this treaty, and all claims, with the like exception, on the part of corporations, companies or private individuals, subjects of Her Britannic Majesty, upon the Government of the United States, arising out of acts committed against the persons or property of subjects of Her Britannic Majesty during the same period, which may have been presented to either Government for its interposition with the other, and which yet remain unsettled, as well as any other such claims which may be presented within the time specified in Article XIV. of this treaty, shall be referred to three Commissioners, to be appointed in the following manner, that is to say: One Commissioner shall be named by the President of the United States, one by Her Britannic Majesty, and a third by the President of the United States and Her Britannic Majesty conjointly; and in case the third Commissioner shall not have been so named within a period of three months from the date of the exchange of the ratifications of this treaty, then the third Commissioner shall be named by the representative at Washington of His Majesty the King of Spain. In case of the death, absence, or incapacity of any Commissioner, or in the event of any Commissioner omitting or ceasing to act, the vacancy shall be filled in the manner hereinbefore provided for making the original appointment; the period of three months in case of such substitution being calculated from the date of the happening of the vacancy.

Certain claims (other than the *Alabama* claims) against either government to be referred to three commissioners.

The Commissioners so named shall meet at Washington at the earliest convenient period after they have been respectively named; and shall, before proceeding to any business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment, and according to justice and equity, all such claims as shall be laid before them on the part of the Governments of the United States and of Her Britannic Majesty, respectively; and such declaration shall be entered on the record of their proceedings.

Their powers and duties.

## ARTICLE XIII.

The Commissioners shall then forthwith proceed to the investigation of the claims which shall be presented to them. They shall

Claims to be investigated.



investigate and decide such claims in such order and such manner as they may think proper, but upon such evidence or information only as shall be furnished by or on behalf of the respective governments. They shall be bound to receive and consider all written documents or statements which may be presented to them by or on behalf of the respective governments in support of, or in answer to, any claim, and to hear, if required, one person on each side on behalf of each government, as counsel or agent for such government, on each and every separate claim. A majority of the Commissioners shall be sufficient for an award in each case. The award shall be given upon each claim in writing, and shall be signed by the Commissioners assenting to it. It shall be competent for each government to name one person to attend the Commissioners as its agent, to present and support claims on its behalf, and to answer claims made upon it, and to represent it generally in all matters connected with the investigation and decision thereof.

A majority to decide.

Decisions to be final.

The High Contracting Parties hereby engage to consider the decision of the Commissioners as absolutely final and conclusive upon each claim decided upon by them, and to give full effect to such decisions without any objection, evasion or delay whatsoever.

#### ARTICLE XIV.

Claims, when to be presented to the commissioners.

Every claim shall be presented to the Commissioners within six months from the day of their first meeting, unless in any case where reasons for delay shall be established to the satisfaction of the Commissioners, and then, and in any such case, the period for presenting the claim may be extended by them to any time not exceeding three months longer.

When to be decided.

The Commissioners shall be bound to examine and decide upon every claim within two years from the day of their first meeting. It shall be competent for the Commissioners to decide in each case whether any claim has or has not been duly made, preferred, and laid before them, either wholly or to any and what extent, according to the true intent and meaning of this treaty.

#### ARTICLE XV.

Awards, when to be paid.

All sums of money which may be awarded by the Commissioners on account of any claim shall be paid by the one government to the other, as the case may be, within twelve months after the date of the final award, without interest, and without any deduction save as specified in Article XVI. of this treaty.

#### ARTICLE XVI.

Records.

The Commissioners shall keep an accurate record and correct minutes or notes of all their proceedings, with the dates thereof, and may appoint and employ a secretary, and any other necessary officer or officers, to assist them in the transaction of the business which may come before them.

Secretary.

Expenses.

Each government shall pay its own Commissioner and agent or counsel. All other expenses shall be defrayed by the two governments in equal moieties.

Chargeable on awards.

The whole expenses of the Commission, including contingent expenses, shall be defrayed by a rateable deduction on the amount of the sums awarded by the Commissioners, provided always that such



deduction shall not exceed the rate of five per cent. on the sums so awarded.

## ARTICLE XVII.

The High Contracting Parties engage to consider the result of the proceedings of this Commission as a full, perfect, and final settlement of all such claims as are mentioned in Article XII. of this treaty upon either government; and further engage that every such claim, whether or not the same may have been presented to the notice of, made, preferred, or laid before the said Commission, shall, from and after the conclusion of the proceedings of the said Commission, be considered and treated as finally settled, barred, and thenceforth inadmissible.

Decision of commissioners to be final upon all claims that might have been presented.

## ARTICLE XVIII.

It is agreed by the High Contracting Parties, that in addition to the liberty secured to the United States fishermen by the Convention between the United States and Great Britain, signed at London on the 20th day of October, 1818, of taking, curing, and drying fish on certain coasts of the British North American Colonies therein defined, the inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty, for the term of years mentioned in Article XXXIII. of this treaty, to take fish of every kind, except shell-fish, on the sea-coasts and shores, and in the bays, harbours, and creeks, of the Provinces of Quebec, Nova Scotia, and New Brunswick, and the Colony of Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the said coasts and shores and islands, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish: provided that, in so doing they do not interfere with the rights of private property, or with British fishermen in the peaceable use of any part of the said coasts in their occupancy for the same purpose.

Rights of the inhabitants of the United States in certain sea fisheries in common with British subjects.

It is understood that the above-mentioned liberty applies solely to the sea fishery, and that the salmon and shad fisheries, and all other fisheries in rivers and the mouths of rivers, are hereby reserved exclusively for British fishermen.

Salmon and shad fisheries reserved for British fishermen.

## ARTICLE XIX.

It is agreed by the High Contracting Parties that British subjects shall have, in common with the citizens of the United States, the liberty, for the term of years mentioned in Article XXXIII. of this treaty, to take fish of every kind, except shell-fish, on the eastern sea-coasts and shores of the United States north of the thirty-ninth parallel of north latitude, and on the shores of the several islands thereunto adjacent, and in the bays, harbours, and creeks of the said sea-coasts and shores of the United States and of the said islands, without being restricted to any distance from the shore, with permission to land upon the said coasts of the United States and of the islands aforesaid, for the purpose of drying their nets and curing their fish: provided that, in so doing, they do not interfere with the rights of private property, or with the fishermen of the United States in the peaceable use of any part of the said coasts in their occupancy for the same purpose.

Rights of British subjects in certain United States sea fisheries.

Salmon and shad fisheries reserved.

It is understood that the above-mentioned liberty applies solely to the sea fishery, and that salmon and shad fisheries, and all other fisheries in rivers and mouths of rivers, are hereby reserved exclusively for fishermen of the United States.

#### ARTICLE XX.

Certain places reserved from the common right of fishing.

It is agreed that the places designated by the Commissioners appointed under the First Article of the treaty between the United States and Great Britain, concluded at Washington on the 5th of June, 1854, upon the coasts of Her Britannic Majesty's dominions and the United States, as places reserved from the common right of fishing under that treaty, shall be regarded as in like manner reserved from the common right of fishing under the preceding Articles. In case any question should arise between the governments of the United States and of Her Britannic Majesty as to the common right of fishing in places not thus designated as reserved, it is agreed that a Commission shall be appointed to designate such places, and shall be constituted in the same manner, and have the same powers, duties, and authority as the Commission appointed under the said First Article of the treaty of the 5th of June, 1854.

#### ARTICLE XXI.

Certain fish-oil and fish to be free of duty.

It is agreed that, for the term of years mentioned in Article XXXIII. of this treaty, fish-oil and fish of all kinds (except fish of the inland lakes, and of the rivers falling into them, and except fish preserved in oil), being the produce of the fisheries of the United States or of the Dominion of Canada, or of Prince Edward's Island, shall be admitted into each country, respectively, free of duty (*k*).

#### ARTICLE XXII.

Commissioners to determine the compensation, if any, to be paid by United States for privileges granted by Art. XVIII.

Inasmuch as it is asserted by the government of Her Britannic Majesty that the privileges accorded to the citizens of the United States under Article XVIII. of this treaty are of greater value than those accorded by Articles XIX. and XXI. of this treaty to the subjects of Her Britannic Majesty, and this assertion is not admitted by the government of the United States, it is further agreed that Commissioners shall be appointed to determine, having regard to the privileges accorded by the United States to the subjects of her Britannic Majesty, as stated in Articles XIX. and XXI. of this treaty, the amount of any compensation which, in their opinion, ought to be paid by the government of the United States to the government of Her Britannic Majesty in return for the privileges accorded to the citizens of the United States under Article XVIII. of this treaty; and that any sum of money which the said Commissioners may so award shall be paid by the United States government, in a gross sum, within twelve months after such award shall have been given.

#### ARTICLE XXIII.

Commissioners how to be appointed.

The Commissioners referred to in the preceding Article shall be appointed in the following manner, that is to say: One Commissioner shall be named by the President of the United States, one by Her

(*k*) Arts. XVIII. to XXI. were subsequently abrogated by the United States, see *ante*, p. 289.



Britannic Majesty, and a third by the President of the United States and Her Britannic Majesty conjointly; and in case the third Commissioner shall not have been so named within a period of three months from the date when this Article shall take effect, then the third Commissioner shall be named by the representative at London of His Majesty the Emperor of Austria and King of Hungary. In case of the death, absence, or incapacity of any Commissioner, or in the event of any Commissioner omitting or ceasing to act, the vacancy shall be filled in the manner hereinbefore provided for making the original appointment, the period of three months in case of such substitution being calculated from the date of the happening of the vacancy.

The Commissioners so named shall meet in the City of Halifax, in the Province of Nova Scotia, at the earliest convenient period after they have been respectively named, and shall, before proceeding to any business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide the matters referred to them to the best of their judgment, and according to justice and equity; and such declaration shall be entered on the record of their proceedings.

Each of the High Contracting Parties shall also name one person to attend the Commission as its agent, to represent it generally in all matters connected with the Commission.

When and where to meet; their powers and duties.

Agent for each government.

#### ARTICLE XXIV.

The proceedings shall be conducted in such order as the Commissioners appointed under Articles XXII. and XXIII. of this treaty shall determine. They shall be bound to receive such oral or written testimony as either government may present. If either party shall offer oral testimony, the other party shall have the right of cross-examination, under such rules as the Commissioners shall prescribe.

If in the case submitted to the Commissioners either party shall have specified or alluded to any report or document in its own exclusive possession, without annexing a copy, such party shall be bound, if the other party thinks proper to apply for it, to furnish that party with a copy thereof; and either party may call upon the other, through the Commissioners, to produce the originals or certified copies of any papers adduced as evidence, giving in each instance such reasonable notice as the Commissioners may require.

The case on either side shall be closed within a period of six months from the date of the organisation of the Commission, and the Commissioners shall be requested to give their award as soon as possible thereafter. The aforesaid period of six months may be extended for three months in case of a vacancy occurring among the Commissioners under the circumstances contemplated in Article XXIII. of this treaty.

Proceedings before these commissioners, how to be conducted.

Documents and papers.

Cases to be closed in six months.

Awards.

#### ARTICLE XXV.

The Commissioners shall keep an accurate record and correct minutes or notes of all their proceedings, with the dates thereof, and may appoint and employ a secretary, and any other necessary officer or officers, to assist them in the transaction of the business which may come before them.

Each of the High Contracting Parties shall pay its own Commissioner and agent or counsel; all other expenses shall be defrayed by the two governments in equal moieties.

Records.

Expenses.



## ARTICLE XXVI.

Navigation of the St. Lawrence to be free.

The navigation of the River St. Lawrence, ascending and descending, from the forty-fifth parallel of north latitude, where it ceases to form the boundary between the two countries, from, to, and into the sea, shall for ever remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain, or of the Dominion of Canada, not inconsistent with such privilege of free navigation.

Other rivers.

The navigation of the Rivers Yukon, Porcupine, and Stikine, ascending and descending, from, to, and into the sea, shall for ever remain free and open for the purposes of commerce to the subjects of Her Britannic Majesty and to the citizens of the United States, subject to any laws and regulations of either country within its own territory not inconsistent with such privilege of free navigation.

## ARTICLE XXVII.

Use in common of certain canals to be urged.

The government of Her Britannic Majesty engages to urge upon the government of the Dominion of Canada to secure to the citizens of the United States the use of the Welland, St. Lawrence, and other canals in the Dominion on terms of equality with the inhabitants of the Dominion, and the government of the United States engages that the subjects of Her Britannic Majesty shall enjoy the use of the St. Clair Flats' Canal on terms of equality with the inhabitants of the United States, and further engages to urge upon the State governments to secure to the subjects of Her Britannic Majesty the use of the several State canals connected with the navigation of the lakes or rivers traversed by or contiguous to the boundary-line between the possessions of the High Contracting Parties on terms of equality with the inhabitants of the United States.

## ARTICLE XXVIII.

Navigation of Lake Michigan.

The navigation of Lake Michigan shall also, for the term of years mentioned in Article XXXIII. of this treaty, be free and open for the purposes of commerce to the subjects of Her Britannic Majesty, subject to any laws and regulations of the United States or of the States bordering thereon not inconsistent with such privilege of free navigation.

## ARTICLE XXIX.

Through transit of goods landed in one country and destined for the other.

It is agreed that, for the term of years mentioned in Article XXXIII. of this treaty, goods, wares or merchandise arriving at the ports of New York, Boston, and Portland, and any other ports in the United States which have been or may, from time to time, be specially designated by the President of the United States, and destined for Her Britannic Majesty's possessions in North America, may be entered at the proper custom-house and conveyed in transit, without the payment of duties, through the territory of the United States, under such rules, regulations and conditions for the protection of the revenue as the government of the United States may from time to time prescribe; and, under like rules, regulations, and conditions, goods, wares, or merchandise may be conveyed in transit, without the payment of duties, from such possessions through the territory of the United States for export from the said ports of the United States.

It is further agreed that, for the like period, goods, wares, or merchandise, arriving at any of the ports of Her Britannic Majesty's pos-

sessions in North America, and destined for the United States, may be entered at the proper custom-house and conveyed in transit, without the payment of duties, through the said possessions, under such rules and regulations and conditions for the protection of the revenue as the governments of the said possessions may from time to time prescribe; and, under like rules, regulations, and conditions, goods, wares, or merchandise may be conveyed in transit, without payment of duties, from the United States through the said possessions to other places in the United States, or for export from ports in the said possessions.

## ARTICLE XXX.

It is agreed that, for the term of years mentioned in Article XXXIII. of this treaty, subjects of Her Britannic Majesty may carry in British vessels, without payment of duty, goods, wares, or merchandise from one port or place within the territory of the United States upon the St. Lawrence, the Great Lakes, and the rivers connecting the same, to another port or place within the territory of the United States as aforesaid: provided, that a portion of such transportation is made through the Dominion of Canada by land carriage and in bond, under such rules and regulations as may be agreed upon between the government of Her Britannic Majesty and the government of the United States.

Carriage of goods free of duty from one place to another in the same country.

Citizens of the United States may, for the like period, carry in United States vessels, without payment of duty, goods, wares, or merchandise from one port or place within the possessions of Her Britannic Majesty in North America to another port or place within the said possessions: provided, that a portion of such transportation is made through the territory of the United States by land carriage and in bond, under such rules and regulations as may be agreed upon between the government of the United States and the government of Her Britannic Majesty.

The government of the United States further engages not to impose any export duties on goods, wares, or merchandise carried under this Article through the territory of the United States; and Her Majesty's government engages to urge the parliament of the Dominion of Canada and the legislatures of the other Colonies not to impose any export duties on goods, wares, or merchandise carried under this Article; and the government of the United States may, in case such export duties are imposed by the Dominion of Canada, suspend, during the period that such duties are imposed, the right of carrying granted under this Article in favour of the subjects of Her Britannic Majesty.

Export duties.

The government of the United States may suspend the right of carrying granted in favour of the subjects of Her Britannic Majesty under this Article, in case the Dominion of Canada should at any time deprive the citizens of the United States of the use of the canals in the said Dominion on terms of equality with the inhabitants of the Dominion, as provided in Article XXVII.

Suspension of these privileges by the United States.

## ARTICLE XXXI.

The government of Her Britannic Majesty further engages to urge upon the parliament of the Dominion of Canada and the legislature of New Brunswick that no export duty, or other duty, shall be levied on lumber or timber of any kind cut on that portion of the American

Duty on lumber cut in Maine and shipped to the United States.



territory in the State of Maine watered by the River St. John and its tributaries, and floated down that river to the sea, when the same is shipped to the United States from the Province of New Brunswick. And, in case any such export or other duty continues to be levied after the expiration of one year from the date of the exchange of the ratifications of this treaty, it is agreed that the government of the United States may suspend the right of carrying hereinbefore granted under Article XXX. of this treaty for such period as such export or other duty may be levied.

## ARTICLE XXXII.

Provisions of Arts. XVIII. and XXV. to extend to Newfoundland.

It is further agreed that the provisions and stipulations of Articles XVIII. to XXV. of this treaty, inclusive, shall extend to the Colony of Newfoundland so far as they are applicable. But if the Imperial parliament, the legislature of Newfoundland, or the congress of the United States, shall not embrace the Colony of Newfoundland in their laws enacted for carrying the foregoing Articles into effect, then this Article shall be of no effect; but the omission to make provision by law to give it effect, by either of the legislative bodies aforesaid, shall not in any way impair any other Articles of this treaty.

## ARTICLE XXXIII.

Arts. XVIII. to XXV. and Art. XXX. when to take effect.

The foregoing Articles XVIII. to XXV., inclusive, and Article XXX. of this treaty, shall take effect as soon as the laws required to carry them into operation shall have been passed by the Imperial parliament of Great Britain, by the parliament of Canada, and by the legislature of Prince Edward's Island on the one hand, and by the congress of the United States on the other. Such assent having been given, the said Articles shall remain in force for the period of ten years from the date at which they may come into operation; and further until the expiration of two years after either of the High Contracting Parties shall have given notice to the other of its wish to terminate the same; each of the High Contracting Parties being at liberty to give such notice to the other at the end of the said period of ten years or at any time afterward (l).

## ARTICLE XXXIV.

Decision as to North-West boundary to be left to Emperor of Germany as arbitrator.

Whereas it was stipulated by Article I. of the treaty concluded at Washington on the 15th of June, 1846, between the United States and Her Britannic Majesty, that the line of boundary between the territories of the United States and those of Her Britannic Majesty, from the point on the forty-ninth parallel of north latitude up to which it had already been ascertained, should be continued westward along the said parallel of north latitude "to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly, through the middle of the said channel and of Fuca Straits, to the Pacific Ocean"; and whereas the Commissioners appointed by the two High Contracting Powers to determine that portion of the boundary which runs southerly through the middle of the channel aforesaid were unable to agree upon the same; and whereas the government of Her Britannic Majesty claims that such boundary line should, under the terms of the treaty above recited, be run through the Rosario Straits, and the government of the United States claims that it should run through the Canal de Haro, it is agreed

(l) See 35 & 36 Viet. c. 45.



that the respective claims of the Government of the United States and of the government of Her Britannic Majesty shall be submitted to the arbitration and award of His Majesty the Emperor of Germany, who, having regard to the above-mentioned Article of the said treaty, shall decide thereupon, finally and without appeal, which of those claims is most in accordance with the true interpretation of the treaty of June 15, 1846.

## ARTICLE XXXV.

The award of His Majesty the Emperor of Germany shall be considered as absolutely final and conclusive; and full effect shall be given to such award without any objection, evasion, or delay whatsoever. Such decision shall be given in writing and dated; it shall be in whatsoever form His Majesty may choose to adopt; it shall be delivered to the representatives or other public agents of the United States and of Great Britain respectively, who may be actually at Berlin, and shall be considered as operative from the day of the date of the delivery thereof.

Award to be conclusive, its form and effect.

## ARTICLE XXXVI.

The written or printed case of each of the two parties, accompanied by the evidence offered in support of the same, shall be laid before His Majesty the Emperor of Germany within six months from the date of the exchange of the ratifications of this treaty, and a copy of such case and evidence shall be communicated by each party to the other through their respective representatives at Berlin.

Cases of the two parties to be laid before the arbitrator.

The High Contracting Parties may include in the evidence to be considered by the Arbitrator such documents, official correspondence, and other official or public statements bearing on the subject of the reference as they may consider necessary to the support of their respective cases.

After the written or printed case shall have been communicated by each party to the other, each party shall have the power of drawing up and laying before the Arbitrator a second and definitive statement, if it think fit to do so, in reply to the case of the other party so communicated, which definitive statement shall be so laid before the Arbitrator, and also be mutually communicated in the same manner as aforesaid, by each party to the other, within six months from the date of laying the first statement of the case before the Arbitrator.

Counter-cases.

## ARTICLE XXXVII.

If, in the case submitted to the Arbitrator, either party shall specify or allude to any report or document in its own exclusive possession without annexing a copy, such party shall be bound, if the other party thinks proper to apply for it, to furnish that party with a copy thereof, and either party may call upon the other, through the Arbitrator, to produce the originals or certified copies of any papers adduced as evidence, giving in each instance such reasonable notice as the Arbitrator may require. And if the Arbitrator should desire further elucidation or evidence with regard to any point contained in the statements laid before him, he shall be at liberty to require it from either party, and he shall be at liberty to hear one counsel or agent for each party, in relation to any matter, and at such time, and in such manner, as he may think fit.

Papers and documents.

## ARTICLE XXXVIII.

Agents of  
each govern-  
ment.

The representatives or other public agents of the United States and of Great Britain at Berlin, respectively, shall be considered as the agents of their respective governments to conduct their cases before the Arbitrator, who shall be requested to address all his communications, and give all his notices, to such representatives or other public agents, who shall represent their respective governments generally in all matters connected with the arbitration.

## ARTICLE XXXIX.

Proceedings  
of the arbi-  
trator.

It shall be competent to the Arbitrator to proceed in the said arbitration, and all matters relating thereto, as and when he shall see fit, either in person, or by a person or persons named by him for that purpose, either in the presence or absence of either or both agents, and either orally or by written discussion or otherwise.

## ARTICLE XL.

Secretary or  
clerk.

The Arbitrator may, if he think fit, appoint a secretary or clerk for the purposes of the proposed arbitration, at such rate of remuneration as he shall think proper. This and all other expenses of and connected with the said arbitration, shall be provided for as hereinafter stipulated.

## ARTICLE XLI.

Expenses,  
how to be  
paid.

The Arbitrator shall be requested to deliver, together with his award, an account of all the costs and expenses which he may have been put to in relation to this matter, which shall forthwith be repaid by the two governments in equal moieties.

## ARTICLE XLII.

Form of  
award.

The Arbitrator shall be requested to give his award in writing as early as convenient after the whole case on each side shall have been laid before him, and to deliver one copy thereof to each of the said agents.

## ARTICLE XLIII.

Ratifications.

The present treaty shall be duly ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by Her Britannic Majesty; and the ratifications shall be exchanged either at Washington or at London within six months from the date hereof, or earlier if possible.

In faith whereof, we, the respective Plenipotentiaries, have signed this treaty, and have hereunto affixed our seals.

Done in Duplicate at Washington the 8th day of May, in the year of our Lord 1871.

[L.S.]	HAMILTON FISH.
[L.S.]	ROBT. C. SCHENCK.
[L.S.]	SAMUEL NELSON.
[L.S.]	EBENEZER ROCKWOOD HOAR.
[L.S.]	GEO. H. WILLIAMS.
[L.S.]	DE GREY AND RIPON.
[L.S.]	STAFFORD H. NORTHCOTE.
[L.S.]	EDWD. THORNTON.
[L.S.]	JOHN A. MACDONALD.
[L.S.]	MOUNTAGUE BERNARD.

## APPENDIX D.

## THE ANGLO-FRENCH AGREEMENT, 1904.

*Convention signed at London, April 8, 1904.*

HIS Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, and the President of the French Republic, having resolved to put an end, by a friendly Arrangement, to the difficulties which have arisen in Newfoundland, have decided to conclude a Convention to that effect, and have named as their respective Plenipotentiaries:

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, the Most Honourable Henry Charles Keith Petty-Fitzmaurice, Marquess of Lansdowne, His Majesty's Principal Secretary of State for Foreign Affairs; and

The President of the French Republic, his Excellency Monsieur Paul Cambon, Ambassador of the French Republic at the Court of His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India;

Who, after having communicated to each other their full powers, found in good and due form, have agreed as follows, subject to the approval of their respective Parliaments:—

## ARTICLE I.

France renounces the privileges established to her advantage by Article XIII. of the Treaty of Utrecht, and confirmed or modified by subsequent provisions.

## ARTICLE II.

France retains for her citizens, on a footing of equality with British subjects, the right of fishing in the territorial waters on that portion of the coast of Newfoundland comprised between Cape St. John and Cape Ray, passing by the north; this right shall be exercised during the usual fishing season closing for all persons on the 20th October of each year.

The French may therefore fish there for every kind of fish, including bait and also shell fish. They may enter any port or harbour on the said coast and may there obtain supplies or bait and shelter on the same conditions as the inhabitants of Newfoundland, but they will remain subject to the local Regulations in force; they may also fish at the mouths of the rivers, but without going beyond a straight line drawn between the two extremities of the banks, where the river enters the sea.

They shall not make use of stake-nets or fixed engines without permission of the local authorities.



On the above-mentioned portion of the coast, British subjects and French citizens shall be subject alike to the laws and Regulations now in force, or which may hereafter be passed for the establishment of a close time in regard to any particular kind of fish, or for the improvement of the fisheries. Notice of any fresh laws or Regulations shall be given to the Government of the French Republic three months before they come into operation.

The policing of the fishing on the above-mentioned portion of the coast, and for prevention of illicit liquor traffic and smuggling of spirits, shall form the subject of Regulations drawn up in agreement by the two Governments.

#### ARTICLE III.

A pecuniary indemnity shall be awarded by His Britannic Majesty's Government to the French citizens engaged in fishing or the preparation of fish on the "Treaty Shore," who are obliged, either to abandon the establishments they possess there, or to give up their occupation, in consequence of the modification introduced by the present Convention into the existing state of affairs.

This indemnity cannot be claimed by the parties interested unless they have been engaged in their business prior to the closing of the fishing season of 1903.

Claims for indemnity shall be submitted to an Arbitral Tribunal, composed of an officer of each nation, and, in the event of disagreement, of an Umpire appointed in accordance with the procedure laid down by Article XXXII. of The Hague Convention. The details regulating the constitution of the Tribunal and the conditions of the inquiries to be instituted for the purpose of substantiating the claims, shall form the subject of a special Agreement between the two Governments.

#### ARTICLE IV.

His Britannic Majesty's Government, recognizing that, in addition to the indemnity referred to in the preceding Article, some territorial compensation is due to France in return for the surrender of her privilege in that part of the Island of Newfoundland referred to in Article II., agree with the Government of the French Republic to the provisions embodied in the following Articles:—

#### ARTICLE V.

The present frontier between Senegambia and the English Colony of the Gambia shall be modified so as to give to France Yarbutenda and the lands and landing places belonging to that locality.

In the event of the river not being open to maritime navigation up to that point, access shall be assured to the French Government at a point lower down on the River Gambia, which shall be recognized by mutual agreement as being accessible to merchant ships engaged in maritime navigation.

The conditions which shall govern transit on the River Gambia and its tributaries, as well as the method of access to the point that may be reserved to France in accordance with the preceding paragraph, shall form the subject of future agreement between the two Governments.

In any case, it is understood that these conditions shall be at least as favourable as those of the system instituted by application of the

General Act of the African Conference of the 26th February, 1885, and of the Anglo-French Convention of the 14th June, 1898, to the English portion of the basin of the Niger.

#### ARTICLE VI.

The group known as the Iles de Los, and situated opposite Konakry, is ceded by His Britannic Majesty to France.

#### ARTICLE VII.

Persons born in the territories ceded to France by Articles V. and VI. of the present Convention may retain British nationality by means of an individual declaration to that effect, to be made before the proper authorities by themselves, or, in the case of children under age, by their parents or guardians.

The period within which the declaration of option referred to in the preceding paragraph must be made, shall be one year, dating from the day on which French authority shall be established over the territory in which the persons in question have been born.

Native laws and customs now existing will, as far as possible, remain undisturbed.

In the Iles de Los, for a period of thirty years from the date of exchange of the ratifications of the present Convention, British fishermen shall enjoy the same rights as French fishermen with regard to anchorage in all weathers, to taking in provisions and water, to making repairs, to transhipment of goods, to the sale of fish, and to the landing and drying of nets, provided always that they observe the conditions laid down in the French Laws and Regulations which may be in force there.

#### ARTICLE VIII.

To the east of the Niger the following line shall be substituted for the boundary fixed between the French and British possessions by the Convention of the 14th June, 1898, subject to the modifications which may result from the stipulations introduced in the final paragraph of the present Article.

Starting from the point on the left bank of the Niger laid down in Article III. of the Convention of the 14th June, 1898, that is to say, the median line of the Dallul Mauri, the frontier shall be drawn along this median line until it meets the circumference of a circle drawn from the town of Sokoto as a centre, with a radius of 160,932 mètres (100 miles). Thence it shall follow the northern arc of this circle to a point situated 5 kilomètres south of the point of intersection of the above-mentioned arc of the circle with the route from Dosso to Matankari viâ Maourédé.

Thence it shall be drawn in a direct line to a point 20 kilomètres north of Konni (Birni-N'Kouni), and then in a direct line to a point 15 kilomètres south of Maradi, and thence shall be continued in a direct line to the point of intersection of the parallel of 13° 20' north latitude with a meridian passing 70 miles to the east of the second intersection of the 14th degree of north latitude and the northern arc of the above-mentioned circle.

Thence the frontier shall follow in an easterly direction the parallel of 13° 20' north latitude until it strikes the left bank of the River Komadugu Waubé (Komadougou Ouobé), the thalweg of which it

will then follow to Lake Chad. But, if before meeting this river the frontier attains a distance of 5 kilomètres from the caravan route from Zinder to Yo, through Sua Kololua (Soua Kololoua), Adeber, and Kabi, the boundary shall then be traced at a distance of 5 kilomètres to the south of this route until it strikes the left bank of the River Komadugu Waubé (Komadougou Ouobé), it being nevertheless understood that, if the boundary thus drawn should happen to pass through a village, this village, with its lands, shall be assigned to the Government to which would fall the larger portion of the village and its lands. The boundary will then, as before, follow the thalweg of the said river to Lake Chad.

Thence it will follow the degree of latitude passing through the thalweg of the mouth of the said river up to its intersection with the meridian running 35' east of the centre of the town of Kouka, and will then follow this meridian southwards until it intersects the southern shore of Lake Chad.

It is agreed, however, that, when the Commissioners of the two Governments at present engaged in delimiting the line laid down in Article IV. of the Convention of the 14th June, 1898, return home and can be consulted, the two Governments will be prepared to consider any modifications of the above frontier line which may seem desirable for the purpose of determining the line of demarcation with greater accuracy. In order to avoid the inconvenience to either party which might result from the adoption of a line deviating from recognized and well-established frontiers, it is agreed that in those portions of the projected line where the frontier is not determined by the trade routes, regard shall be had to the present political divisions of the territories so that the tribes belonging to the territories of Tessaoua-Maradi and Zinder shall, as far as possible, be left to France, and those belonging to the territories of the British zone shall, as far as possible, be left to Great Britain.

It is further agreed that, on Lake Chad, the frontier line shall, if necessary, be modified so as to assure to France a communication through open water at all seasons between her possessions on the north-west and those on the south-east of the Lake, and a portion of the surface of the open waters of the Lake at least proportionate to that assigned to her by the map forming Annex 2 of the Convention of the 14th June, 1898.

In that portion of the River Komadugu which is common to both parties, the populations on the banks shall have equal rights of fishing.

#### ARTICLE IX.

The present Convention shall be ratified, and the ratifications shall be exchanged, at London, within eight months, or earlier if possible.

In witness whereof his Excellency the Ambassador of the French Republic at the Court of His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, and His Majesty's Principal Secretary of State for Foreign Affairs, duly authorized for that purpose, have signed the present Convention and have affixed thereto their seals.

Done at London, in duplicate, the 8th day of April, 1904.

(L.S.) LANSDOWNE. (L.S.) PAUL CAMBON.



*Declaration respecting Egypt and Morocco.*

## ARTICLE I.

His Britannic Majesty's Government declare that they have no intention of altering the political status of Egypt.

The Government of the French Republic, for their part, declare that they will not obstruct the action of Great Britain in that country by asking that a limit of time be fixed for the British occupation or in any other manner, and that they give their assent to the draft Khedivial Decree annexed to the present Arrangement, containing the guarantees considered necessary for the protection of the interests of the Egyptian bondholders, on the condition that, after its promulgation, it cannot be modified in any way without the consent of the Powers Signatory of the Convention of London of 1885.

It is agreed that the post of Director-General of Antiquities in Egypt shall continue, as in the past, to be entrusted to a French *savant*.

The French schools in Egypt shall continue to enjoy the same liberty as in the past.

## ARTICLE II.

The Government of the French Republic declare that they have no intention of altering the political status of Morocco.

His Britannic Majesty's Government, for their part, recognize that it appertains to France, more particularly as a power whose dominions are conterminous for a great distance with those of Morocco, to preserve order in that country, and to provide assistance for the purpose of all administrative, economic, financial, and military reforms which it may require.

They declare that they will not obstruct the action taken by France for this purpose, provided that such action shall leave intact the rights which Great Britain, in virtue of Treaties, Conventions, and usage, enjoys in Morocco, including the right of coasting trade between the ports of Morocco, enjoyed by British vessels since 1901.

## ARTICLE III.

His Britannic Majesty's Government, for their part, will respect the rights which France, in virtue of Treaties, Conventions, and usage enjoys in Egypt, including the right of coasting trade between Egyptian ports accorded to French vessels.

## ARTICLE IV.

The two Governments, being equally attached to the principle of commercial liberty both in Egypt and Morocco, declare that they will not, in those countries, countenance any inequality either in the imposition of customs duties or other taxes, or of railway transport charges.

The trade of both nations with Morocco and with Egypt shall enjoy the same treatment in transit through the French and British possessions in Africa. An Agreement between the two Governments shall settle the conditions of such transit and shall determine the points of entry.

This mutual engagement shall be binding for a period of thirty years. Unless this stipulation is expressly denounced at least one year in advance, the period shall be extended for five years at a time.

Nevertheless, the Government of the French Republic reserve to

themselves in Morocco, and His Britannic Majesty's Government reserve to themselves in Egypt, the right to see that the concessions for roads, railways, ports, &c., are only granted on such conditions as will maintain intact the authority of the State over these great undertakings of public interest.

## ARTICLE V.

His Britannic Majesty's Government declare that they will use their influence in order that the French officials now in the Egyptian service may not be placed under conditions less advantageous than those applying to the British officials in the same service.

The Government of the French Republic, for their part, would make no objection to the application of analogous conditions to British officials now in the Moorish service.

## ARTICLE VI.

In order to insure the free passage of the Suez Canal, His Britannic Majesty's Government declare that they adhere to the stipulations of the Treaty of the 29th October, 1888, and that they agree to their being put in force. The free passage of the Canal being thus guaranteed, the execution of the last sentence of paragraph 1 as well as of paragraph 2 of Article VIII. of that Treaty will remain in abeyance.

## ARTICLE VII.

In order to secure the free passage of the Straits of Gibraltar, the two Governments agree not to permit the erection of any fortifications or strategic works on that portion of the coast of Morocco comprised between, but not including, Melilla and the heights which command the right bank of the River Sebou.

This condition does not, however, apply to the places at present in the occupation of Spain on the Moorish coast of the Mediterranean.

## ARTICLE VIII.

The two Governments, inspired by their feeling of sincere friendship for Spain, take into special consideration the interests which that country derives from her geographical position and from her territorial possessions on the Moorish coast of the Mediterranean. In regard to these interests the French Government will come to an understanding with the Spanish Government.

The agreement which may be come to on the subject between France and Spain shall be communicated to His Britannic Majesty's Government.

## ARTICLE IX.

The two Governments agree to afford to one another their diplomatic support, in order to obtain the execution of the clauses of the present Declaration regarding Egypt and Morocco.

In witness whereof his Excellency the Ambassador of the French Republic at the Court of His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, and His Majesty's Principal Secretary of State for Foreign Affairs, duly authorized for that purpose, have signed the present Declaration and have affixed thereto their seals.

Done at London, in duplicate, the 8th day of April, 1904.

(L.S.) LANSDOWNE.

(L.S.) PAUL CAMBON.

*Declaration concerning Siam, Madagascar, and the New Hebrides.*

## I.—SIAM.

The Government of His Britannic Majesty and the Government of the French Republic confirm Articles 1 and 2 of the Declaration signed in London on the 15th January, 1896, by the Marquess of Salisbury, then Her Britannic Majesty's Principal Secretary of State for Foreign Affairs, and Baron de Courcel, then Ambassador of the French Republic at the Court of Her Britannic Majesty.

In order, however, to complete these arrangements, they declare by mutual agreement that the influence of Great Britain shall be recognized by France in the territories situated to the west of the basin of the River Menam, and that the influence of France shall be recognized by Great Britain in the territories situated to the east of the same region, all the Siamese possessions on the east and south-east of the zone above described and the adjacent islands coming thus henceforth under French influence, and, on the other hand, all Siamese possessions on the west of this zone and of the Gulf of Siam, including the Malay Peninsula and the adjacent islands, coming under English influence.

The two Contracting Parties, disclaiming all idea of annexing any Siamese territory, and determined to abstain from any act which might contravene the provisions of existing Treaties, agree that, with this reservation, and so far as either of them is concerned, the two Governments shall each have respectively liberty of action in their spheres of influence as above defined.

## II.—MADAGASCAR.

In view of the Agreement now in negotiation on the questions of jurisdiction and the postal service in Zanzibar, and on the adjacent coast, His Britannic Majesty's Government withdraw the protest which they had raised against the introduction of the Customs Tariff established at Madagascar after the annexation of that island to France. The Government of the French Republic take note of this Declaration.

## III.—NEW HEBRIDES.

The two Governments agree to draw up in concert an Arrangement which, without involving any modification of the political *status quo*, shall put an end to the difficulties arising from the absence of jurisdiction over the natives of the New Hebrides.

They agree to appoint a Commission to settle the disputes of their respective nationals in the said islands with regard to landed property. The competency of this Commission and its rules of procedure shall form the subject of a preliminary Agreement between the two Governments.

In witness whereof His Britannic Majesty's Principal Secretary of State for Foreign Affairs and his Excellency the Ambassador of the French Republic at the Court of His Majesty the King of the United



Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, duly authorized for that purpose, have signed the present Declaration and have affixed thereto their seals.

Done at London, in duplicate, the 8th day of April, 1904.

(L.S.) LANSDOWNE.

(L.S.) PAUL CAMBON.

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